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Consent and waiver are said to be legally transformative, that is, they are verbal acts with legal repercussions.[1] Coercion undermines the validity of these verbal acts. In the context of criminal procedure, coercion may invalidate the legal significance of a defendant's consent to a search, the waiver of his privilege against self-incrimination, or the waiver of his right to counsel. The question of whether we should or should not invalidate a defendant's actions because of government coercion is for the most part a matter of public policy. An examination of the boundaries established by the courts between acceptable and improper police behavior reveals that the lines are drawn based upon a desire to promote the public policy goals of effective law enforcement and public confidence in the criminal justice system as an accurate truth-seeking mechanism. Depending on whether a law enforcement officer's acts will further or hinder societal concerns, the law may characterize his acts as coercive in one area of criminal procedure but the acceptable norm in another context. Despite the fact that the words "coercion" and "voluntariness" generally connote subjectivity, a defendant's perception of whether his consent was voluntary or coerced is largely irrelevant in the determination of whether the law will invalidate his actions on the grounds of coercion.

Our task in this Symposium[2] is to analyze not the essence of coercion, but to determine when the law should treat a defendant's actions as legally invalid due to coercion. This article examines the circumstances under which a criminal defendant may effect a valid relinquishment of his Fourth, Fifth, and Sixth Amendment rights; how the differences in the procedural safeguards accorded these rights reflect the degree to which our criminal justice system is willing to recognize coercive government actions as an invalidating force with respect to each of these rights; and the moral reasoning underlying this scheme. Part I summarizes the evolution of the law of waiver and consent in criminal procedure. It discusses the Sixth Amendment and the rationale under-

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1. Consent is morally and legally transformative in that "it changes the moral and legal relationship between parties to an agreement." Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 890 (1997).

2. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

lying the concept of waiver, the United States Supreme Court's extension of the Sixth Amendment standards for waiver to the relinquishment of Fifth Amendment rights, and the Supreme Court's refusal to extend the concept of waiver to the Fourth Amendment. Part II analyzes the role of moral considerations in the willingness of the courts to give effect to the invalidating force of coercion upon the transformative acts of waiver and consent.

I. WAIVER AND CONSENT: THE SIXTH, FIFTH, AND FOURTH AMENDMENTS[3]

A. *Waiver of the Sixth Amendment Right to Counsel*

The Sixth Amendment to the United States Constitution provides an accused with procedural protections relating to the structure of a criminal trial, including the right to counsel.[4] The Sixth Amendment right to counsel attaches at all "critical stages" of criminal proceedings in which the absence of counsel may result in substantial prejudice against the accused and where the presence of counsel would mitigate or eliminate this prejudice.[5]

It was in the context of the Sixth Amendment, in *Johnson v. Zerbst*,[6] that the United States Supreme Court first articulated the now familiar definition of waiver: "an intentional relinquishment or abandonment of a known right or privilege."[7] The defendant in *Zerbst* was charged with possessing and passing counterfeit Federal Reserve notes.[8] He had little education, was without the

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3. This background is not a thorough review of the Fourth, Fifth, and Sixth Amendments, but rather a brief overview to highlight the invalidating role of coercion with respect to waiver and consent in criminal procedure. The validity of a defendant's consent or waiver after it has been previously withheld, for example, is beyond the scope of this article.

4. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Supreme Court has also recognized a due process right to counsel independent from the Sixth Amendment. *See* Powell v. Alabama, 287 U.S. 45 (1932). Miranda warnings, created as a prophylactic measure to protect the Fifth Amendment privilege against self-incrimination, also include a right to counsel during custodial interrogation.

Coercion in the waiver of other trial rights raises interesting questions, but is beyond the scope of this article. *See, e.g.*, United States v. Mezzannatto, 115 S. Ct. 797, 800, 805-06 (1995) (holding that defendants who engage in plea negotiations may waive the protection against later use of their statements for impeachment purposes); Town of Newton v. Rumery, 480 U.S. 386 (1987) (holding that release-dismissal agreements—in which defendants agree to release their civil suits against the government in exchange for the dismissal of the government's case against them—are not impermissible per se).

5. United States v. Wade, 388 U.S. 218, 236-38 (1967) (holding that post-indictment lineups possess a "grave potential" for prejudice and are therefore a "critical" stage of the proceedings at which the defendant is entitled to the assistance of counsel). "Critical stages" are those proceedings which lead to the loss of liberty. The Supreme Court has recognized that the defendant has a right to counsel at a preliminary hearing, *see* White v. Maryland, 373 U.S. 59 (1963); at a pretrial line up, *see* United States v. Wade, 388 U.S. 218 (1967); during a pretrial interrogation when the state attempts to elicit information directly from an accused who has been formally charged, *see* Brewer v. Williams, 430 U.S. 387 (1977); and when the government surreptitiously and deliberately attempts to elicit information from an indicted defendant, *see* Maine v. Moulton, 474 U.S. 159 (1985). *See generally* 1 WILLIAM H. ERICKSON, UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE § 3.01[3] (1997).

6. 304 U.S. 458 (1938).

