ILLEGITIMATE CHOICES: A MINIMALIST(?) APPROACH TO CONSENT AND WAIVER IN CRIMINAL CASES

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ABSTRACT

Current doctrine justifies many government searches, interrogations, and deprivations of liberty on the ground that the target of the action "voluntarily" agreed to it or waived applicable rights. The standard critiques of this doctrine—that these choices are often or always coerced, the result of an unconstitutional condition, or inherently shaped by race, gender, and class—have usually been given short shrift by the courts, leading one of us to question whether the practice of using consent and waiver to deprive someone of basic rights and liberties should be abolished. In the meantime, we jointly wondered if there is a more immediate "minimalist" path forward, drawing on the Supreme Court's own jurisprudence. This article takes the position that in many situations the voluntariness of a person's choice need not be an issue, because the option the government proffers to that person is legally illegitimate. Specifically, the "illegitimate choice" test we propose would make concerns about the validity of a person's choice legally irrelevant in three situations: (1) when Supreme Court caselaw, properly construed, has made it so; (2) when the benefit the government offers is premised on acceptance of a condition that is not narrowly tailored to a compelling interest; or (3) when the benefit the government offers is itself unconstitutional. This approach would call into question searches based on the third-party doctrine, promises of leniency during interrogations, many types of pretrial and post-conviction dispositional conditions, certain waivers associated with plea bargaining, some types of special needs searches, and consent searches conducted in the absence of suspicion. In all of these situations, the illegitimate choice test would avoid difficulties with determining whether a choice is coerced or voluntary, while still maintaining consent as a viable option at other criminal justice decision-points.

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INTRODUCTION

People suspected or convicted of crimes are constantly confronted with choices that can have significant impact on their liberty interests. They may be asked to consent to a search or seizure of their house, car, or person, or to explain themselves during interrogation.[1] They may have to decide whether to accept a plea offer that not only requires them to plead guilty and waive their trial rights but also to waive their right to appeal and to obtain exculpatory information from the prosecution.[2] Both before and after trial, individuals charged or convicted of crime may be asked by a judge whether they agree to abide by conditions if they are released from jail or prison.[3] And even people who are not involved in or suspected of crime sometimes make choices that have liberty-depriving consequences. For instance, the Supreme Court has held that people "assume the risk" that information they surrender to third parties will be accessed by the government, and that they will be subject to warrantless searches by virtue of choosing to participate in a high school activity, accept welfare benefits, or engage in a "pervasively

1. *See infra* text accompanying notes 34–39, 51–65.
2. *See infra* text accompanying notes 24–32.
3. *See infra* text accompanying notes 163–77.

regulated business."[4] These latter decisions occur outside the criminal legal setting but can still furnish evidence for criminal charges.

According to judicial doctrine, in all of these cases the choice must be "voluntary" to be valid.[5] But the definition of that term varies immensely depending on the context. While a decision that is the product of torture and similar physical coercion is clearly "involuntary" as a matter of law,[6] significant psychological pressure to make a choice—even if caused by the government—or a lack of knowledge about the consequences of that choice—even if exploited by the government—often is *not* considered involuntary by the courts.[7]

Many scholars and some justices have disagreed with this narrow view of involuntariness, usually using one of three lines of attack.[8] Most straightforwardly, they have argued for a broader definition of "coercion" by defining impermissible threats as any government proffer that differs from a predetermined "baseline" preference. Others have looked at the issue through the prism of the "unconstitutional conditions doctrine." A third line of critique focuses on how power differentials exert pressure on people to acquiesce to government actors, especially targeting how the decision to consent is shaped by race, gender, socioeconomic status, and other intersecting identities and characteristics.

In this article we argue for an additional way to resolve these questions. Many of the issues that arise in connection with decision-making in the criminal process can be resolved without resorting to the problematic voluntariness concept. Indeed, one of us has written about the possibility of doing away entirely with consent and waiver as the basis for depriving someone of basic rights and liberties.[9] Here we do not go so far, but rather jointly envision a more immediate path forward that avoids the difficult inquiries current law requires about the voluntariness of a consent or confession or the validity of a waiver.

Specifically, we argue that, in numerous settings in which the government seeks to legitimate its actions by relying on consent or waiver by an individual, the government is acting unconstitutionally. More specifically still, we propose three categories of choices that, even if truly "voluntary," should not validate state action: (1) when the person's choice

4. *See infra* text accompanying notes 68–75.
5. *See infra* Part IA.
6. *See infra* text accompanying notes 34–36.
7. *See infra* Part IA.
8. *See infra* Part IB.
9. Kate Weisburd, *Criminal Procedure Without Consent*, 113 CALIF. L. REV. (forthcoming 2025) (on file with authors) (examining consent search reform nationwide and making the case that the same rationales driving that reform, such as coercion and racial equity concerns, apply to the other forms of consent and waiver that permeate criminal procedure).

is irrelevant because Supreme Court caselaw, properly construed, has made it so (such as when the "consent" of pregnant women does not legitimize transmitting their hospital drug test results to the police); (2) when the benefit offered is premised on acceptance of a condition that, under strict scrutiny analysis, is not narrowly tailored to a compelling government interest (such as when people are required to waive the right to exculpatory evidence as part of a plea deal), or (3) when the benefit offered is itself unconstitutional (such as when the only benefit to a consent search is the avoidance of police harassment or violence). These three inquiries comprise what we will call, in shorthand, the "illegitimate choice" test, a test that delineates when government efforts to deprive individuals of liberty under the guise of "choice" are illegitimate.

The illegitimate choice test that we outline here would call into question searches based on the third-party doctrine, promises of leniency during interrogations, many types of pretrial and post-conviction dispositional conditions, certain waivers associated with plea bargaining, some types of special needs searches, and consent searches conducted in the absence of suspicion. It would thus eliminate in these settings the ability of police, prosecutors, and judges to elicit decisions through the mechanism of consent or waiver. And it would do so without requiring an assessment of "coercion," "voluntariness," or the validity of "consent." Given that courts are not particularly receptive to arguments focused on coercion, unconstitutional conditions, and power dynamics, our test offers another approach: in the situations we discuss here, the options offered by the government should not be on the table even when a person's consent or decision is "voluntary" under any definition of that word.

Thus, the illegitimate choice test would have wide-ranging impact. In a sense it could be called abolitionist, in that it significantly limits the power of police, prosecutors, and judges. At the same time, because our proposal does not directly dismantle the criminal legal system and because we rely to a large extent on existing caselaw, our approach might better be labeled minimalist.[10] Although minimalism is the focus of this Symposium issue of the *Washington University Law Review*, our article does not attempt to resolve the ongoing debate between abolition, minimalism, and other theories of reform. Rather, it suggests a pragmatic solution that would substantially limit the reach—and power—of today's criminal legal system.

10. *Compare* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020) ("For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States."), *with* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019) ("Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.").

Part I briefly surveys the law and scholarship on voluntariness and choice in the criminal justice setting. It explores courts' vacillations in this area, how scholars have tried to help (through finetuning the definition of coercion, rejuvenating unconstitutional conditions jurisprudence, or urging a better accounting of power dynamics), and why the law remains unchanged. Part II fleshes out the illegitimate choice test by describing three situations in which a person's choice should be considered an illegitimate basis for government action: again, when the Constitution has made the person's choice irrelevant; when the government's conditions do not survive strict scrutiny because they are not narrowly tailored to a compelling government interest; and when the options proffered by the government do not provide any legitimate benefit to the individual. The conclusion situates the illegitimate basis test on the reform spectrum, ranging from traditional reforms and "minimalist" approaches to the "non-reformist reforms" that abolitionists advocate and total abolition.

I. VOLUNTARINESS IN THE COURTS AND ACADEMIA

Rules governing consent, waiver, and choice are all meant to recognize the value of individual autonomy—the freedom to make and act upon one's decisions. In theory, the law values autonomy because it assumes people are ordinarily the best judges of their own interests and because, even if they are not, taking away their opportunity to decide would show insufficient respect for the person.[11] Thus, people who are mentally competent are generally permitted to decide whether they want to consent to a search, waive the right to silence, plead guilty or go to trial, waive counsel, choose to testify, and appeal convictions.[12] Legal doctrines generally assume that to forbid such decisions would insult the dignity of the individual and also make a mockery of the concept of autonomy itself.

A significant caveat to this rule, however, is that people's decisions in the criminal context will not be honored when they are "involuntary."[13] This word may refer to decisions that are the result of coercion by others, to decisions that are not based on adequate information, or both. Much

11. *See generally* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992) (providing the rationale for these conclusions).

12. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (consent to search); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (waiver of right to silence); Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983) (citing with approval ABA rules stating that pleading, waiver of jury trial, and waiver of the right testify is up to the client).

13. *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Another significant caveat is that the defendant must be competent to make the decision. *See* Godinez v. Moran, 509 U.S. 389, 400 (1993). We do not address that issue here.

depends on the context of the decision. Both the Supreme Court (which will be focus of the caselaw discussion here) and scholars have made that much clear.[14]

A. The Courts

The most demanding standard governing defendant choice, developed during the first half of the twentieth century, is the "knowing, voluntary, and intelligent" test that the Supreme Court applies when a person seeks to waive trial counsel.[15] That standard eventually migrated to the decision to plead guilty.[16] *Miranda v. Arizona* likewise demanded that waivers of the right to remain silent be made "voluntarily, knowingly[,] and intelligently."[17] This three-prong test is the gold standard for evaluating choice in the criminal system. But it has rarely been vigorously applied.

The intelligence prong has always been on the shakiest ground because, construed strictly, it is so demanding. Waiving counsel or confessing to police in the absence of counsel is rarely "intelligent." In any event, after the 1970s the Court often eliminated that prong and simply required that waivers be "voluntary and knowing" in both of those contexts, as well as in connection with guilty pleas.[18]

The knowing prong also often receives short shrift. For instance, those waiving counsel need not be apprised of the value of an attorney's advice or the dangers of self-representation.[19] Those pleading guilty need not be told of all the collateral consequences of a conviction.[20] Nor are they entitled to the potentially exculpatory impeachment information they would receive had they gone to trial.[21] A confession is valid under the Fifth Amendment even if the police lie about the evidence they have or fail to correct the

14. *See Bustamonte*, 412 U.S. at 224 ("[N]either linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'").

15. *See* Iowa v. Tovar, 541 U.S. 77, 88 (2004) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

16. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

17. *Miranda*, 384 U.S. at 444.

18. *See Moran*, 509 U.S. at 400 (applying the voluntary and knowing standard to guilty pleas and waiver of counsel); Davis v. United States, 512 U.S. 452, 461 (1994) (applying this standard to waiver of *Miranda* rights).

19. *Tovar*, 541 U.S. at 91–92.

20. Chaidez v. United States, 568 U.S. 342, 350–53 (2013) (noting that, while defendants pleading guilty must be informed of deportation risk, most courts hold that most other "collateral consequences" typically need not be disclosed); *see also* Jenny Roberts*, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

21. United States v. Ruiz, 536 U.S. 622, 630–31 (2002).

suspect's belief that only signed statements are admissible in evidence.[22] And a waiver of one's Fourth Amendment rights—a consent to search or seizure—need not be knowing in any sense, because police are not required to tell people they may refuse to submit.[23]

The voluntariness prong of waiver jurisprudence—which is of most interest here—has also generally had little punch to it, at least in the past half-century. The courts routinely state that guilty pleas and confessions may not be the result of "threats or promises."[24] But in *Bordenkircher v. Hayes*,[25] probably the most famous criminal case on the involuntariness issue, the Supreme Court held that the Due Process Clause was not violated by a prosecutor's threat to indict Hayes on a habitual offender charge—one that could bring a life sentence—if he did not agree to plead guilty and accept a five-year term; the options the prosecutor proffered, the Court declared, were not impermissibly coercive because, given Hayes's two prior convictions, the habitual offender charge was "[w]ithin the limits set by the legislature's constitutionally valid definition of chargeable offenses."[26] Similarly, in *Brady v. United States*[27] the Court upheld a plea of guilty on kidnapping charges under a statute that permitted the death penalty for that crime only after a jury trial. According to the Court, "even if we assume that Brady would not have pleaded guilty except for the death penalty provision . . . this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."[28] In short, the Court has refused to recognize a coercion claim in the plea-bargaining context if the choice is between two statutorily recognized options.

