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Memo on the Potential Application of the Unconstitutional Conditions Doctrine to Waivers of Criminal Rights

Introduction and Overview of the Doctrine

The unconstitutional conditions doctrine posits that the government may not condition a benefit, even one that is not required, on the waiver of a constitutional right without meeting strict scrutiny. Though this doctrine enjoys rich development and support in the First Amendment context, a completely different approach has developed to analyze constitutionally sufficient waiver of criminal rights. There, the Supreme Court generally views constitutional waivers by criminal defendants as contracts conferring mutual benefits, focusing on a pressing need for this efficiency. While less than three percent of criminal defendants exercise their right to a trial, [1] the Supreme Court maintains that the continued waiver of these rights to a jury trial, to confront one's accuser, to invoke the privilege against self-incrimination, and more are essential to the continued functioning of the legal system.[2]

The Court has never articulated why this doctrine would apply to some rights and not others; rather, two versions of the doctrines have evolved independently, creating glaring and irreconcilable constitutional inconsistencies.[3] This memo intends to provide a bird's-eye summary of the doctrinal discord between the Court's assessment of waivers of non-criminal and criminal rights, while also delving into opportunities presented by precedent, at the Supreme Court and lower court levels, to explicitly expand the unconstitutional conditions doctrine in the criminal rights context and to resolve this doctrinal inconsistency.

Origins, Evolution, and Application of the Doctrine for Non-Criminal Rights

As developed by the Court for non-criminal rights, the unconstitutional conditions doctrine deems impermissible a benefit conditioned on the forfeiture of a constitutional right, "even though the burden may be characterized as being only indirect."[4] Furthermore, it makes no difference whether the government is exacting a penalty or denying a benefit.[5] As the

[1] National Association of Criminal Defense Lawyers Report, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, 5 (2018).
[2] *See, e.g.* Santobello v. New York, 404 U.S. 257 (1971)
[3] Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. REV. 801, 832 (2003); *see also* Howard E. Abrams*, Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. Crim. L. & Criminology 128, 132 (1981) ("To date, the Court has not formulated or consistently applied a coherent theory of unconstitutional conditions analysis. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978), *with* Califano v. Jobst, 434 U.S. 47 (1977); *compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742.").
[4] Sherbert v. Vermer, 374 U.S. 398, 404 (1963) (citation omitted).
[5] *See* Sherbert*,* 374 U.S 398, 404*.* ("Government imposition of such a choice [between unemployment benefit of exercise of religious freedom to observe the Sabbath] puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

conditioned benefit creates a burden on a fundamental constitutional right, it will be subjected to a strict scrutiny analysis.[6]

In *Terral v. Burke Construction,* the Court announced that, though it was understood that states enjoyed a near absolute power to license foreign corporations, they could not revoke a license for failure to forfeit the right of removal to federal courts.[7] This decision directly countered a competing judicial notion championed by Justice Holmes that "the greater includes the lesser" -- if the government has the power to completely deny a benefit, that power must necessarily include a right to attach any conditions to receiving that benefit.[8]

Subsequently, in *Frost & Frost Trucking Co v. Railroad Comm'n* (1926)*,* the Court articulated the guiding concern of the unconstitutional conditions doctrine: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[9]

Following these decisions, the Court's opinions have consistently buttressed the basic principle that certain fundamental rights may not be subjected to governmental pressure to waive. Specifically, in the First Amendment context, the Court has invalidated an array of attempts to impose conditions, setting aside among others:

- government employment or licensure conditioned on waivers of rights to political affiliation,[10] association,[11] and speech;[12]
- unemployment benefits conditioned on forfeiture of religious liberty;[13]