7. *Zerbst*, 304 U.S. at 464.

8. *Id.* at 459.

financial means to hire retained counsel, and had no family or friends in the area.[9] He was arraigned, tried, convicted, and sentenced on the same day without the assistance of counsel. At trial, the defendant briefly addressed the jury, stating only, "I don't consider myself a hoodlum as the District Attorney has made me out to be several times."[10] He was sentenced to four and one half years of incarceration. Standard procedure at the penitentiary required new prisoners to be placed in isolation for sixteen days; as a result, the defendant was unable to file an appeal within the allotted time.[11] The Supreme Court reversed the conviction on the grounds that the defendant could not have effectively waived his right to counsel if he did not know that he had a right to counsel.[12] In doing so, the Supreme Court emphasized that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights," and stated that "[t]he determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[13] The Court further stated that the policy underlying this right was one of humanity and fairness, and that the Sixth Amendment:

> [E]mbodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. . . .
>
> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[14]

The *Zerbst* court held, in essence, that a conviction obtained by government exploitation of the defendant's ignorance as to legal procedure was no conviction at all. Although the public policy behind this rule was, in part, the ascertainment of truth and the exculpation of the innocent, the Court also expressed serious concern for persons overwhelmed by the complexity of our legal system regardless of their guilt or innocence.[15] The Court subsequently extended this "intentional relinquishment of a known right" standard to the states through the Due Process Clause of the Fourteenth Amendment.[16]

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9. *Id.*
10. *Id.* at 461.
11. *Id.* at 469.
12. *Id.*
13. *Id.*
14. *Id.* at 462-63.
15. *Id.* at 469.
16. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

Massiah v. United States[17] extended the right to counsel from the context of a courtroom to encounters between citizens and law enforcement officials. In *Massiah*, law enforcement officials instructed a co-defendant to elicit incriminating statements from the defendant as the officials listened to the conversation through a radio transmitter. The defendant had been indicted and was represented by counsel.[18] The Supreme Court found that the state, by deliberately eliciting incriminating statements after indictment and seeking to use the statements against the defendant at trial, violated the defendant's Sixth Amendment right to counsel.[19]

Although *Massiah* clarified the parameters of the Sixth Amendment right to counsel, the standard for waiver of that right beyond the confines of a courtroom was not clear until *Brewer v. Williams*.[20] The defendant in *Brewer* was an escapee from a mental institution who had been formally charged with the abduction of a young girl.[21] He was represented by counsel and had been advised of his rights.[22] While transporting the defendant to the jurisdiction where the abduction occurred, law enforcement officials who knew the defendant to be deeply religious explained to the defendant, in the absence of counsel, that the weather conditions were such that unless the defendant immediately led the officers to the girl's body it would never be found, and that the child's parents "should be entitled to a Christian burial."[23] The defendant responded by leading the officers to the girl's body. The Supreme Court found the facts to be "constitutionally indistinguishable"[24] from those in *Massiah*, and held that the officers' subtle persuasion amounted to a violation of the defendant's right to counsel.[25] The Court recognized that the murder of a small child inevitably produced great pressure on the state and the courts to bring the perpetrator to justice, but that "it is precisely the predictability of those pressures"[26] that required faithful adherence to the Constitution. Holding that the *Zerbst* standard applied to a waiver of the right to counsel at critical stages regardless of whether the waiver occurred in a courtroom or in a patrol car, the court emphasized that "waiver requires not merely comprehension but relinquishment."[27] Hence, a waiver of the Sixth Amendment right to counsel must be knowing, intelligent, and voluntary.[28]

Zerbst, *Massiah*, and *Brewer* together stand for the proposition that once

17. 377 U.S. 201 (1964).
18. *Massiah*, 377 U.S. at 201-02.
19. Note, however, that when an undercover agent elicits incriminating information from an indicted defendant but does not convey this information to law enforcement officials, no Sixth Amendment violation has occurred. *See* Weatherford v. Bursey, 429 U.S. 545 (1977) (finding no Sixth Amendment violation where there was no realistic possibility that the state gained an advantage).
20. 430 U.S. 387 (1977).
21. *Brewer*, 430 U.S. at 400.
22. *Id.*
23. *Id.* at 401-02.
24. *Id.* at 400.
25. *Id.*
26. *Id.* at 406.
27. *Id.* at 407.
28. *Id.*

the Sixth Amendment right to counsel has attached, an effective waiver of that right, whether it occurs in a courtroom, a patrol car, or in any other location, must be an "intentional relinquishment of a known right"; the waiver must be knowing, intelligent, and voluntary. These cases reflect the Court's concern with police overreaching and procedural fairness to defendants, especially those defendants who may be vulnerable to such overreaching by virtue of diminished mental abilities, a lack of education, or some other factor related to background or experience. Finally, the Court acknowledged the fact that a layperson's unfamiliarity with legal procedure may prejudice his ability to preserve his rights at trial.[29]