22. *See, e.g.*, Frazier v. Cupp , 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."); Connecticut v. Barrett, 479 U.S. 523, 530 (1987) ("We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes.").

23. Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973).

24. *See, e.g.*, Parker v. North Carolina, 397 U.S. 790, 802, 804 n.7 (1970) (Brennan, J., concurring) (acknowledging that "it has long been held that certain promises of leniency or threats of harsh treatment by the trial judge or the prosecutor unfairly burden or intrude upon the defendant's decision-making process" and citing cases); United States v. Villalpando, 588 F.3d 1124, 1128 (7th Cir. 2009) ("Trickery, deceit, even impersonation do not render a confession inadmissible . . . unless government agents make threats or promises." (quoting United States v. Kontny, 238 F.3d 815, 817 (7th Cir. 2001))).

25. 434 U.S. 357 (1978).

26. *Id.* at 364.

27. 397 U.S. 742 (1970).

28. *Id.* at 749–50.

In *United States v. Mezzanatto*,[29] the Court opened the door to another sort of leverage during plea bargaining. There, it held that a prosecutor can force a person who wants a plea deal to waive the protection afforded by Rule 410 of the Federal Rules of Evidence, which bans use of statements made during plea negotiations at trial in the event the defense rejects the plea offer.[30] In the course of doing so, the Court stated "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[31] Relying on this notion, lower courts have accepted pleas conditioned on waiver of the right to appeal and the right to exculpatory information.[32]

In the interrogation setting, the Court has likewise defined involuntariness narrowly, despite a test that looks at the "totality of the circumstances," a standard meant to examine not only the defendant's behavior and traits, but the conduct of the police and how the two interact.[33] Before *Miranda* was decided the Court held involuntary under the Due Process Clause confessions obtained through torture,[34] threats of violence,[35] and prolonged unbroken questioning,[36] especially when aimed at a person of borderline mental capacity or who was very young or in extreme pain at the time of the interrogation.[37] But taking a cue from the Supreme Court's post-*Miranda* willingness to put up with various forms of "trickery" and deception,[38] lower courts have permitted police interrogators to lie about a wide array of facts, including "witnesses against the defendant, earlier statements by a now-deceased victim, an accomplice's willingness to testify, whether the victim had survived an assault, 'scientific' evidence available,

29. 513 U.S. 196 (1995).

30. *Id.* at 203–04.

31. *Id.* at 201.

32. *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76, 85, 87 (2015) (documenting that, of the federal plea agreements studied, roughly twenty-five percent waived discovery rights and thirty-five percent waived ineffective counsel claims); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that of 971 randomly selected federal criminal cases, nearly two-thirds contained waivers of defendants' right to direct appeal).

33. Fare v. Michael C., 442 U.S. 707, 725 (1979).

34. Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

35. Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

36. Lisenba v. California, 314 U.S. 219, 240–41 (1941).

37. Davis v. North Carolina, 384 U.S. 737 (1966) (invalidating a confession of a borderline intellectually disabled individual with a third or fourth grade education); Haley v. Ohio, 332 U.S. 596, 599–600 (1948) ("Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest."); Mincey v. Arizona, 437 U.S. 385, 401–02 (1978) (holding inadmissible confession while defendant was "weakened by pain and shock").

38. *See* United States v. Villalpando, 588 F.3d 1124, 1128 (7th Cir. 2009) (quoting United States v. Kontny, 238 F.3d 815, 817 (7th Cir. 2001)); Colorado v. Spring, 479 U.S. 564, 576 (1987) (upholding confession despite police misinformation about focus of questioning).

including DNA and fingerprint evidence, and the degree to which the investigating officer identified and sympathized with the defendant."[39]

These cases stand in contrast to other Fifth Amendment cases that involve surrender of the right to remain silent outside the interrogation context. In that setting, the Court held in *Griffin v. California*, "the imposition of any sanction which makes assertion of the Fifth Amendment 'costly'" is constitutionally impermissible compulsion.[40] In *Griffin*, the Court held that the prosecutor could not make adverse comment about a defendant's decision to refrain from taking the stand.[41] In *Simmons v. United States*,[42] it relied on similar reasoning in holding that suppression hearing testimony aimed at excluding evidence could not be used at trial, because forcing a choice between one's Fourth and Fifth Amendment rights was "intolerable."[43] In other cases, involving civil plaintiffs, the Court held that jobs,[44] public contracts,[45] and eligibility for office[46] may not be conditioned on surrender of the right to remain silent.

However, all of these cases were decided over forty-five years ago. More recently, the Court has signaled a willingness to rethink the *Griffin* doctrine. For instance, in the 2002 decision of *McKune v. Lile*,[47] the Court held that both entry into a sexual abuse treatment program and visitation, spending, and earning privileges could be conditioned on admitting all prior sexual offenses, including those not yet charged, because these benefits were "minimal"; thus the threat of their loss was not coercive under the Fifth Amendment.[48] Several cases have also significantly narrowed *Griffin*'s holding about adverse comment,[49] and some Justices have even indicated that *Griffin* itself was wrongly decided.[50]

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39. Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612–13 (2006) (footnotes omitted).

40. Spevack v. Klein, 385 U.S. 511, 515 (1967) (citing Griffin v. California, 380 U.S. 609, 614 (1965)).

41. *Griffin*, 380 U.S. at 614–15.

42. 390 U.S. 377 (1968).

43. *Id.* at 394.

44. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

45. Lefkowitz v. Turley, 414 U.S. 70, 85 (1973).

46. Lefkowitz v. Cunningham, 431 U.S. 801, 809 (1977).

47. 536 U.S. 24 (2002).

48. *Id.* at 29.

49. *See* Portuondo v. Agard, 529 U.S. 61, 73 (2000) (holding that prosecutor's statement during closing argument that defendant had the opportunity to listen to the state's witnesses and tailor his testimony accordingly did not violate *Griffin*); United States v. Robinson, 485 U.S. 25, 34 (1988) (holding that prosecutor's comment about defendant's failure to take the stand that is a "fair response" to defense attorney's claim that defendant could not tell his story does not violate *Griffin*); United States v. Hastings, 461 U.S. 499, 512 (1983) (holding that repeated violations of *Griffin* can be harmless error).

50. Justice Thomas would clearly vote to overturn the decision. *See* Salinas v. Texas, 570 U.S. 178, 192 (2013) (Thomas, J., concurring) ("*Griffin* is impossible to square with the text of the Fifth Amendment . . . . "). In 2014, Justices Thomas, Roberts, Alito, and Kagan all joined an opinion refusing

The same tendencies toward restrictive interpretations of voluntariness are evidenced in Fourth Amendment cases involving choice. Borrowing from its confession cases, the Supreme Court has held that the voluntariness of consent to a search and seizure is to be determined by "careful scrutiny of all the surrounding circumstances," including "the state of the accused's mind."[51] As with interpretation of the Fifth Amendment, older cases were fastidious on the consent issue. In *Amos v. United States*,[52] decided in 1921, the Court found "implied coercion" when two agents confronted the wife of the defendant at the defendant's home and told her they had come to search the premises "for violations of the revenue law."[53] Similarly, in the 1968 case of *Bumper v. North Carolina*,[54] the Court stated that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[55]

But since then, the Court has never found a consent to search involuntary, despite the pressure that many people feel when confronted by the police. This is so even though, unlike in the interrogation context where *Miranda* warnings are required, police do not need to make sure the defendant knows of the right to refuse consent,[56] nor do they need to tell individuals for whom they lack the requisite suspicion that they are free to leave.[57] The Court has refused to invalidate consents to search after an arrest,[58] after a traffic citation has already been issued,[59] and after being told that a refusal to agree to a blood test can result in loss of one's driver's license.[60] In *United States v. Mendenhall*,[61] the non-verbal acquiescence of a twenty-two year-old Black woman to the requests of two airport detectives to surrender her documents and accompany them to a nearby room for a search was found to be "voluntary,"[62] as was the consent by a bus passenger, in the case of *United States v. Drayton*,[63] when asked by armed officers whether they could search his luggage.[64] In neither case, the Court found, were there

to extend *Griffin* to the death penalty phase. White v. Woodall, 572 U.S. 415, 427 (2014). Conservative Justices Gorsuch, Kavanaugh, and Barrett have since joined the bench, replacing Justices Scalia, Kennedy, and Ginsburg, along with Justice Jackson, who replaced Justice Breyer.

51. Schneckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973).
52. 255 U.S. 313 (1921).
53. *Id.* at 315, 317.
54. 391 U.S. 543 (1968).
55. *Id.* at 550.
56. *Schneckloth*, 412 U.S. at 231.
57. Ohio v. Robinette, 519 U.S. 33, 39–40 (1996).
58. United States v. Watson, 423 U.S. 411, 424 (1976).
59. *Robinette*, 519 U.S. at 37–38, 40.
60. South Dakota v. Neville, 459 U.S. 553, 565–66 (1983) (also suggesting that consent would be valid even after being told a refusal could be introduced into evidence).
61. 446 U.S. 544 (1980).
62. *Id.* at 557–58.
63. 536 U.S. 194 (2002).
64. *Id.* at 206–07.

"threats [or] any show of force"[65] and accordingly, the interactions were not Fourth Amendment seizures.

In many Fourth Amendment cases the Court has also validated consent to *future* searches and seizures. This notion comes in several guises. The Court's decisions allowing suspicionless or near suspicionless searches of parolees and probationers lean heavily on the fact that these individuals knew, when they were released, that such searches would take place.[66] Lower courts have relied on similar reasoning in finding that pretrial detainees and those put on probation or parole consent to supervision conditions ranging from limits on procreation to continuous GPS tracking.[67] The Supreme Court has also held that business owners operating "pervasively regulated business[es]" voluntarily surrender their Fourth Amendment rights.[68] For instance, in a case holding that warrants were not required to search gun dealers, the Court stated that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[69] In numerous other cases involving searches or seizures of groups—for instance, in connection with drug testing, checkpoints, and health and safety inspections—the Court has similarly stated or implied that the group acquiesced to the search and that this consent helps justify searches and seizures in the absence of individualized suspicion, at least when it is carried out for regulatory/administrative "special needs" purposes as opposed to criminal law enforcement.[70]

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65. *Mendenhall*, 446 U.S. at 558; *Drayton*, 536 U.S. at 206 ("Nothing Officer Lang said indicated a command to consent to the search.").

66. Samson v. California, 547 U.S. 843, 847 (2006). While the Court denied that it was deciding the case on a consent theory, *see id.* at 852 n.3, it stressed that "the parole search condition under California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer 'at any time,' . . . was 'clearly expressed' to petitioner." It also noted that in *United States v. Knights*, 534 U.S. 112 (2005), which permitted searches of probationers on minimal suspicion, "we found that acceptance of a clear and unambiguous search condition 'significantly diminished Knights's reasonable expectation of privacy.'" *Samson*, 547 U.S. at 852 (citing *Knights*, 534 U.S. at 119–20).

67. *See* Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 9 (2023) (finding that in survey of rules governing various forms of court supervision, the vast majority required people to consent to the elimination of certain rights); Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 743 (2020) (analyzing the role of consent in justifying GPS monitoring).

68. *See, e.g.*, City of Los Angeles v. Patel, 576 U.S. 409, 424–25 (2015) (stating that this genre of consent has been limited to four industries (liquor, firearms, mining and junkyards)). *But see infra* note 70.