B. *Waiver of the Fifth Amendment Privilege Against Self-Incrimination*

The Fifth Amendment's privilege against self-incrimination protects an accused from being compelled to testify against himself or to provide the government with testimonial or communicative evidence.[30] Two years after the United States Supreme Court held the Fifth Amendment applicable to the states,[31] the Court announced the most significant Fifth Amendment case to date, *Miranda v. Arizona*.[32] In *Miranda*, the Court determined that custodial interrogation—"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,"[33]—was inherently coercive, and that officers must provide the suspect with a prophylactic advisement of his rights in these situations in order to protect the Fifth Amendment privilege against self-incrimination and to ensure that any statements made by the suspect were "truly the product of free choice."[34]

For purposes of this article, *Miranda*'s significance is twofold. First, *Miranda* sheds light on the definition of coercion in criminal procedure by establishing custodial interrogation as a baseline for presumptively coercive state action.[35] In reaching this conclusion, the Court considered the privacy in which custodial interrogation generally occurs and the absence of an accurate

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29. *See generally* Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (holding that a lay person's lack of familiarity with legal procedure cannot be offset by legal counsel's representation).

30. *See* Schmerber v. California, 384 U.S. 757 (1966) (holding that police did not violate defendant's privilege against self-incrimination by taking a blood sample over his objection because the privilege only protects the contents of his mind). The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

31. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment privilege against self-incrimination applicable to the states and noting that both state and federal courts determined admissibility of a confession on a voluntariness standard).

32. 384 U.S. 436 (1966).

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

34. *Id.* at 457. The documented instances of false confessions are significant enough to justify concern over this issue. *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 84 (1993) (discussing psychological perspectives on why suspects confess and stating that 49 persons in 350 cases were wrongly convicted of murder based on their own false confession).

35. *Miranda*, 384 U.S. at 514-25 (discussing the policy reasons for establishing constitutional safeguards against custodial interrogation without counsel).

gauge with which to measure the atmosphere in an interrogation room. After surveying police department manuals which instructed officers to intimidate suspects through the use of psychological tactics,[36] the Court concluded that custodial interrogation was by nature coercive:[37] "This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[38] If custodial interrogation is presumptively coercive, then the factors that define "custody" are instructive in discerning the Court's understanding of coercion. "Custody" includes such factors as the time and place of interrogation; the length of interrogation; the number of officers present; the actions and words of the officers and the defendant; physical restraint or the threat of physical restraint.[39] The determination of whether a defendant is in custody entails an objective, rather than a subjective, inquiry of "how a reasonable man in the suspect's position would have understood his situation."[40] The subjective views harbored by the officer or the suspect are not relevant.[41]

Miranda is also significant for its adoption of the *Johnson v. Zerbst* standard in the context of the Fifth Amendment. Previously, the Supreme Court's constitutional threshold for a defendant's relinquishment of the privilege against self-incrimination was voluntariness under the totality of the circumstances, which accounted for the characteristics of the accused and the details of the interrogation.[42] The trial court's role was to "determine whether a defendant's will was overborne . . . [under] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . ."[43] Confessions that were the product of an "overborne will" and a critically impaired capacity for self-determination were inadmissible as a violation of due process under either the Fifth or Fourteenth Amendment.[44] In *Miranda*, the Court established that a waiver of the privilege against self-incrimination must not only be voluntary, but also knowing and intelligent.[45] According to the Court, the requirement that law enforce-

36. The tactics included: isolating the defendant in an unfamiliar environment; displaying an air of confidence in the suspect's guilt; pretending to be an ally to the suspect; strategically alternating hostility with kindness; and discouraging a suspect from consulting with a relative or an attorney. *See id.* at 449-54.

37. *Id.* at 465.

38. *Id.* at 457.

39. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341 (1976).

40. *See Berkemer*, 468 U.S. at 420.

41. *See* Stansbury v. California, 511 U.S. 318, 323 (1994).

42. Cases considering the relevant factors in a voluntariness analysis include the following: Davis v. North Carolina, 384 U.S. 737 (1966) (lack of any advice to the accused regarding his constitutional rights); Fay v. Noia, 372 U.S. 391 (1963) (denial of right to consult with counsel); Spano v. New York, 360 U.S. 315 (1959) (defendant's emotional instability); Payne v. Arkansas, 356 U.S. 560 (1958) (threats and lack of education); Fikes v. Alabama, 352 U.S. 191 (1957) (low intelligence of the accused); Turner v. Pennsylvania, 338 U.S. 62 (1949) (extensive questioning); Lee v. Mississippi, 332 U.S. 742 (1948) (physical abuse); Haley v. Ohio, 332 U.S. 596 (1948) (youth of the accused); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (repeated and prolonged nature of questioning); Chambers v. Florida, 309 U.S. 227 (1940) (length of detention).

43. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (citing Culombe v. Connecticut, 367 U.S. 568, 603 (1961)).