69. United States v. Biswell, 406 U.S. 311, 316 (1972).

70. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) ("By choosing to 'go out for the team,' [the athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)

Finally, stretching the voluntary consent idea about as far as it can be stretched, the Court's so-called "third-party doctrine" holds that people "assume the risk" that information surrendered to a third party like a phone company will end up in the hands of the government, because they "know or should know" that the third party retains the information and could betray their confidence.[71] In *Carpenter v. United States*,[72] the Court retreated from this notion when it decided that cell site location information can only be obtained with a warrant even though people know or should know such data are maintained by cellphone companies.[73] But *Carpenter* was limited to its facts,[74] and thus, to date, as far as the Supreme Court is concerned, all sorts of other data, ranging from financial information to the phone numbers we dial, are unprotected by the Fourth Amendment because we consent to its retention by third parties.[75]

B. Scholars

Most of the Supreme Court's opinions regarding voluntariness have been roundly criticized by academics. Scholars, including the two of us, are highly skeptical of the Court's conclusions that the plea in *Bordenkircher* was uncoerced, that incriminating statements made in response to police trickery are "knowing," that the consents in cases like *Mendenhall* and *Drayton* were voluntary, and that we voluntarily assume the risk that information we give to third parties will end up in the government's hands.[76]

("Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere."); Camara v. Mun. Ct., 387 U.S. 523, 537 (1967) ("[W]e think that a number of persuasive factors combine to support the reasonableness of area [suspicionless] code-enforcement inspections. First, such programs have a long history of judicial and public acceptance . . . . "). *See generally* David R. Dorey, *The Unconstitutionality of Exit Searches*, 15 U. PA. J. CONST. L. ONLINE 75, 96 (2013) ("[E]very case where the Court has adjudicated the constitutionality of a special needs search . . . could effectively be recategorized as one in which the aggrieved party consented.").

71. For a description and defense of the third-party doctrine, see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

72. 585 U.S. 296 (2018).

73. *Id.* at 316–17.

74. *Id.* at 316 ("Our decision today is a narrow one."); *id.* at 318 (stating that the decision has no implications for government attempts to obtain "corporate tax or payroll ledgers").

75. *Id.* at 319 ("We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.").

76. *See, e.g.*, Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 376 (1986) ("*Bordenkircher* is clearly wrong in giving prosecutors additional leverage to secure guilty pleas."); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 37 (1992) (suggesting that interrogation deception can lead to false confessions); Russell L. Weaver, *The Myth of "Consent"*, 39 TEX. TECH L. REV. 1195, 1200–01 (2007) (expressing disagreement with *Mendenhall* and *Drayton*); DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 5–52 (2022) (discussing race and consent, including that "racial concerns figured nowhere in the

The literature explaining this skepticism is vast and will not even be summarized here. But it is possible to tease out of this literature three prominent critical frameworks. The first is focused on the baseline theory of coercion developed by philosophers, the second relies on the unconstitutional conditions doctrine that the Supreme Court has applied in other contexts, and the third is based on the inherent power dynamic at play when the state asks people to consent or waive their rights.

1. Baseline Theory

One significant strain of the scholarship on coercion attempts to differentiate between "threats"—which are considered impermissible—and "promises" or "offers"—which are generally considered uncoercive—by trying to establish a "baseline" condition that expresses an individual's expected situation.[77] If an option offered by the government departs from the baseline in the person's favor, it is a promise. If instead the government's offer is less attractive than the baseline, it is a threat.[78]

In the plea-bargaining context, for instance, assume that the proper baseline is the maximum sentence that could be imposed on the person if convicted at trial. On that assumption, if the maximum sentence for a person charged with kidnapping is twenty years and the prosecutor offers something below that during plea negotiations, the offer is not a threat, at least in theory. But, of course, in most jurisdictions a person charged with kidnapping will not always, or even often, receive the maximum sentence after conviction at trial. If, for instance, the typical person convicted of kidnapping at trial receives a ten-year sentence, then in our hypothetical jurisdiction a prosecutorial offer of ten years or more would be a threat, even though it is below the statutory maximum. Applying this type of analysis to *Bordenkircher*, if the typical post-trial sentence for a forgery conviction (Hayes's crime in that case)[79] in the relevant jurisdiction was five years or less, the prosecutor's gambit in that case was a threat, not a promise; it

Bustamonte case."); I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654–55 (2018) (addressing how the consent doctrine shapes and reflects inequity); Kerr, *supra* note 71, at 564 ("The verdict among commentators has been frequent and apparently unanimous: The third-party doctrine is not only wrong, but horribly wrong.").

77. Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 589 ("[W]hether a given proposal is a threat or an offer depends entirely on the baseline condition by which it is measured.").

78. *See generally* Harry G. Frankfurt, *Coercion and Moral Responsibility*, *in* ESSAYS ON FREEDOM OF ACTION 63, 67 (Ted Honderich ed., 1973) ("Threatening a person is generally thought to require justification, while there is no similar presumption against the legitimacy of making someone an offer.").

79. Bordenkircher v. Hayes, 434 U.S. 357, 359 (1978).

would be invalid on this view of coercion even though the habitual offender charge in that case was legislatively authorized.

The challenge to this line of reasoning should be apparent. The all-important baseline can be very difficult to determine. Josh Bowers has argued that the baseline should be whatever sentence is "proportionate," as measured primarily by the "practice law baseline" for similarly situated defendants, but also taking into account the specific characteristics and record of the defendant.[80] Putting aside the fact that the Supreme Court has almost always refused to engage in proportionality review outside of the death penalty context,[81] this definition of the baseline raises multiple issues. Take again the case of Paul Hayes, the defendant in *Bordenkircher*, who was charged with forgery, but also had two prior felony convictions (robbery and detention of a female, both of which resulted in five-year sentences). If prosecutors in Hayes's jurisdiction usually charge only the instant offense when the accused has two prior felonies but in a non-trivial number of cases go with a habitual offender charge instead, would the prosecutor's offer in Hayes violate Bowers's "practice law" baseline? Assume instead that only a very small number of accused forgers with two priors have ever been indicted as a habitual offender, but that the sentences for all other accused forgers vary considerably, say from a year's probation to seven years. Now what is the baseline? What if Hayes's two priors and other evidence indicate that he poses a much higher (or lower) risk than other accused forgers with two priors?[82] Does it matter if other jurisdictions in the same state have different practices?

Bowers admits that "what I am after is abstract."[83] Mitch Berman, whose work on coercion is often cited, admits the same thing. He states that the baseline should be "the level of punishment that the sentencer would impose if it knew all relevant factors except for whether the defendant being sentenced pled guilty or was convicted after trial[.]"[84] But he also notes that "[t]here is, of course, a vast range within which [the baseline punishment] may reasonably fall."[85] Although both Bowers and Berman agree that the

80. Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1106–07, 1122 (2016) ("[T]he judge would do more than merely calculate statistically whether the defendant received a punishment much worse than *legally* similarly situated others (that is, those with like records who were convicted of the same offense). The judge also would take into account the particular act behind the crime, the reasons for it, the defendant's circumstances, and even the prosecutor's charging and bargaining behavior.").

81. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 903 (2011) (writing of "the Court's deliberate effort to limit proportionality review to a narrow range of cases, almost all of which involve the death penalty").

82. *Bordenkircher*, 434 U.S. at 359 n.3.

83. Bowers, *supra* note 80, at 1124.

84. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 99 (2001).

85. *Id.*

prosecutor's proffer in *Bordenkircher* was improper,[86] in the run-of-the-mill case their baselines will end up describing such a large range of possibilities that the guidance they provide will often be minimal.

Similar conundrums arise in many of the other situations courts have confronted in criminal cases. In the pretrial and parole release setting where the courts routinely authorize suspicionless searches, is the baseline the person's Fourth Amendment status while in detention (where suspicionless searches are clearly authorized),[87] or is it assumed the person has the same Fourth Amendment rights as a person who has never been detained? In the interrogation setting, calibrating the relevant baseline is also difficult. Often it will run into the same difficulties encountered in analyzing plea bargaining. For instance, determining whether an interrogator's offer of softer treatment in return for a confession is coercive will require ascertaining the standard sentencing practice in similar cases. And if instead a confession is caused by police lies about their motivations or the evidence they have, there is not even a quid pro quo that could be characterized as a proposal. The police are not saying "talk or else"; rather, the conduct in question sounds in fraud rather than coercion.[88] One could make the same point in all of the Fourth Amendment cases in which the police, without physical or menacing gestures, obtain consent by asking for it, getting it through a third party, or posing as someone else. In none of these cases is the government threatening, at least explicitly, to make the person worse off if they do not consent (nor is it promising to make the person better off if they do).[89]

In other cases, the baseline and the proffer are easier to deduce. In the *Griffin* line of cases,[90] the individuals involved would clearly have been left in a worse position had the government been able to force them to decide

86. *Id.* at 101; Bowers, *supra* note 80, at 1128.

87. Hudson v. Palmer, 468 U.S. 517, 526 (1984) (holding that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell").

88. *Cf.* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 536–37 (2005) (arguing that the "psychological pressure" that trickery imposes on suspects should not be considered a "penalty [that] violates the baseline to the suspect's detriment" even if it "caused the suspect's mood to change for the worse," in part because "defendants routinely feel powerful psychological pressure to speak at trial, none of which has ever been considered to violate the self-incrimination clause[]" and in part because of administrability issues); Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1167 (2017) (arguing that "once the warnings are given and acknowledged as understood, police deception during interrogation amounts to Fifth Amendment coercion when, but only when, the deceptive statements would be coercive if true").

89. Later in this article we argue that a refusal to consent does carry implicit illegitimate risks, which can be considered a baseline argument. *See infra* text accompanying notes 215–26. But while we would allow consent searches when there is reasonable suspicion, a baseline approach would bar every consent search.

90. *See supra* text accompanying notes 40–50.

between remaining silent and the "costs" of doing so (e.g., the costs associated with adverse comment about failure to take the stand, losing one's job, being impeached with suppression hearing evidence, or losing visitation rights). The same is true in the Fourth Amendment cases where the ability to obtain a license is conditioned on surrendering Fourth Amendment rights.[91] But even if "coercion" is clearly present on a baseline theory in these cases, the question remains whether it is permissible. In *McKune*, the Supreme Court held that loss of visitation rights and other prison perks was a de minimis cost.[92] In licensing and similar special needs cases in which the government argues that the consent model should replace cause requirements, the reduction in Fourth Amendment rights may be justifiable on public safety grounds.[93]

At best, coercion defined by baseline theory leaves much unclear, at least when applied to criminal cases.[94] When all is said and done, determining whether a government act is "coercive" often collapses into a normative analysis of whether government should be permitted to proceed. Alan Wertheimer, whose book on coercion has been highly influential, calls the appropriate anchor the "moralized baseline."[95] In a later work he stated:

> [I]n the final analysis I do not believe that much turns on whether we can legitimately say that one agreement or another is exploitative or coercive on some linguistically plausible account of these terms. Rather, the crucial questions concern the moral status of such agreements: Should they be prohibited? Should they be enforceable?[96]

91. *See supra* text accompanying notes 68–70.

92. McKune v. Lile, 536 U.S. 24, 41–44 (2002) (concluding that the loss of privileges in *McKune* was less costly than the consequences of remaining silent in numerous other situations—including plea bargaining—where the Court had held that the Fifth Amendment was not violated).

93. *See, e.g.*, United States v. Biswell, 406 U.S. 311, 315–16 ("[C]lose scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders . . . since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.").

94. It is also worth noting that the parallel debate in substantive criminal law about when behavior is sufficiently compelled to vitiate criminal responsibility has gone down a different path from baseline theory, with many scholars arguing that "causation is not compulsion" and that only causes that lead to irrational decision-making should be considered compelled. *See, e.g.*, Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 900–01 (2011). If that were the test for voluntariness in the criminal procedure arena, few decisions would be considered coerced.

95. *See* ALAN WERTHEIMER, COERCION 136 (1987); Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 900 (1997) [hereinafter *Remarks on Coercion and Exploitation*].