44. *See* Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

45. *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)) ("This Court

ment officers advise defendants of their rights served to ensure the knowing and intelligent nature of a waiver while eliminating the need for lower courts to engage in speculation as to whether a particular defendant, in light of his background, intelligence, and education, was aware of his constitutional privilege against self-incrimination. The institution of *Miranda* warnings created a "simple" means to "overcome [the] pressures" of custodial interrogation.[46]

A waiver of the privilege against self-incrimination must not only be knowing and intelligent, but also voluntary. In the context of confessions, the Supreme Court defined "voluntariness" in *Bram v. United States*[47] as, "not . . . extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[48] Yet in *Brady v. United States*,[49] the Supreme Court upheld the validity of a guilty plea tendered in reliance upon the government's promise of leniency and in an effort to avoid the possibility of a death penalty. Conceding that a promise of leniency was "possibly coercive," the Court held that this "possibly coercive atmosphere . . . could be counteracted by the presence of counsel or other safeguards"[50] in the same manner that the inherently coercive atmosphere of custodial interrogation could be dissipated by *Miranda* warnings. The Court concluded that a plea of guilty entered with the knowledge of the direct consequences "must stand unless induced by threats [or promises to discontinue improper harassment], misrepresentation [including unfulfilled or unfulfillable promises], or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business [e.g. bribes]."[51]

In addition, a statement is "voluntary" for purposes of the Fifth Amendment if coercive forces acting upon the defendant arise from sources other than government action. In *Colorado v. Connelly*,[52] the Supreme Court held that a defendant's confession—an involuntary manifestation of a mental disease which compelled the defendant to make the statement—was "voluntary" because "voluntariness" is defined as "the absence of police overreaching rather than 'free choice' in any broader sense of the word."[53]

In the context of the Fifth Amendment, therefore, the Supreme Court recognizes the impact of coercive government behavior upon criminal defendants, whether these pressures exist in the privacy of an interrogation room or in open court. However, voluntariness is defined as the absence of government

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has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in custody interrogation."). A defendant's statement which is not given knowingly or voluntarily is not admissible in the prosecution's case in chief, but may still be admissible for impeachment purposes if voluntarily made. *See* Harris v. New York, 401 U.S. 222 (1971).

46. *Miranda*, 384 U.S. at 468-69.
47. 168 U.S. 532 (1897).
48. *Bram*, 168 U.S. at 542-43.
49. 397 U.S. 742 (1970).
50. *Brady*, 397 U.S. at 754.
51. *Id.* at 755.
52. 479 U.S. 157 (1986).
53. *Connelly*, 479 U.S. at 170.

coercion rather than the defendant's exercise of volition. Advisements and the presence of counsel serve to neutralize these pressures, but a court may find that a confession was coerced despite these safeguards if the confession was induced by threats, misrepresentation, or improper promises.

C. *Consent Searches and the Fourth Amendment*

Government searches conducted without a warrant supported by probable cause are per se unreasonable.[54] Perhaps the most common exception to the warrant and probable cause requirements is a search conducted pursuant to a valid consent.[55] From the perspective of a law enforcement officer, it may be preferable to obtain consent to search instead of securing a warrant.[56] A consent search allows an officer to bypass paperwork and the need to locate a magistrate who can issue a warrant.[57] Evidence produced during a consent search is less likely to be suppressed on technical grounds.[58] Also, because consent searches require no degree of suspicion on the officer's part, they allow an officer to pursue inarticulable hunches in detecting crime.[59]

The flexibility which makes consent searches favored among law enforcement officials also creates a strong potential for abuse. As a practical matter, at a hearing on a motion to suppress evidence on the grounds that the defendant did not give consent, the dispute usually amounts to a swearing match in which the police officer possesses greater credibility than the defendant, who has every motive to lie in order to preserve his liberty. Hence, absent some significant discrepancies such as an inconsistency in documentary evidence or the conflicting testimony of a fellow officer, factual disputes over whether consent was in fact given are overwhelmingly resolved in favor of the state.

A court may find consent where a defendant uttered no words of consent but manifested consent through his conduct.[60] The scope of consent is measured under a standard of objective reasonableness: "What would the typical

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54. *See, e.g.*, Katz v. United States, 389 U.S. 347, 359 (1967) (holding that government recordings of defendant's conversations in a telephone booth violated the Fourth Amendment). The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

55. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250-51 (1991) (holding that defendant's consent to a search of his car included permission to examine the contents of a bag lying on the floor of the car).

56. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 596 (3d ed. 1996).

57. LAWRENCE TIFFANY ET AL., DETECTION OF CRIME 159 (1967).

58. LAFAVE, *supra* note 56, § 8.1, at 596 (stating that despite the prosecutorial burden to prove consent, consent "may be perceived as the 'safest' course of action in terms of minimizing the risk of suppression").

59. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (stating that where officers lack probable cause, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence").

60. *See* ERICKSON, *supra* note 5, § 1.11 [1][d] (citing United States v. Griffin, 530 F.2d 739 (7th Cir. 1976); People v. Bordeaux, 488 P.2d 57 (Colo. 1971)).

reasonable person have understood by the exchange between the officer and the suspect?"[61] In addition, the test to determine whether a suspect has been seized is an objective one of whether, in the totality of the circumstances, the conduct of law enforcement officers would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[62]

Assuming that the defendant gave consent to the search, the government must also demonstrate that the consent was voluntary.[63] Before 1973, lower courts were divided as to whether the definition of voluntariness included a showing that the defendant was aware of his right to withhold consent to search.[64] The United States Supreme Court answered this question in *Schneckloth v. Bustamonte*[65] by holding that "voluntariness" does not include the element of knowledge.[66] The *Schneckloth* court held that although a waiver of Fifth and Sixth Amendment rights must be knowing, intelligent, and voluntary, a consent under the Forth Amendment need only be voluntary.[67] In concluding that a voluntary consent was sufficient to effect a valid relinquishment of Fourth Amendment rights, the Court held that a defendant can effectively surrender his Fourth Amendment rights without being aware of the fact that he possessed these rights in the first place.[68] The Court concluded that voluntariness is a question of fact to be determined under the totality of the circumstances, and that the defendant's knowledge of his right to withhold consent is one factor in this consideration rather than a prerequisite to admissibility.[69]

In explaining its refusal to extend *Miranda*'s prophylactic advisement to the Fourth Amendment context, the Court undertook a detailed analysis of the meaning of voluntariness. The Court considered, and dismissed, the possibility that voluntariness was synonymous with "knowledge," because to equate the two would permit physical or mental threats. The Court acknowledged that official action is almost always the cause for the defendant's incriminating statement, and reasoned that as a practical matter, the concept of voluntariness could not incorporate a "but for" analysis.[70] Unable to agree on a definition

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61. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing Illinois v. Rodriquez, 497 U.S. 177 (1990)).

62. Michigan v. Chesternut, 486 U.S. 567, 569 (1988).

63. *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

64. *See, e.g.*, Cipres v. United States, 343 F.2d 95 (1965) (holding that consent is not voluntary unless it is given with the knowledge that it could be withheld); People v. Tremayne, 98 Cal. Rptr. 193 (Cal. Ct. App. 1971) (holding that knowledge of the right to withhold consent was a persuasive, but not a determinative, factor in a voluntariness analysis).

65. 412 U.S. 218 (1973).

66. *Schneckloth*, 412 U.S. at 224-25.

67. *Id.* at 241.

68. *Id.* at 225-26.

69. *Id.* at 248-49. The Supreme Court has also declined to extend *Miranda* to testimony before a grand jury. *See* United States v. Mandujano, 425 U.S. 564 (1976).

70. *Schneckloth*, 412 U.S. at 224 ("Under [a 'but for'] test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.") (citations omitted).

of voluntariness which took into account for the defendant's subjective experience, the Court turned to an area more readily susceptible to a quantitative analysis, public policy:

> "[V]oluntariness" has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.[71]

Hence, under *Schneckloth*, the concept of voluntariness has little or nothing to do with a defendant's subjective perception of the circumstances under which he relinquishes a constitutional right; rather, "voluntariness" is an "accommodation" of "values," specifically, the need for effective law enforcement and the need for the public to perceive the criminal justice system as fair. If a defendant surrenders his constitutional rights under circumstances which further law enforcement and which the public will perceive as fair, the defendant's act is "voluntary." If a defendant waives his rights or consents to a government intrusion under circumstances which do not further law enforcement or which the public may perceive as unfair, the defendant's act is not "voluntary." *Schneckloth* held that the subjective mental state of the person who allegedly consented is not the focus of a voluntariness analysis.[72]

The *Schneckloth* court considered the possibility of imposing a requirement that officers advise suspects of their right to refuse before eliciting consent. The Court summarily rejected this alternative on the grounds that it would be "thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[73] The Court added that while advisements may be appropriate in the structured atmosphere of a courtroom, officers in the field operate under informal and unpredictable conditions which require flexibility on the part of the officer, and hence, freedom from restrictive procedural safeguards. The suggestion, then, is that advisements are not necessarily given when they are needed, but when they do not interfere with the investigation of crimes. The Court's reasoning here is questionable; the phrase, "you can say no" is hardly a "detailed requirement" that is "thoroughly impractical." The Court's concern, instead, appears to be that informed suspects would be less likely to consent to a search, which in turn would frustrate the public policy goal of truth-seeking. As the *Schneckloth* court emphasized, the community possesses a "real interest in encouraging consent" because

71. *Schneckloth*, 412 U.S. at 224-25 (citations omitted).
72. *Id.* at 235.
73. *Id.* at 231-32.

consent searches help convict the guilty and exculpate the innocent.