96. Wertheimer, *Remarks on Coercion and Exploitation*, *supra* note 95, at 896; *see also* Berman, *supra* note 84, at 16 (concluding that the concept of coercion remains "irreducibly normative").

2 Unconstitutional Conditions Doctrine

One source for determining the "moralized" baseline could be the unconstitutional conditions doctrine. In its simplest form the doctrine prohibits the government from conditioning receipt of a governmental benefit on the waiver of a constitutionally protected right.[97] The Supreme Court has explicitly relied on the doctrine in deciding issues such as whether employment may be conditioned on surrendering First Amendment rights,[98] or land use permits may be conditioned on agreements to limit or change the use of the property.[99] It does so by gauging the importance of the government and individual interests involved, the nexus or germaneness of the condition to the government's goal, and the extent to which the condition achieves that goal.[100] Several scholars, including one of us, have argued that the various diversion programs and supervision conditions violate the unconstitutional conditions doctrine.[101]

A recent article authored by Kay Levine, Jonathan Nash, and Robert Schapiro argues that many other consent, choice, and waiver situations that courts confront in criminal cases can and should be analyzed through the unconstitutional conditions framework.[102] They contend, for instance, that the Supreme Court's decision upholding a state statute that permits states to conduct a warrantless test of a person suspected of drunk driving should have considered whether driving on the roads can be conditioned on such searches, rather than simply declaring that such searches are valid incident to arrest because they are not very intrusive.[103] Likewise, they argue that the Supreme Court should have examined the germaneness of conditioning parole release on suspicionless searches rather than blithely concluding that such searches are permissible because of parolees' reduced expectations of

97. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) ("[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

98. Perry v. Sindermann, 408 U.S. 593 (1972).

99. Dolan v. City of Tigard, 512 U.S. 374 (1994).

100. After looking at early twentieth century cases, Robert L. Hale reached this conclusion while also expressing doubts about whether discussion of "compulsion" in these cases made sense, given that all conditions imposed by the government could be considered compulsion. Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 341 (1935); *see also Koontz*, 570 U.S. at 606 (discussing the nexus and "rough proportionality" aspects of test that apply after a legitimate government interest is established).

101. *See e.g.*, Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 743 (2020); Andrea Roth, *"Spit and Acquit": Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. 405, 417 (2019); Bowers, *supra* note 80.

102. Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401 (2024).

103. *Id.* at 1431–35.

privacy,[104] and should have analyzed whether conditioning business licenses on acceptance of suspicionless inspections is a disproportionate burden on businesses, not just pronounce that such businesses have minimal Fourth Amendment protections because they are pervasively regulated.[105] In the Fifth Amendment context, they point out that the Court's focus on whether the consequences for silence will lead to self-incrimination ignores the possibility that forcing people to talk can bring about other significant harms besides conviction (e.g., in a *McKune*-type case, loss of treatment opportunities that could accelerate release).[106] And they state that, "[i]f the Court were to apply the unconstitutional conditions doctrine to plea bargaining . . . [i]t would have to examine the germaneness and the proportionality of the requirement the government wants to impose."[107]

Levine and her co-authors also admit, however, that, "The Supreme Court's aversion to using the unconstitutional conditions doctrine in the criminal procedure arena has been unyielding."[108] It is not hard to imagine why. While it may provide a more concrete way of analyzing choice, waiver, and consent issues than the coercion-baseline framework, the constitutional conditions analysis would still involve courts engaging in very difficult inquiries about the importance of the individual interests involved and the germaneness and proportionality of government offers. More than one commentator has concluded that a "comprehensive theory of unconstitutional conditions is ultimately futile."[109] In particular, applying the unconstitutional conditions principles to plea bargaining would pose a challenge, because waiving rights is an inherent part of the plea process that would often or always be considered impermissible under the doctrine.[110]

104. *Id.* at 1437–40, 1478.
105. *Id.* at 1443–45.
106. *Id.* at 1449–51.
107. *Id.* at 1480; *see also id.* at 1451–55.
108. *Id.* at 1428.
109. *See* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 244 (1989); *see also* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 595 (1990) ("Instead of a general unconstitutional conditions doctrine asking whether there has been 'coercion' or 'penalty,' what is necessary is a highly particular, constitutionally-centered model of reasons: an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests.").
110. As Levine, Nash, and Schapiro would have it, courts applying the doctrine would need to consider whether a person confronted with a plea deal experiences "government coercion akin to that facing a person seeking a zoning variance," Levine et al., *supra* note 102, at 1479–80, here referring to two Supreme Court takings cases that applied unconstitutional conditions doctrine in finding against the government, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1986), and *Dolan v. City of Tigard*, 512 U.S. 374 (1944). Even the run-of-the-mill plea offer (say, one that guarantees a thirty percent reduction in prison time from the sentence after trial), likely puts more pressure on defendants to waive their trial rights than that experienced by landowners told by a zoning board that they may not build a bigger house

While scholars and advocates, ourselves included,[111] have long critiqued plea bargaining, it remains an important option for people charged with crimes, at least in the criminal legal system as it currently operates.[112]

Nonetheless, Levine, Nash, and Schapiro's article is an extremely valuable contribution to scholarship in this area, because it deftly exposes the Court's willingness to use unconstitutional conditions doctrine analysis in connection with zoning and other civil cases while resisting its application to criminal cases, despite the fact that the individual interest at stake in the latter cases—physical liberty—is at least as important as what one does with one's property. While we think this differential treatment might have something to do with the complexity of applying the doctrine to criminal cases as well as its practical impact on institutions like plea bargaining, Levine, Nash, and Schapiro suggest another plausible explanation. Put baldly, their suggestion is that this anomaly is another piece of evidence that the Court intentionally treats those enmeshed in the criminal system as second-class citizens. The Court's "criminal procedure exceptionalism," they say, has "segregated persons accused of crime from other rights-bearing citizens as a matter of worthiness [by isolating] criminal procedure rights from economic rights as a matter of constitutional importance."[113] That observation is directly relevant to a third strain of coercion/voluntariness scholarship.

3. Power Differentials

In the context of the Fourth Amendment, scholars and advocates have long raised concern that questions of consent and voluntariness are inherently race, class, gender, citizenship status, and disability dependent.[114]

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unless they give the public an easement to the beach, *cf. Nollan*, 483 U.S. 825, or by storeowners seeking an easement told by a city commission that they may do so only if they cede some property to ensure enough floodplain, *cf. Tigard*, 512 U.S. 374. If that is so, application of the doctrine would seriously truncate plea bargaining.

111. *See* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505 (2016); Weisburd, *supra* note 9.

112. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/Z6UM-8LBR].

113. Levine et al., *supra* note 102, at 1470–71.

114. *See e.g.*, Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1975 (2019); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 315; Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1529 (2018); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 947 (2023); CARBADO, *supra* note 76, at 969; Capers, *supra* note 76, at 654–55.

As one advocacy organization explained, for people of color who have been the victim of police brutality, "consenting is a survival tactic, not a choice."[115] Indeed, commentators and advocates often put quotes around the word "consent" to signal their skepticism that consent searches and other forms of waiver are ever truly consensual.[116]

Research shows that the pressure to comply is inherently shaped by race. As Devon Carbado explained in the context of consent searches, because of racial stereotypes of Black criminality, Black people are subject to a kind of "surplus compliance."[117] Fear of police power will "pressure Black people to terminate police encounters by giving up their rights, consenting to searches and otherwise being overly cooperative."[118] Judge Julia Cooper Mack, the first African American woman to serve on the District of Columbia Court of Appeals, explained in a powerful dissent: "[N]o reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team."[119] These concerns are not limited to the Fourth Amendment. Other scholars have discussed how the seminal Supreme Court cases addressing plea bargaining,[120] confessions,[121] waiver of trial rights,[122] and court supervision[123] fail to accurately account for how race affects the "voluntariness" of people's decisions in each of these settings.

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115. KAYLAH ALEXANDER, JOSEPHINE ROSS, PATRICE SULTON & LEAH WILSON, ELIMINATE CONSENT SEARCHES, DC JUSTICE LAB & STAAND 2 (2020), https://dcjusticelab.org/wp-content/uploads/2022/04/EliminateConsentSearches.pdf [https://perma.cc/M4ZP-ZSNP].

116. *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1618 (2012); Stephen E. Henderson & Guha Krishnamurthi, *A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment*, OHIO ST. L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531890 [https://perma.cc/5AX8-8XPD]; George C. Thomas III, *Terrorism, Race and A New Approach to Consent Searches*, 73 MISS. L.J. 525 (2003); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 140 (2011); Josephine Ross, *Abolishing Police Consent Searches Through Legislation: Lessons from Scotland*, 72 AM. U. L. REV. 2017, 2018 (2023).

117. CARBADO, *supra* note 76, at 51.

118. *Id.*

119. *In re* J.M., 619 A.2d 497, 513 (D.C. 1992) (Mack, J., dissenting). Justice Alan C. Page of the Minnesota Supreme Court cites this same sense of fear in his dissent in a different bus-sweep case: "I speak from the perspective of an African-American male who was taught by his parents that, for personal safety . . . it is best to comply carefully and without question to the officers' request." State v. Harris, 590 N.W.2d 90, 106 n.4 (Minn. 1999) (Page, J., dissenting).

120. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 24 (1998)

121. Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. ST. L.J. 883, 901–02 (2020); Matthew B. Johnson, Kimberly Citron-Lippmann, Christina Massey, Chitra Raghavan & Ann Marie Kavanagh, *Interrogation Expectations: Individual and Race/Ethnic Group Variation Among an Adult Sample*, 13 J. ETHNICITY CRIM. JUST. 16 (2015).

122. Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 CRIM. JUST. POL'Y REV. 500 (2020).

123. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 157 (2022).

While race is often the most salient factor influencing voluntariness, scholars have also explained how other intersecting and often marginalized identities shape interactions between citizens and police, prosecutors, and judges.[124] Even more generally, empirical research shows that "decision makers judging the voluntariness of consent consistently underestimate the pressure to comply with intrusive requests."[125] Not only does the doctrine fail to account for this reality, but it tends to reinforce it. As observed by Bennett Capers, in many criminal procedure cases the Supreme Court implicitly suggests that a "good citizen" does not "run from the police," does not keep silent in the face of police questioning, and "should feel comforted by the presence of officers."[126]

Scholars have urged a more holistic analysis of why people consent. Decades ago, Tracey Maclin called for consent search jurisprudence to abandon the notion of "an *average*, *hypothetical*, *reasonable* person," and replace it with consideration of how defendants' race affects their ability to say no to police.[127] Marcy Strauss has similarly suggested that judges should consider whether the defendant's "prior personal experience or group cultural experience with the police may have affected the decision to consent."[128]

Yet, despite the voluminous literature exposing the unbalanced nature of decision-making in the criminal context and making suggestions on how to redress it, judicial doctrine continues to rely on unidimensional and uncontextualized conceptions of government-citizen interactions.[129] With a few notable exceptions, most courts do not engage in the holistic analysis advocated by scholars and advocates.[130] There are many possible

124. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37, 37–38 (2004); JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS 56–77 (2020); Jamelia Morgan, Essay, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 536 (2022).

125. Sommers & Bohns, *supra* note 114, at 1962.

126. Capers, *supra* note 76, at 665–67.

127. Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 53 VAL. U. L. REV. 1045, 1052 (2019).

128. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 256 (2001).

129. Weisburd, *supra* note 9, at 5.

130. *See, e.g.*, State v. Sum, 511 P.3d 92 (Wash. 2022); United States v. Smith, 794 F.3d 681 (7th Cir. 2015) (discussing the relevance of race in making seizure determination); Miles v. United States, 181 A.3d 633, 635 (D.C. 2018) (discussing ways that Black men's fear of police explain why Mr. Miles fled from police); Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) ("[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from . . . a pattern of racial profiling of black males in the city of Boston.").

explanations, both practical and theoretical, for this refusal to shift.[131] But certainly the desire to appear "colorblind" is one reason many courts, including the Supreme Court,[132] have chosen to avoid engaging with questions related to race, both in Fourth Amendment cases and in other contexts.