The Court noted that advisement is required in custodial interrogation because such questioning "contains inherently compelling pressures which work to . . . compel him to speak where he would not otherwise do so freely,"[74] but that advisement is not necessary in order to question individuals who are not in custody because "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[75] Likening consent searches to noncustodial questioning, the Court determined that advisement is unnecessary in a consent search because "[t]here is no reason to believe . . . that the response to a policeman's question is presumptively coerced."[76]

According to the Court, waiver and its additional procedural safeguards apply only to "trial rights," which the Court defined as "a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process."[77] The Court quoted *Johnson v. Zerbst's* reasoning that safeguards were necessary to the "realistic recognition of the obvious truth" that a lay person lacks sufficient skill to protect his legal interests "before a tribunal with power to take his life or liberty,"[78] and emphasized that Sixth Amendment waivers require additional procedural protections because a "wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted."[79] In attempting to explain why this rationale would not apply with equal force in the context of searches and seizures, the *Schneckloth* court stated simply that the Fourth Amendment protects privacy interests rather than trial rights, and that there is "no likelihood of unreliability or coercion present in a search-and seizure case."[80] This statement may not be entirely accurate because the Court does in fact acknowledge the possibility of coercion in a Fourth Amendment context.[81]

However, the Court's assertion concerning the reliability of evidence produced in a consent search is instructive. While coerced confessions may be unreliable or false, the same cannot be said of coerced consent to a search that yields, for example, a quantity of heroin.[82] The Court's distinction between "trial rights" and Fourth Amendment rights is questionable in light of the Court's holdings in *Massiah v. United States* and in *United States v. Wade*.[83] In *Massiah*, the Court held that the Sixth Amendment was violated when officers arranged to eavesdrop as a co-defendant elicited statements from the defendant, who had already been indicted. In *Wade*, the Court held that post-indictment lineups implicate the Sixth Amendment. Arguably, these investigatory tactics on the part of law enforcement officials do not affect the promo-

74. *Id.* at 247.
75. *Id.* at 232.
76. *Id.*
77. *Id.* at 236-37.
78. *Id.* at 236.
79. *Id.* at 241.
80. *Id.* at 242.
81. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968).
82. *Schneckloth*, 412 U.S. at 228.
83. 388 U.S. 218 (1967).

tion of truth at trial any more than searches and seizures; these "critical stages," however, enjoy the benefit of Sixth Amendment protection. If, as the Court found in *Wade*, lineups contain a risk of abuse or unintentional suggestion which undermine truth-seeking, it is difficult to understand why the law provides protection against this prejudice after indictment, but not before.[84]

In an effort to explain why the *Zerbst* standard was extended to Fifth Amendment, but not Fourth Amendment, rights, the *Schneckloth* court stated that police questioning differs from searches and seizures in that custodial interrogation undermines the integrity of the fact-finding processes because it "enable[s] the defendant . . . to tell his story without fear, effectively."[85] According to the Court, fear in the context of custodial interrogation was not an evil in and of itself, but rather an impediment to the defendant's ability to convict or exculpate himself with accuracy. In addition, the Court pointed to the *Miranda* court's fear that "[w]ithout the protections flowing from adequate warnings and the rights of counsel . . . the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[86] It is true that "[a] confession is like no other evidence."[87] Yet the Court failed to explain how, for example, twenty pounds of marijuana in a defendant's trunk is somehow less compelling evidence of guilt. The rights at issue provide some insight into the course taken by the Supreme Court in refusing to extend the *Zerbst* standard to the Forth Amendment. The language of the Fifth Amendment, for example, unequivocally provides that "no person shall . . . be compelled . . . to be a witness against himself."[88] By contrast, the Fourth Amendment prohibits only "unreasonable" searches and seizures, and therefore contemplates that some searches and seizures will occur against the suspect's will. This difference creates distinct baselines for these constitutional rights. In the Forth Amendment's test of reasonableness, which balances public policy on the one hand with individual rights on the other, public policy often wins out, as evidenced by the "emerging pattern of nonprotection" in the administrative search context.[89]

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84. *See* Kirby v. Illinois, 406 U.S. 682 (1972) (holding that no right to counsel exists in pre-indictment lineups). The Second Circuit has also held that a post-indictment consent to search was not a critical stage of a criminal proceeding. *See* United States v. Kon Yu-Leung, 910 F.2d 33 (2d Cir. 1990).

85. *Schneckloth*, 412 U.S. at 229.

86. *Id.* at 240 (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

87. Arizona v. Fulminante, 499 U.S. 279, 296 (1990) ("Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.").

88. U.S. CONST. amend. V.

89. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992) (discussing administrative searches).

Scholarly interpretations of the distinction drawn by *Schneckloth* are diverse. *See, e.g.*, LAFAVE, *supra* note 56, §8.1(a) (quoting Escobedo v. Illinois, 378 U.S. 478 (1964)) ("[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."); William J. Stuntz, *Waiving Rights in Criminal Procedure* 75 VA. L. REV. 761 (1989) (arguing that waivers in the courtroom receive more protection than other relinquishments of constitutional rights because in these other contexts, the right holder is not the intended beneficiary); Toby M. Tonaki et. al., *State v. Quino: The Hawaii Supreme Court Pulls Out All the "Stops,"* 15 U. HAW. L. REV. 289 (1993) (stating that the waiver of the Fifth Amendment privilege against self-incrimination, as an eviden-

Consent, then, is invalid if not voluntary, and coercive or overbearing conduct on the part of law enforcement officers will invalidate an alleged consent. In *Bumper v. North Carolina*,[90] the Supreme Court invalidated the consent purportedly given by the defendant's elderly grandmother after several officers appeared at her home which was located in an isolated area, announced that they had a warrant to search the house, and proceeded to conduct a search. The Court held the officers' representation that they possessed authority that could not be resisted amounted to coercion. In addition to an officer's claim of authority, other factors bearing on the validity of consent include a show of force or coercive surroundings, such as the presence of a large number of uniformed officers, the display of weapons, or a confrontation in the middle of the night; a threat to obtain a search warrant where there are not grounds upon which a warrant could issue; prior illegal police action; the defendant's maturity, sophistication, and mental or emotional state; the defendant's prior or subsequent refusal to consent; and the defendant's awareness of the right to refuse to give consent.[91]

D. *Summary*

The Supreme Court has held that police-citizen encounters in the context of the Fourth Amendment are not presumptively coercive, although state action in combination with a defendant's characteristics may produce an environment in which a defendant's consent to a search is coerced, and therefore invalid. In the Fifth Amendment context, the Court has held that custodial interrogation is presumptively coercive, but that an advisement of the defendant's rights and the availability of counsel sufficiently neutralizes the coercive nature of such questioning. With respect to the Sixth Amendment, the Court has acknowledged the "reality" that a defendant's ignorance of criminal procedure gives rise to prejudice at critical stages of criminal proceedings, but that the presence of counsel, or the knowing, intelligent, and voluntary waiver of the right to counsel, is an adequate safeguard against this prejudice.

"There is no universal standard that must be applied in every situation where a person forgoes a constitutional right."[92] However, the common thread that exists within the standards for waiver and consent is the public's need to perceive the criminal justice system as accurate. In the Fifth and Sixth Amendment context, the law acknowledges that, by objective standards, the custodial environment is inherently coercive. Because truth-seeking is hindered by the exploitation of a defendant's ignorance in these situations, advisement and the assistance of counsel are provided as a prophylactic measure to counteract this coercion. In the Fourth Amendment setting, however, exploiting a

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tiary privilege, impedes rather than aids the ascertainment of truth and that the *Schneckloth* voluntariness standard rather than the *Zerbst* "knowing, intelligent, and voluntary" standard should apply to confessions).

90. 391 U.S. 543 (1968).

91. *See generally* ERICKSON, *supra* note 5, § 1.11[1] (discussing search and seizure); LAFAVE, *supra* note 56, § 8.2.

92. *Schneckloth*, 412 U.S. at 245.

defendant's ignorance as to his rights furthers the public policy goal of truth-seeking. Hence, consent to a search or seizure need only be voluntary, with "voluntariness" defined not by a defendant's subjective perception, but by public policy concerns.

II. COERCION

Turning from the circumstances under which we allow coercion to negate the legal effect of a defendant's consent or waiver, to the circumstances in which we *should* allow coercion to negate the legal effect of these actions, we begin with the Supreme Court's determination in *Schneckloth* that if not for confrontations with law enforcement officials, it is highly unlikely that the majority of citizens would intentionally incriminate themselves. It follows that citizen-police encounters involve some degree of pressure to cooperate, and that criminal suspects act with constrained volition in their interactions with law enforcement officers.[93] This proposition finds support in the field of psychology, as well.[94]

If the courts were to acknowledge the pressures inherent in police-citizen encounters, procedural safeguards in addition to those already in place might be necessary to counteract these pressures. Because the public's concerns with respect to the criminal justice system revolve around truth-seeking, such safeguards would be perceived as a hindrance to effective law enforcement and would not be tolerated. The need to perceive the criminal justice system as an accurate and fair system may explain some of the inconsistencies created by the problematic *Schneckloth* opinion. A defendant in a search and seizure situation is just as ignorant of his rights as a defendant in a courtroom, and in both situations he stands to lose his liberty. Although the deprivation of liberty is not so close at hand in the Fourth Amendment context, the penalty will ultimately be the same. Our community condones the exploitation of the defendant's ignorance in a search and seizure context, yet condemns the same behavior under the Fifth and Sixth Amendments. Coercion, then, is a legal fiction, a term of art invoked upon consideration of the public policy concerns presented under the facts of a particular case.

Florida v. Bostick[95] is a good example. In *Bostick*, the defendant was a passenger on a Greyhound bus *en route* from Miami to Atlanta. During a brief, scheduled stop in Fort Lauderdale, two uniformed police officers boarded the bus and approached the defendant, who was sitting in the back of the

93. *See* Berkemer v. McCarty, 468 U.S. 420, 438 (1984) ("To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions.").

94. *See* Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte: *Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 97 U. ILL. L. REV. 215 (1997) (detailing Stanley Milgram's 1960 experiment in obedience theory which proved that "[l]egitimate authority . . . influences behavior to a much larger extent than anyone previously imagined, often dwarfing a person's fundamental sense of right and wrong").