II. WHEN THE VOLUNTARINESS OF A PERSON'S CHOICE IS IRRELEVANT: THE ILLEGITIMATE CHOICE TEST

The foregoing discussion is not meant to suggest that baseline, unconstitutional conditions, and power imbalance theories are irrelevant or should never play roles in addressing the "voluntariness" of a person's choice.[133] Rather, our observations are meant to set up our contention that, in many situations, voluntariness, waiver, and consent analysis, with all of its challenges, can be avoided all together. Relying on plausible interpretations of Supreme Court caselaw, we set out three different scenarios that are unconstitutional regardless of how voluntariness analysis might play out: when choice should be irrelevant under the applicable constitutional provision; when the condition the government proffers is unconstitutional because it is not narrowly tailored to a compelling government interest; and when the benefit the government is offering is unconstitutional. In all three situations, a person's choice, even if in theory "voluntary," should not be a basis for authorizing government action. In this short paper we can only gesture at how these somewhat overlapping ideas would play out. But the following discussion does provide a roadmap for how one might challenge, in a host of legal contexts, the necessity of the voluntariness inquiry.

A. When A Person's Choice Is Not Constitutionally Relevant

In some areas of constitutional law in which the "voluntariness" of a person's choice has traditionally been considered the centerpiece of analysis, a closer look at the most recent jurisprudential developments

131. *See, e.g.*, Strauss, *supra* note 128, at 256–58 (observing that a rule that puts a thumb on the coercion scale for people of color would be difficult for judges to apply, "provides no guidance to the police in the field," and, if applied categorically, "may lead to a perception that the system is unfair" as applied to other types of people).

132. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). *But see* Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533, 1534 (2024) ("[C]olorblind constitutionalism is an illogical fit for the Fourth Amendment.").

133. For instance, both the baseline and unconstitutional conditions frameworks are useful in explaining why conditioning loss of a job, government contracts, or the right to suppress illegally seized evidence on forfeiting the right to silence can be seen as "compulsion" under the Fifth Amendment.

reveals that the courts have migrated to a rationale in which choice is no longer relevant. If that is so, questions of consent and waiver need not be addressed.

The Supreme Court's rethinking of its definition of "search" for Fourth Amendment purposes provides a good illustration of this phenomenon. A long line of Supreme Court cases have held that one cannot reasonably expect privacy with respect to personal information in the possession of third parties when it is surrendered to them "voluntarily," and thus that government efforts to obtain that information cannot be a Fourth Amendment search.[134] For some time, the Court's definition of voluntariness for purposes of this "third-party doctrine" was capacious. In *United States v. Miller*,[135] the Court declared that the defendant "voluntarily" permitted his bank to document his financial transactions and assumed the risk of further disclosure. In *Smith v. Maryland*,[136] the Court similarly concluded that the defendant "voluntarily" allowed his phone company to record the phone numbers he called, and that he knew or should have known they could be revealed to others. Critics of these decisions pointed out that life in modern society *requires* people to use banks and phones;[137] their choice to do so is voluntary only in the shallowest sense of the word. In *Carpenter v. United States*,[138] the Court finally recognized this point. As the majority put it: "Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily 'assume[ ] the risk' of turning over a comprehensive dossier of his physical movements."[139]

We agree with the Court's assessment that the assumption of risk doctrine stretches the voluntariness concept to its outer limit. But that assessment ends up being beside the point, because ultimately *Carpenter* did not rely on it. If it had, it could not have distinguished *Smith* and *Miller*, both of which also involved government access to information (specifically, phone numbers and financial information) that must be surrendered to third parties to participate in modern society. Rather, the key rationale for *Carpenter* was that "[t]here is a world of difference between the limited types of personal information addressed in *Smith* [a single phone number]

134. Smith v. Maryland, 442 U.S. 735, 743–44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

135. 425 U.S. 435, 442–43 (1976).

136. 442 U.S. at 744.

137. *See, e.g.*, *id.* at 750 (Marshall, J., dissenting) ("[U]nless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance . . . . It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative.").

138. 585 U.S. 296 (2018).

139. *Id.* at 315 (quoting *Smith*, 442 U.S. at 745).

and *Miller* ['non-confidential' business transactions] and the exhaustive chronicle of location information casually collected by wireless carriers."[140] This aspect of *Carpenter* makes the voluntariness of a disclosure to a third party and the target's knowledge about government access irrelevant for Fourth Amendment purposes. From now on these cases should be and, in our opinion, should always have been decided not by reference to whether people willingly give to third parties the information the government seeks but rather by assessing the amount and type of information that the police are seeking.[141]

Carpenter was presaged to some extent by the Court's decision in *Ferguson v. City of Charleston*,[142] which held that a police-sponsored policy that transmitted the drug screens of pregnant women to law enforcement for possible prosecution violated the Fourth Amendment. The jury had found that the women consented to the drug screens and "the possible disclosure of the test results to the police."[143] The majority assumed, nonetheless, that the consent was invalid and went on to conclude that the warrantless program was not justified under "special needs" analysis because its primary purpose was criminal law enforcement.[144] In his dissent, Justice Scalia pointed out that, even if the women had consented to a drug screen while *ignorant* that the results would go to the police, precedent at the time would have permitted police access to those results on an abandonment/third-party theory.[145] The majority ignored that precedent entirely. Rightly so, to our minds. *Ferguson* is another signal that consent is irrelevant in some types of third-party searches. We hope that in the future this notion extends beyond the medical and common carrier settings involved in *Ferguson* and *Carpenter* to all cases involving surrender of otherwise private information to institutional third parties.[146] If so, the issue of whether personal information possessed by those third parties was

140. *Id.* at 314; *see also id.* at 335–36 (Kennedy, J., dissenting) ("[T]he fact that information was relinquished to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.").

141. *See* CHRISTOPHER SLOBOGIN, VIRTUAL SEARCHES: REGULATING THE COVERT WORLD OF TECHNOLOGICAL POLICING 75–77 (2022) (making this argument).

142. 532 U.S. 67 (2001).

143. *Id.* at 74 n.6.

144. *Id.* at 83–84.

145. *Id.* at 94 (Scalia, J., dissenting) ("Under our established Fourth Amendment law . . . . using lawfully (but deceivingly) obtained material for purposes other than those represented, and giving that material or information derived from it to the police, is not unconstitutional.").

146. For moves in this direction from the lower courts, see Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790, 1829 (2022) (finding that *Carpenter*-type arguments have occasionally prevailed in cases involving IP addresses, cell site location data, web-surfing data, video recordings, and financial information).

surrendered to them voluntarily would be irrelevant under the Fourth Amendment.

The voluntariness of one's choice should also be irrelevant in some important interrogation contexts, in particular when police "negotiate" with those who are subject to interrogation. While courts have been quick to label "compulsion" for Fifth Amendment purposes any police suggestions that there will be greater punishment if a confession is not forthcoming, they have had more trouble with police "promises of leniency" in return for incriminating statements.[147] It is not hard to understand why. Such offers (for instance, a declaration by interrogators that a confession will likely result in a reduced sentence) are precisely the types of offers that prosecutors make during plea bargaining.[148] Even under baseline theory, these offers might be perfectly legitimate so long as they are consistent with the "practice law baseline" (per Bowers) or the "range within which [the baseline punishment] may reasonably fall" (per Berman).[149]

In our view, however, neither baseline analysis, unconstitutional conditions, nor power dynamics analysis should be necessary in this scenario, because promises of legal leniency made by the police during interrogation violate a person's right to have counsel present during all "critical stages" of the adversary process.[150] When the police make offers or promises to suspects about their legal prospects, they are engaging in conduct that is different in kind than other types of police questioning that try to elicit incriminating statements.[151] In effect, they are undertaking the prosecutor's role, and thus are engaging in the "trial-like" confrontation that the Supreme Court has held triggers a right to counsel under the Sixth Amendment.[152] As the Court stated in *United States v. Ash*, "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance

147. *See* MCCORMICK ON EVIDENCE 400 (Edward W. Cleary ed., 3d ed. 1984) (speaking of "the general increasing distaste for a rigid requirement that a promise render a confession inadmissible," based on a reading of cases in the 1970s and early 1980s).

148. Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 863 (2017) ("When our justice system does not balk at using promises of leniency to induce the ultimate act of self-incrimination—a plea of guilty—it need not be squeamish about using similar leverage to induce suspects to say truthfully what happened.").

149. *See supra* text accompanying notes 80–86.

150. United States v. Wade, 388 U.S. 218, 226–27 (1967) ("[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial . . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.").

151. As to how defendants would prove such promises were made, see Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003) (outlining three constitutional arguments in support of requiring taping of interrogations).

152. United States v. Ash, 413 U.S. 300, 312 (1973) (holding that the Sixth Amendment right to counsel applies only to "trial-like confrontations").

in meeting his adversary."[153] Determining whether a confession in exchange for a reduced sentence or charge—or whether the sentence or charge is in fact "reduced"—is a "legal problem" of the first order, a fact Richard Leo, the leading researcher on interrogations, recognized when he dubbed this practice "pre-plea bargaining."[154]

We acknowledge that, compared to our discussion of how *Carpenter* should be interpreted, this argument is more of a stretch. Doctrinally, there are two barriers to the conclusion that counsel must be present if police engage in pre-plea bargaining. The first is that, for most interrogations, the "criminal prosecution" that the Court has declared is the threshold for Sixth Amendment protection has not begun because the suspect has yet to be formally charged.[155] But when police promise leniency, they are, in effect, suggesting a charge or sentence, making this type of interrogation the de facto commencement of prosecution. Quoting from the Court's leading case on the issue, when the police begin negotiating disposition the government has "'committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"[156]

The second doctrinal obstacle is that, when the police are making their promises, the suspect has usually already been given *Miranda* warnings and has decided to talk, which normally would be seen as a waiver of the right to counsel, whether that right is based on the Fifth or Sixth Amendments.[157] However, even in *Iowa v. Tovar*, the case which refused to require detailed warnings about the consequences of proceeding pro se, the Court held that the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing."[158] Outside the interrogation room, people would not be allowed to plead guilty in the absence of counsel without a hearing to determine whether the waiver of counsel is valid;[159] the same should be true during the bargaining that takes place during interrogation. Because this judicial determination will not have been made prior to the typical interrogation, the Sixth Amendment is violated when police promise an uncounseled suspect

153. *Id.* at 313.

154. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 30 (2008) (using this term).

155. Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008).

156. *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

157. *See* Patterson v. Illinois, 487 U.S. 285, 293 (1988).

158. Iowa v. Tovar, 541 U.S. 77, 89 (2004) (quoting Faretta v. California, 422 U.S. 806 (1975)) (internal quotation marks omitted).

159. *See* Westbrook v. Arizona, 384 U.S. 150, 150 (1966) (per curiam) (vacating a lower court ruling because there had been no "hearing or inquiry into the issue of [the petitioner's] competence to waive his constitutional right to the assistance of counsel").

leniency. Under these circumstances, as with the third-party doctrine, the person's choice, even if made enthusiastically, is inoperative; the government may not rely on it to whitewash its behavior.

B. When the Government's Condition Fails to Pass Applicable Constitutional Scrutiny

In the cases just discussed, the Constitution has made the inquiry into whether a choice is voluntary irrelevant, because it has made the choice itself irrelevant. In our view, it no longer matters whether a person "voluntarily" surrenders cell site location information, "voluntarily" agrees to give drug treatment results to the government, or "voluntarily" agrees to confess in return for a promise of leniency from police, because the law focuses on other issues in determining what the government may do. In a second category of cases, in contrast, choice may be relevant, but only if the condition proffered by the government can survive strict scrutiny, that is, only if the government can show that the condition achieves a compelling state interest in a narrowly tailored fashion.