95. 501 U.S. 429 (1991).

bus, blocked the aisle, and began questioning him.[96] One of the officers carried a gun in a recognizable weapons pouch.[97] To disembark would have meant risking the departure of the bus and being stranded in a strange city without luggage.[98] Despite the presence of many of the factors which the Court had previously characterized as indicia of coercion, the Supreme Court held that the defendant consented to this encounter.[99] The officers were conducting a suspicionless "sweep" of the bus, a popular method of drug interdiction in furtherance of the "war on drugs."[100] It was this policy in favor of drug interdiction, more than any of the factors previously articulated by the Court, which drove the decision in *Bostick*. A jurisprudence which places greater reliance upon public policy than upon precedent embodies the very problem that the Court hoped to avoid—a loss of public confidence in the accuracy and fairness of our judicial system.[101]

As Professor Wertheimer writes, "however important society's need for searches, it arguably has nothing to do with the voluntariness of consent."[102] Perhaps society's need for searches should not be a relevant factor in defining voluntariness, however, it assuredly is a factor if not the most important factor under the Supreme Court's current framework. Professor Wertheimer states that courts follow moral considerations in delineating the situations in which it will recognize coercion as an invalidating force. In criminal procedure, this "morality" is society's need to perceive the criminal justice system as an accurate mechanism for truth-seeking. Unfortunately, morality in the sense of humanity, as envisioned under *Zerbst*, is notably absent in the context of consent searches. As Professor Wertheimer aptly states, "there is independent moral value"[103] in protecting the volitional dimension of a defendant's choices in addition to the cognitive—the "knowing and intelligent"—aspect. In defining fairness, *Zerbst* recognized the defendant's perspective, emphasizing that the defendant in that case—arraigned, tried, and sentenced in one day without an attorney—must have perceived the criminal justice system as "intricate, complex, and mysterious."[104] By contrast, the Supreme Court in *Schneckloth* explained that the defendant's subjective perception of events was largely irrelevant to the definitions of fairness, voluntariness, and coercion. The defendant's perspective certainly should not be the determinative factor, as such a policy would generate abuse both by and against the defendant. However, in a system that prides itself on individualized justice, an approach that renders a defendant's perspective irrelevant leaves much to be desired in

96. *Bostick*, 501 U.S. at 429.

97. *See generally id.* (explaining that the defendant was on a bus crossing Broward county on his way to Fort Lauderdale).

98. *Id.*

99. *Id.* at 429-30.

100. *Id.*

101. Consider the statement of veteran criminal defense attorney Larry Pozner after the announcement of the verdict in the trial of Timothy McVeigh: "Wait'll the next time a jury brings in an unpopular verdict, then tell me the system works." Richard Willing & Kevin Johnson, *Effect of Oklahoma Trial Far Beyond Guilty Verdict*, USA TODAY, June 16, 1997, at 1A.

102. ALAN WERTHEIMER, COERCION 117 (1987).

103. *Id.* at 121.

104. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

terms of fundamental fairness.

Professor Joseph Grano has criticized Professor Wertheimer for a failure to incorporate but-for causation in his analysis of coercion, arguing that as a result, Professor Wertheimer overlooks the "overborne will" aspect of coercion. The example given by Professor Grano is that a man who is beaten may be coerced to confess, but a man who is beaten who was planning to confess before the beating occurred may not have been coerced to confess. Because a beating is "wrongful" under Professor Wertheimer's theory, coercion has occurred; however, according to Professor Grano, "[w]hen this sense of volitional impairment, or interference with autonomy, seems lacking, we may hesitate, at least without further thought, to embrace a finding of coercion."[105] It is true that Professor Wertheimer does not fully reconcile the "voluntariness principle" with his theory of coercion, and that his theory of coercion takes into account the Supreme Court's distaste for subjective inquiries as exhibited by its holding in *Colorado v. Connelly*.[106] However, it cannot be said that Professor Wertheimer endorses the view that the defendant's subjective perspective should be eliminated from the equation. To the contrary, he emphasizes that, "[i]f, as the critics suggest, the notion of voluntariness were to be abandoned, I suspect that the problems which haunt its specification would only reappear under another heading."[107]

As Professor Grano's hypothetical demonstrates, a theory of coercion which eliminates but-for causation lends itself to inaccurate results. Yet the *Schneckloth* court explicitly refused to incorporate the concept of but-for causation in its theory of coercion. The Court's reasoning was that subjective standards lead to uncertainty and inconsistent results in the law. However, as Professor Grano's example reveals, ignoring the defendant's subjective perspective altogether will also produce uncertainty, because courts will inevitably be forced characterize some voluntary behavior as coerced, and vice versa. In determining the circumstances under which we should recognize coercion, somewhere between *Zerbst* and *Schneckloth* we eliminated the subjective perspective of the defendant, a factor that is important in ensuring that our system of justice is perceived as a fair system.[108] Perhaps more importantly, we lost sight of the sense of fairness and humanity embodied in the individual rights at the heart of this discussion.

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105. JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 76-78 (1996).

106. See *supra* notes 47-53 and accompanying text for a discussion of the "voluntariness principle."

107. WERTHEIMER, *supra* note 102, at 121.

108. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) (stating that in the transition from the Warren court to the Burger and Rehnquist courts, "the Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order," and that the greatest changes have been the creation or expansion of "inclusionary rules" such as harmless error and impeachment).