We believe strict scrutiny is the appropriate framework in the criminal setting because physical liberty is the most fundamental of rights. This argument is not new with us.[160] Although the Supreme Court has never endorsed it explicitly, several of its decisions rely on the notion that restrictions on liberty must be subjected to special scrutiny.[161] We think it is time the Court recognized forthrightly that the government should not be able to infringe on physical liberty unless it has a very strong reason for doing so and implements that interest in the least restrictive way possible. As one of us has stated, "there is no suggestion, much less a clear statement, within the Constitution that punishments are exempt from normal levels of constitutional scrutiny."[162] Application of strict scrutiny to the choices the government offers individuals would render many of those offers illegitimate, and thus eliminate the need to evaluate the voluntariness of people's consent or waiver. While a full explication of this theme would

160. Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (arguing for heightened scrutiny in the sentencing and pretrial detention contexts); Note, *The Right to be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1128 (2022) (arguing that "[p]hysical liberty" is a "fundamental right," deprivation of which should be subject to strict scrutiny); Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2128 (2020) (explaining that in some cases the Court "considered it obvious that some substantive right to physical liberty inheres in due process").

161. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982))); Black v. Romano, 471 U.S. 606, 610 (1985); Bearden v. Georgia, 461 U.S. 660, 671–73 (1983).

162. Kate Weisburd, *Rights Violations as Punishment*, 111 CAL. L. REV. 1305, 1335 (2023).

require an article in itself, below we briefly explore the implications of strict scrutiny analysis in three contexts: release decision-making; plea bargaining, and Fourth Amendment jurisprudence.

1. Conditions of Release

When the restrictions on physical liberty that are imposed in the pretrial, probation, or parole settings are combined with infringement of another constitutional right, the law has sometimes been receptive to strict scrutiny analysis. For instance, the Religious Land Use and Institutionalized Persons Act (RLUIPA), passed in 2001, explicitly imposes a strict scrutiny standard on correctional actions that burden a prisoner's "religious exercise" unless the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[163] The RLUIPA was upheld by the Supreme Court five years later,[164] and has been applied in the pretrial setting.[165] Another example of strict scrutiny analysis in the criminal context is found in *United States v. Myers*,[166] where then Second Circuit court judge Sonia Sotomayor invalidated a supervised release condition that limited a parent's ability to visit with his child on the grounds that "the liberty interest at stake is fundamental" and that "a deprivation of that liberty is 'reasonably necessary' only if the deprivation is narrowly tailored to serve a compelling government interest."[167] A handful of courts have followed suit in the context of family relationships.[168] Other cases have applied strict or heightened scrutiny to prohibitions on having children, internet bans, and mandatory penile plethysmographs.[169]

In most cases analyzing the validity of release conditions, however, the courts tend to fall back instead on a weaker "reasonable relation" standard, adapted from the 1973 Supreme Court decision in *Jackson v. Indiana*[170] that

163. 42 U.S.C. § 2000cc(a)(1)(A)–(B).

164. Cutter v. Wilkinson, 544 U.S. 709 (2005).

165. Khatib v. County of Orange, 639 F.3d 898, 903–04 (9th Cir. 2011) (applying the statute to local lockups).

166. 426 F.3d 117, 126 (2d Cir. 2005).

167. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

168. *See* Goings v. Ct. Servs. & Offender Supervision Agency, 786 F. Supp. 2d 48, 70–71 (D.D.C. 2011) (applying strict scrutiny to a no contact provision related to a defendant's ability to see their children); United States v. Reeves, 591 F.3d 77, 82–83 (2d Cir. 2010) (applying heightened scrutiny to a supervised release condition requiring a defendant to notify the probation department if he enters a "significant romantic relationship"); Simants v. State, 329 P.3d 1033, 1039 (Alaska Ct. App. 2014) (applying heightened scrutiny to a probation condition that barred a woman from living with her own child); Doe v. Lima, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) (applying strict scrutiny to a condition barring contact with son).

169. Weisburd, *supra* note 162, at 1342–43.

170. 406 U.S. 715 (1972); *see also* Weisburd, *supra* note 9, at 35 (discussing the extensive reliance on the "reasonably related" standard in the context of probation and parole).

held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[171] The reasonable relation standard is not entirely toothless. For instance, relying either on this standard or on vagueness doctrine, recent decisions have invalidated probation conditions that bar knowing association "with any member, prospect, or associate member of any gang";[172] require the defendant to "work regularly at a lawful occupation";[173] and prohibit "unprotected sex activities without approval of the Probation Office" (in the latter case because the prohibition was not reasonably related to the offense of unlawful possession of a firearm, deterring future crime, or assisting rehabilitation).[174] These cases, however, are the exception, not the norm. Because it is so easy to justify almost any condition as "reasonably related" to rehabilitation or public safety, most probation conditions are upheld. For example, restrictions on social relationships are routinely permitted under a "reasonably related" justification.[175] A condition requiring a person on probation to seek permission from his probation officer before "engaging in [] sexual relationship[s]" was also upheld as reasonably related to rehabilitation.[176] Likewise, at the height of the COVID-19 pandemic, a federal district court judge ordered that a probationer receive a COVID-19 vaccine—a condition that has nothing to do with crime prevention—on the ground that it was reasonably related to public safety.[177]

Much of the commentary about the propriety of release conditions has focused on the wide-ranging power courts wield in setting terms of release and on the broad discretion afforded to the probation and parole officers who are charged with enforcing them.[178] Our central observation is

171. *Jackson*, 406 U.S. at 738.

172. United States v. Washington, 893 F.3d 1081 (8th Cir. 2018).

173. United States v. Evans, 883 F.3d 1154, 1163 (9th Cir. 2018).

174. United States v. Harris, 794 F.3d 885, 888 (8th Cir. 2015).

175. *See, e.g.*, United States v. Romig, 933 F.3d 1004, 1007 (8th Cir. 2019) (holding that prohibition on associating with any member of a motorcycle gang did not infringe on freedom of association because it was reasonably related to the sentencing factors); United States v. Pacheco-Donelson, 893 F.3d 757, 763 (10th Cir. 2018) (same); *Evans*, 883 F.3d at 1164–65 (same); People v. Lopez, 78 Cal. Rptr. 2d 66, 73 (Cal. Ct. App. 1998) (holding a probation condition prohibiting gang association was reasonably related to rehabilitation and prevention of future criminality).

176. Krebs v. Schwarz, 568 N.W.2d 26, 28 (Wis. Ct. App. 1997).

177. *See* Madison Alder, *N.Y. Federal Judge Orders Defendant Vaccinated as Bail Condition*, BLOOMBERG L. (Aug 18, 2021, 5:24 PM), https://news.bloomberglaw.com/us-law-week/n-y-federal-judge-orders-defendant-vaccinated-as-bail-condition [https://perma.cc/DBH4-K32F].

178. *See, e.g.*, Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 77 (2000) ("The published cases in the area of probation conditions reveal an extraordinary level of judicial reliance on the judge's own values and sense of morality combined with the judge's best guess or intuition about the potential deterrent or rehabilitative impact of a particular sanction. The sentencing

different. We believe that even if the court-imposed condition is precisely described and officer discretion is minimized or eradicated, the condition is impermissible unless it achieves the state's interest in the least restrictive manner possible. As the above discussion suggests and many cases explicitly state, the government's stated interest in devising release conditions is and should be public safety, principally achieved through rehabilitation and other mechanisms for preventing and deterring reoffending and flight.[179] Strict scrutiny analysis demands that every release condition that the government wants people to accept in the pretrial, probation, and parole settings must directly address these goals, and must do so in a narrowly tailored fashion.[180]

For instance, as one of us has argued elsewhere, strict scrutiny analysis would call into serious question government efforts to condition release on agreement to submit to electronic ankle monitoring.[181] First, there is little empirical evidence that monitoring promotes the state's interests. It may do little to deter reoffending and its stigmatizing effect may undermine rehabilitative efforts.[182] Second, even if the compelling interest demonstration can be made as a general matter, monitoring should only be a condition for people who would otherwise be incarcerated in the interest of protecting the public and only when there is no less intrusive means of achieving the same goal. The state should have to demonstrate that the

judge's broad discretion leaves significant room for racial, ethnic, and religious bias to enter into the sentencing judgment."); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 291 (2016) ("[P]robationary systems concentrate adjudicative and legislative power in probation officers, often to the detriment of the socially disadvantaged.").

179. *See* United States v. Bortels, 962 F.2d 558, 560 (6th Cir. 1992) (stating that if condition "is reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public, it must be upheld"); United States v. Balderas, 358 F. App'x 575, 581 (5th Cir. 2009) (same); United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991) (maintaining that condition is valid if it is "primarily designed to meet the ends of rehabilitation and protection of the public" and if it is "reasonably related to such ends").

180. Some courts appear to agree, or at least apply the reasonable relation test in a way that mimics strict scrutiny or "rational basis with bite." *See, e.g.*, United States v. Santos Diaz, 66 F.4th 435, 448 (3d Cir. 2020) (conditions "will be upheld if (1) they are directly related to deterring defendant and protecting the public and (2) are narrowly tailored"), *cert. denied*, 144 S. Ct. 203 (2023). Even the Supreme Court has gestured at this notion. In *Zadvydas v. Davis*, it noted that "we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals." 533 U.S. 678, 690–91 (2001) (citing Kansas v. Hendricks, 521 U.S. 346, 368 (1997); United States v. Salerno, 481 U.S. 739, 747 (1987); Foucha v. Louisiana, 504 U.S. 71, 81–83 (1992)).

181. Weisburd, *supra* note 162, at 1359–61.

182. *See* Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., concurring in part and dissenting in part) (arguing that the device "cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures."); NAT'L INST. OF JUST., U.S. DEP'T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 3 (2011), https://www.ojp.gov/pdffiles1/nij/234460.pdf [https://perma.cc/UJT9-9LN5] (noting that the visibility of the device may make it more difficult to obtain and keep a job).

particular person poses a high risk of reoffending or escaping before the monitoring condition may be imposed.[183] Along the same lines, Erin Murphy has argued that monitoring should withstand challenge only if it were "imposed for only a short period, was demonstrably effective, and constituted the only means of achieving the safety goal."[184]

Strict scrutiny would also produce different results in several of the previously discussed Supreme Court cases dealing with other correctional restrictions. For instance, contrary to the result in *McKune v. Lile*, the government would not be able to reduce prisoners' privilege status simply because they refuse to reveal past sexual offenses. While revelation of that information might be an important predicate for successful treatment,[185] a refusal to disclose it does not suddenly make the person more dangerous; thus, without some further showing that the individual has become higher risk, there is no reasonable relation between the status reduction and the state's avowed purpose. Likewise, contrary to the Supreme Court's decisions in *United States v. Knights*[186] and *Samson v. California*,[187] conditioning parole or probation on submission to searches of the home or person at the whim of probation or parole officers would clearly not survive strict scrutiny, unless perhaps the person is considered to be a significant risk for armed, violent crime (in which case release would probably not occur in any event).[188]

In short, it is not enough to say, as the Fifth Circuit did in *United States v. Smith*, that the person released "could have rejected [the release condition] and elected prison. He chose to enjoy the benefits of [release]; he must endure its restrictions."[189] A person should only have to endure release restrictions that are very likely to reduce risk or achieve another important government aim. If that limitation is imposed, the "voluntariness" of the person's choice need not be a concern.

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183. For an analysis of how this showing might be made, see CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK (2021).

184. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1396 (2008).

185. *See* McKune v. Lile, 536 U.S. 24, 29 (2002) ("[I]t is of considerable importance for the program participant to admit having committed the crime for which he is being treated and other past offenses. The first and in many ways most crucial step in the Kansas rehabilitation program thus requires the participant to confront his past crimes so that he can begin to understand his own motivations and weaknesses.").

186. 534 U.S. 112 (2001).

187. 547 U.S. 843 (2006).

188. Some have even argued that these suspicionless searches and seizures diminish rehabilitative prospects, especially when conducted by police rather than parole officers, because their routine invasions of homes and arrests on technicalities impede the ability of releasees to keep housing and develop prosocial relationships. Tonja Jacobi & Addie Maguire, *Searches Without Suspicion: Avoiding a Four Million Person Underclass*, 48 BYU L. REV. 1769, 1805–08 (2023).

189. United States v. Smith, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds sub nom.* Schacht v. United States, 398 U.S. 58 (1970).

2. Plea Bargaining

Strict scrutiny analysis would also have significant implications for plea bargaining. As with release conditions, bargaining proffers that trench on other constitutional rights should be highly suspect. Clearly, for example, a plea agreement that is contingent on writing an apology letter accepting responsibility would only survive if it passed First Amendment scrutiny (because the letter is compelled speech), substantive due process (because the letter implicates autonomy), and the Fifth Amendment (because the letter implicates the right against self-incrimination).[190]

But on the assumption that restrictions on physical liberty are, by *themselves*, triggers for strict scrutiny, many other plea conditions would be suspect as well, not because they are coercive or impose an unconstitutional condition but because they do not narrowly further the state's goals. For the reasons we just discussed, prosecutors should not be able to offer plea deals that include release conditions that would not survive strict scrutiny. Under the same logic, in the absence of a showing that it is necessary to protect the public, prosecutors would also be barred from conditioning a plea offer on a person's agreement to forego seeking compassionate release, parole, or a sentence reduction, conditions that today are routinely imposed in some jurisdictions.[191]

The state's efforts to use plea deals to obtain waivers of rights should also be subject to strict scrutiny. The state's goals during plea bargaining are fundamentally twofold: convicting a guilty person (justice) without the expense of a trial (efficiency). Many waivers associated with a plea—such as waivers of the rights to silence, jury, and confront accusers—are arguably a necessary means of achieving both goals.[192] But other waivers are not; at best, they further only efficiency, the lesser of the two objectives. For instance, it has become standard practice for prosecutors to condition plea

190. Weisburd, *supra* note 162, at 1312.

191. *See* United States v. Osorto, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020) (rejecting a condition that barred application for compassionate release and stating, "It is no answer to say that Funez Osorto is striking a deal with the Government, and could reject this term if he wanted to, because that statement does not reflect the reality of the bargaining table."); E-mail from G.S., Criminal Defense Attorney, to K. Weisburd (Feb. 5, 2024) (on file with authors) (explaining that a standard plea condition requires defendants to agree to not seek early termination of probation); E-mail from C.W., Criminal Defense Attorney, to K. Weisburd (Feb. 5, 2024) (on file with authors) (noting that it is common to see plea conditions that require defendants to not seek early termination of a suspended and deferred sentence); E-mail from J.S., Criminal Defense Attorney, to K. Weisburd (Feb. 5, 2024) (on file with authors) (discussing a standard plea condition that reads: "Defendant waives the right to appeal or collaterally challenge the length and conditions of supervised release, as well as any sentence imposed upon a revocation of Defendant's supervised release.").

192. Even waivers of Rule 410 protection prohibiting impeachment of statements made during plea negotiations—upheld in *Mezzanatto*—could be said to be a necessary means of encouraging adherence to pleas by people who are guilty.

deals on waivers of the right to appeal, the right to exculpatory evidence, and the right to effective assistance of counsel.[193] These waivers do not withstand strict scrutiny because they *detract* from the state's justice objective of convicting (only) guilty people. Preventing arguments on appeal that the prosecution withheld exculpatory evidence prior to the plea negotiation does not further the state's goal of separating the guilty from the innocent.[194] Nor does forestalling contentions that defense counsel incompetently failed to explain the consequences of the plea or pursue exculpatory leads.[195] In these situations—which are not that far removed from prosecutorial attempts to prevent constitutional challenges to the statute of conviction, something the Supreme Court has explicitly prohibited[196]—the voluntariness of the waiver should not be an issue, because no such waivers should be sought.

3. Search and Seizure

Application of strict scrutiny analysis to deprivations of liberty would also force courts to consider the legitimacy of many of the conditions that arise in Fourth Amendment cases. Consider, for instance, the "spit and acquit" routine that has cropped up in some jurisdictions. In Orange County, California, people charged with low level crimes are sometimes offered a deal: their charges will be dismissed in exchange for a DNA sample that can be deposited in the local DNA database.[197] Strict scrutiny (which applies because of the threatened liberty infringement) would require the state to demonstrate that this seizure of genetic information is narrowly tailored to achieve the goals of custodial arrest and charging. These goals are, generally speaking, protecting the public from the arrestee, finding evidence that supports the arrest, and initiating the formal prosecution.[198] Obtaining a DNA sample from an arrestee suspected of committing a misdemeanor effectuates none of these purposes, because low-level crimes do not generate genetic evidence.[199] When such a search does not pass strict scrutiny, it should be impermissible, whether or not it is reasonable under

193. Klein et al., *supra* note 32, at 85–87.

194. *Cf.* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

195. *Cf.* Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010) (finding ineffective assistance of counsel when counsel failed to inform defendant that conviction would lead to deportation).

196. *See, e.g.*, Class v. United States, 583 U.S. 174 (2018).

197. *See* Thompson v. Spitzer, 307 Cal. Rptr. 3d 183 (Cal. Ct. App. 2023).

198. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 309 (2016) (noting that "our traditional justifications for arrests" are "starting the criminal process and maintaining public order").

199. In contrast, people arrested for more serious crimes, where a DNA sample might help prove the crime of arrest, presumably will be subject to charging regardless of their willingness to give a sample.

the Fourth Amendment, because refusing the search results in a deprivation of liberty.[200]

Next consider searches and seizures of groups of individuals, which the Supreme Court often classifies as special needs situations and which many scholars call programmatic searches and seizures.[201] The current conceit is that members of the group consent or acquiesce to suspicionless regulatory searches and seizures of business and homes in return for licenses or assurances that their premises are safe.[202] Assuming these practices involve deprivations of liberty (which we realize is a contestable proposition), strict scrutiny would instead demand inquiry into the purpose of the program—ideally set out in statute and regulation[203]–and into whether the suspicionless or seizure regime is a narrowly tailored way of effectuating it.

Many of the programs approved by the Court—involving regulation of gun dealers, liquor stores, coal mines, and home safety—probably meet this test. In each of these situations, the suspicionless search regime was designed to detect dangers inevitably associated with the entity in question—improper gun or liquor sales, flawed mine infrastructure, faulty home wiring, and so on—and traditional suspicion-based searches would not adequately protect the state's interests given the difficulty of detecting these problems.[204] But in other cases, the relationship between the search and seizure regime and the purpose of the program is much more attenuated. For instance, the Court's opinion in *Board of Education v. Earls*,[205] upholding suspicionless drug testing of high school students in extracurricular activities, offered no evidence that drug usage was a problem

200. It should also be noted that, while the Court's Fourth Amendment cases typically reject arguments that searches and seizures be carried out in the least intrusive means possible, *see, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."), its approach to searches that involve bodily intrusions (which spit and acquit involves) signals a willingness to contemplate such arguments. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 765 (1985) (requiring the state to show it has a "compelling need" for evidence sought through surgery).

201. Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1441–42 (2018) (discussing "the so-called 'special-needs' cases, in which the government undertakes programmatic searches without individualized suspicion and for reasons other than 'the general interest in crime control.'").

202. *See supra* text accompanying notes 68–70.

203. One of us has argued that these are requirements under both the Fourth Amendment and administrative law principles. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016).

204. *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 537 (1967) ("[T]he public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself."); United States v. Biswell, 406 U.S. 311, 316 (1972) ("[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection.").

205. 536 U.S. 822 (2002).

among this group (at least as opposed to other groups within the high school).[206] Similarly, in *Wyman v. James*, the Court's opinion upholding suspicionless searches for evidence of abuse in the homes of mothers receiving welfare, there was no evidence that abuse was prevalent in such homes (at least any more so than in homes of mothers who were not on welfare).[207] In these cases, the search programs were not narrowly tailored to achieve the state's aims.

In this regard, consider the Eleventh Circuit opinion *Lebron v. Secretary, Florida Department of Children & Families*,[208] which enjoined Florida's Temporary Assistance for Needy Families (TANF) program on the ground that it unconstitutionally conditioned welfare recipients' Fourth Amendment rights on agreement to undergo suspicionless drug testing. Levine, Nash, and Schapiro describe this decision as a "textbook" application of the unconstitutional conditions doctrine and of how to evaluate "coercion" in the Fourth Amendment context.[209] That may be, but the case could be more straightforwardly resolved under strict scrutiny.

The key sentence in the opinion is the following: "Here, because the state of Florida cannot drug test TANF applicants absent individualized suspicion or a showing of a governmental substantial special need that outweighs the applicant's privacy rights, it cannot do so indirectly by conditioning the receipt of this government benefit on the applicant's forced waiver of his Fourth Amendment right."[210] While this language resonates with unconstitutional condition language, the word doing all the work in this passage is "substantial." Without it, the court's reasoning would apply to any of the Supreme Court's programmatic cases that *upheld* "waivers" of Fourth Amendment rights. In each of these cases, the Court permitted the government to offer a benefit (e.g., a gun store license) in exchange for relinquishing Fourth Amendment rights,[211] decisions the Eleventh Circuit presumably had no intention of contesting. Application of strict scrutiny would have more directly posed the question: does the drug testing program effectively implement a "substantial" special need? Based on the record in

206. Whereas the lower court opinion in *Earls* made clear there was no such evidence. *See* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1277 (10th Cir. 2001) ("[G]iven the paucity of evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished.").

207. Wyman v. James, 400 U.S. 309, 341–42 (1971) (Marshall, J., dissenting) (noting that the home visits were unlikely to uncover evidence of abuse, especially because children need not be present, and that, in any event, such incidents "are not confined to indigent households").

208. 710 F.3d 1202 (11th Cir. 2013).

209. Levine et al., *supra* note 102, at 60–61.

210. 710 F.3d at 1217.

211. For a description of the cases, see *supra* text accompanying notes 68–70.

Lebron, the answer is no. According to the Eleventh Circuit, "[T]he State failed to offer any factual support or to present any empirical evidence of a 'concrete danger' of illegal drug use within Florida's TANF population. . . . or that [recipients] misappropriate government funds for drugs at the expense of their own and their children's basic subsistence. The State has presented no evidence that simply because an applicant for TANF benefits is having financial problems, he is also drug addicted or prone to fraudulent and neglectful behavior."[212] That is strict scrutiny reasoning, and it avoids entirely the coercion question of whether the waiver was "forced."

4. The "Greater Includes the Lesser" Argument

One concern about applying strict scrutiny in the way we have discussed is that its end result will be greater harm to the people it means to protect. If the condition the government wants to impose in exchange for a benefit such as release, a plea bargain, or welfare becomes constitutionally problematic, the government may simply refuse to offer the benefit. This possibility has also led some to make the "greater-includes-the lesser" argument: if the government can withhold the benefit entirely, the person is no worse off receiving the benefit conditionally, and thus cannot plausibly argue that their constitutional rights have been infringed by the condition.[213] In defending the scenarios discussed in this section, those who make this argument might say, for instance, that virtually any release condition is permissible because the government does not have to release anyone charged or convicted of crime. In defending the spit and acquit regime, they might contend that virtually any demand in return for dismissal of charges is permissible because the government has complete control over the charging process. In advocating for Florida's TANF program they might say that virtually any condition imposed on those seeking welfare is permissible because welfare is a government-created entitlement, not a right.

Because it zeroes in on the extent to which the government's condition is related to legitimate goals, strict scrutiny exposes the fallacy of each of these arguments. If the government's goal at a particular point in the pretrial, bargaining, and sentencing contexts is public safety, the government *must*

212. 710 F.3d at 1211 (footnote omitted).

213. *See* Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175, 177 (1989) (no recipients of a proposal "can complain that they are worse off than they would be were the government [to carry out its threat] . . . . And, if they are not worse off than they *could* be constitutionally, how can they claim infringement of their constitutional rights?"); *see also* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992) ("In my view, the Court's 'special needs' decisions have it about right . . . . [I]n each, the government has options that it might well exercise if searching is forbidden—options that are not regulated by Fourth Amendment law[—and] these options might well make innocent search targets worse off than they would be with the searches.").

release low risk individuals; there is no legitimate reason to detain them.[214] In the spit and acquit scenario, if the government is willing to dismiss charges in return for a completely hypothetical benefit of adding to the DNA database, it obviously does not believe the purposes of custodial arrest or punishment will be served by pursuing the case, which should thus be dropped in any event. And if the government's goal in conditioning welfare on drug testing is to prevent drug abuse, getting rid of welfare entitlements will, if anything, increase such abuse among families in need. Strict scrutiny requires the government to act consistently with its goals. In short, it exposes those situations where the government does not have the "greater" power and instead may only resort to its "lesser" exercise of authority.

C. When the Government's Proposed Benefit Is Not Constitutional

The final category of cases in which the voluntariness of a person's choice should be irrelevant is when the "benefit" the government purports to provide in exchange for consent or waiver is illegitimate. In the category of cases just discussed, the *condition* sought to be imposed by the government might be illegitimate, but at least it is proposed in exchange for a legitimate and often attractive option—release from prison, the ability to operate a business, or welfare benefits. In the cases discussed here, in contrast, the government has nothing legitimate or attractive to offer.

Consider this case, a common occurrence in American cities. The police approach several young Black men standing on a street corner in Washington, D.C. They ask the men to turn out their waistbands, which they do, and then ask the men to consent to a patdown, which they also do.[215] While this type of police conduct could be challenged as discriminatory, such arguments rarely succeed.[216] Indeed, under current law, this type of

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214. In the sentencing context, another way of saying this, using strict scrutiny language, is that at some point the government's retributive interest in detention is no longer compelling, at which point its interest in protecting the public takes over, which must be implemented in the least restrictive way possible. The courts that uphold challenges to probation conditions implicitly recognize this point when they direct the state to modify the probation conditions rather than allow the government to re-incarcerate the person. *See, e.g.*, United States v. Evans, 883 F.3d 1154, 1164 (9th Cir. 2018) (remanding case to the district court with an order to modify the offending condition); United States v. Harris, 794 F.3d 885, 890 (8th Cir. 2015) (ordering the deletion of the offending condition).

215. *See* Soup Visions, *White Washington DC Police Harassing Me Again*, YOUTUBE (Nov. 15, 2017), https://www.youtube.com/watch?v=cghtBX19cjA [https://perma.cc/4KN2-MEHT]; *see also* Weisburd, *supra* note 9, at 3 (arguing that the coercion in this scenario is reflective of coercion in other forms of consent and waiver that pervade criminal procedure).

216. *See supra* text accompanying notes 124–32; *see also* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 307–08 ("The Supreme Court has construed the Equal Protection Clause to permit almost any government action that avoids explicit discrimination, unless it can be shown to be based on outright hostility to a racial or ethnic group . . . . And even when a police officer *does* act out of racial animus—pulling over a [B]lack

encounter would be considered "consensual," assuming the absence of drawn guns or commands. In this case, for instance, the officers merely "asked" the men to display their waistbands and undergo a patdown, and the men assented.

There are two other challenges to this practice, however. Following our arguments in the previous section, the first challenge is that consent searches do not further important state interests in a narrowly tailored fashion. That challenge would involve assessing the "hit rates" of consent searches and alternative methods of dealing with crime in the relevant neighborhoods.[217] That challenge would take a significant amount of empirical work to bring to fruition.

The second, more powerful challenge to the practice is that the police have nothing legitimate to offer in exchange for consent. Under *Terry v. Ohio*[218] and related cases,[219] police are not entitled to frisk people, much less search them, in the absence of reasonable suspicion. Further, of course, that suspicion cannot arise solely from the fact that the target is a young, Black man associating with other Black men.[220] Nor can suspicion be based on a refusal to give consent, because that would make the right to refuse consent meaningless;[221] the suspicion must precede the encounter, not the reverse. Unlike the types of government proffers at issue in the previous section—release from detention, dismissal of charges, or (to provide another search example) permission to board a plane after going through TSA—the "benefit" that the men in the D.C. case get from consent is non-existent. Their consent gains them nothing that they did not already have.

There is some suggestion in the Court's cases that people's consent in such situations "enhances their own safety and the safety of those around them,"[222] and "may result in considerably less inconvenience" because it dispels suspicion.[223] But, given that, by definition, there is no suspicion to

motorist, for example, simply because the officer does not like [B]lack people—*demonstrating* that typically proves impossible.").

217. *Cf.* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 692 (2002) (noting, based on data regarding traffic stops by the Michigan State Police, that consent searches had a twenty-two percent hit rate while probable cause searches had a fifty-three percent hit rate).

218. 392 U.S. 1 (1968).

219. Delaware v. Prouse, 440 U.S. 648 (1979) (holding police not permitted to randomly stop motorists); Brown v. Texas, 443 U.S. 47 (1979) (holding police not permitted to stop individuals in high drug problem area who walk away from one another when the police arrive).

220. *Cf.* Florida v. J.L., 529 U.S. 266 (2000) (finding stop of young Black man standing at a bus stop unconstitutional when based on an anonymous tip that he was carrying a gun when the only corroborated information was that a young Black man was standing at the bus stop wearing particular clothing).

221. Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or a seizure.").

222. United States v. Drayton, 536 U.S. 194, 205 (2002).

223. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

dispel, safety from what? And inconvenience for whom? In effect, the police are saying to the young men, "If you consent, we will not subject you to further inquiry or detention unless we find something. Make things easy for yourself and for us by consenting."

The implication of this reasoning is that, in the street policing context, the police should have to have at least reasonable suspicion before they can ask for consent to search, whether the consent is sought from pedestrians, drivers of cars, or occupants of homes.[224] Otherwise, consent should have no effect, even if it is "voluntary." In recent years, a small but growing number of jurisdictions have limited consent searches by prohibiting them in the absence of reasonable suspicion.[225] While not required by recent precedent, this stricture is consistent with older cases like *Amos* and *Bumper*, which held that obtaining consent through claims of "lawful authority" to search are invalid despite good evidence that the consent was voluntary.[226] In both cases, the police implied that if consent were not given, they would forge ahead anyway. The same inference arises when consent is arbitrarily sought in the street policing context, where the message that police "requests" for consent communicate is "Waive your Fourth Amendment rights or we will ignore them." In the absence of reasonable suspicion, the unconstitutionality of that proffer is evident. In that situation, the "voluntariness" of a consent should be irrelevant, because even *asking* for consent is illegitimate.

CONCLUSION

We have argued that the illegitimate choice test is a way to deploy already existing legal principles to resolve otherwise thorny questions of consent and voluntariness. Those questions need not be addressed at all if our prescriptions were adopted. Regardless of whether consent or waiver has occurred or is voluntary, the validity of third-party searches would depend on the amount and type of information accessed, pre-plea bargaining during interrogation could not take place without counsel, release and plea bargain conditions would need to be narrowly tailored to public safety or

224. This is the stance taken in PRINCIPLES OF THE L., POLICING § 4.06(b)(1) (AM. L. INST. 2022). *But cf.* Ohio v. Robinette, 519 U.S. 33 (1977) (holding, to the contrary, that no suspicion is required before an officer who had finished issuing a traffic citation could ask for consent). Note that, even with a reasonable suspicion limitation, police would still benefit from consents, because they could search in the absence of probable cause.

225. Weisburd, *supra* note 9, at 8–11 (surveying state efforts to reform consent searches).

226. In *Amos*, the defendant's wife "admitted" the officers to the house. Amos v. United States, 255 U.S. 313, 317 (1921). In *Bumper*, the defendant's grandmother admitted the officers into the house and later testified that "she actually wanted the officers to search her house—to prove to them that she had nothing to hide. . . . 'I just give them a free will to look because I felt like the boy wasn't guilty.'" Bumper v. North Carolina, 391 U.S. 543, 556–57 (1968) (Black J., dissenting).

justice concerns, and suspicionless searches and seizures would similarly be limited to those that achieve compelling state interests through narrowly tailored means. Further, a consent to carry out a search would only be valid if police already have reasonable suspicion.

Given the topic of this symposium, in this concluding section we want to end by briefly touching on how our proposal relates to minimalism and abolitionism. As an initial matter, one might argue that the illegitimate choice test does little to minimize, much less abolish, the power of police, prosecutors, or judges. For example, even if the test is adopted, our expansive interpretation of *Carpenter* and *Ferguson* could be rejected, courts could uphold otherwise troubling conditions of probation through expansive interpretations of strict scrutiny doctrine, and police barred from relying on consent could find alternative legal means of searching people on the street. Indeed, some scholars have opined that rights-based frameworks are rarely effective for those already marginalized.[227] According to this view, the Constitution offers little solace for historically oppressed people and more often is simply a tool of racial, economic, and social subordination.[228] As Amna Akbar puts it, "[r]eform alone will not be enough."[229] Similarly, India Thusi posits that "it is futile to expend additional resources reforming institutions that have proven resistant to change, particularly where they have a legacy of oppression."[230]

At the same time, our proposal does not necessarily conflict with abolition theory, for at least three reasons. First, despite the potential for judicial and official manipulation, the illegitimate choice test would significantly shrink the power of police, prosecutors, and judges. Second, while it focuses on the harm and suffering that people experience today, it would not stand in the way of broader and deeper transformations.[231] Incremental change need not be in conflict with the abolitionist project so long as the change seeks to "reduce rather than strengthen the scale and

227. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2196–97 (2013); Weisburd, *supra* note 67, at 48.

228. Dorothy E. Roberts, *Foreword: Abolitionist Constitutionalism*, 133 HARV. L. REV. 1, 106 (2019); Butler, *supra* note 227, at 2196; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1790 n.22 (2020).

229. Akbar, *supra* note 228, at 1788.

230. I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1589–92 (2023); *see also* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 314 (2018) (observing that those who focus on reducing the number of people in prison as opposed to abolishing prison "risk playing into a dynamic by which 'criminal justice reform's first step—relief for nonviolent drug offenders—could easily become its last'").

231. Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 14, 2023), https://lpeproject.org/blog/abolition-in-the-interstices/ [https://perma.cc/HF3Z-HCE8]; Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. (forthcoming 2024). As indicated earlier, in related work, one of us examines what abolishing the various forms of consent and waiver would mean for the operation of the criminal legal system more broadly. *See* Weisburd, *supra* note 9.

scope of policing, imprisonment, and surveillance."[232] Third, using constitutional arguments to limit the use of consent can be seen as an example of what Dorothy Roberts calls "abolition constitutionalism."[233] Professor Roberts suggests that scholars "can craft an approach to engaging with the Constitution that furthers radical change" by using constitutional doctrine to expose hypocrisy (in our case, the hypocrisy of using individual "choice" as a cover for exercises of power), while recognizing that the existing legal system will not bring about deserved freedom for the people historically subordinated by the criminal legal system.[234]

In full disclosure, the two of us have different views on abolition.[235] But we also believe it remains an open question whether abolitionism and minimalism are fully distinct and opposing categories, instead represent different points along a continuum, or have some other relationship altogether. For purposes of this article, these differing views and open questions are beside the point. We both agree that the concepts of choice, waiver, and consent are currently deployed in ways that violate basic Constitutional principles and further entrench social inequities endemic to the criminal legal system. Our proposal—regardless of how it is labeled or characterized—aims to address these problems.

232. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/5MJF-8A6T] ("[I]t is inaccurate to cast abolitionists as opposed to incremental change. Rather, abolitionists have insisted on reforms that reduce rather than strengthen the scale and scope of policing, imprisonment, and surveillance.").

233. Roberts, *supra* note 228.

234. *Id.* at 108.

235. *Compare* Christopher Slobogin, Essay, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 534 (2024) (expressing a preference for "criminal law minimalism" rather than abolitionism), *with* Weisburd, *supra* note 123, at 205–06.