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[6] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1422 (1989).
[7] Terral v. Burke Const. Co.*,* 257 U.S. 529 (1922) ("The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.").
[8] *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); Frost & Frost Trucking Co. v. R.R. Comm'n 271 U.S. 583,601 (1926) (Holmes, J., dissenting); Denver v. Denver Union Water Co., 246 U.S. 178, 1967 – 97 (Holmes. J., dissenting).
[9] Frost & Frost Trucking Co v. Railroad Comm'n 271 U.S. 583 (holding that an act requiring private carriers to become common carriers as a condition of using public highways violated the Due Process Clause of the Fourteenth Amendment).
[10] *See* Elrod v. Burns, 257 U.S. 347 (1976) (holding sheriff's discharge of employees for failure to join the Democratic Party an unconstitutional burden on the First Amendment right); Branti v. Finkel, 445 U.S. 507 (1980) (holding that the county public defender could not constitutionally discharge an employee for being Republican); Schware v. Bd. of Bar Examiners, 381 U.S. 437 (1957) (holding unconstitutional a denial of bar admission based on prior political affiliation with the Communist Party).
[11] *See* Abood v. Detroit Bd. Of Education. 431 U.S. 209 (1977) (holding unconstitutional a collective bargaining agreement that required nonunion school teachers to contribute financially to expressive activities of the union); Shelton v. Tucker*,* 364 U.S 479 (1960)(holding an Arkansas statute requiring teachers at state-funded institutions to file affidavits listing every organizational affiliation as unconstitutional).
[12] *Perry,* 408 U.S. 593 (holding unconstitutional denial of a professor's employment contract renewal because he had criticized the college's administrative policies).
[13] *See* Sherbert v. Vermer, 374 U.S. 398 (1963) (holding a requirement that an individual be available to work on the Sabbath as a requirement for unemployment benefits unconstitutional)

- property tax exemptions that compel speech;[14] and
- press subsidies or funding conditioned on the restriction of editorial freedom.[15]

The Court has also rejected conditions burdening other rights, including:

- the right to remove to federal court;[16]
- the unenumerated right to travel;[17]
- the Fifth Amendment's just compensation clause;[18] and
- the Twenty-fourth Amendment's guarantee for citizens to participate in elections. [19]

However, not all conditioned benefits are categorically unconstitutional: "In some instances, such as where the government funds speech or where there is a sufficient nexus between the benefit and the condition, the government may insist on waiver of a right."[20] But this rationale does not account for the deferential treatment of waivers of criminal rights. As noted above and elucidated below, the government has not tailored the unconstitutional conditions doctrine to allow greater governmental pressure on criminal waiver; rather, two distinct analyses developed independently for different rights, without any attempt by the Court to reconcile the contradictions. As explained by the Court itself, "[a]lthough it has a long history, ... the 'unconstitutional conditions' doctrine has for just as long suffered from notoriously inconsistent application."[21]

Supreme Court Framework for Waiver of Criminal Rights and Plea Bargaining

Waiver of criminal rights clearly falls within the purview of the unconstitutional conditions doctrine as delineated above. Plea bargaining entails a governmental benefit offered in exchange for waiver of defendant's constitutional right to a jury trial, along with other rights that accompany this. Under the unconstitutional conditions doctrine, this bargain would be viewed as a burden on the defendant's due process rights, which would need to meet strict scrutiny to survive constitutional review.

Instead, in the criminal context, the Court seems to have followed Holmes' "greater includes the lesser" theory, ignoring unconstitutional conditions doctrine without explanation,

[14] *See* Speiser v. Randall, 357 U.S. 513 (1969) (holding a loyalty oath as a prerequisite to a tax exemption a constitutionally impermissible limit on free speech).
[15] *See* Ark. Writers Project v. Ragland, 481 U.S. 221 (1987) (holding unconstitutional a subsidy for the press that required publication of specified content*);* Rosenberger v. Rector Univ. of Va., 515 U.S. 819 (1995) (holding that funding for a public-school student newspaper conditioned on editorial discretion is unconstitutional).
[16] Western Union Tel. Co. v. State of Kansas, 216 U.S. (1910). (invalidating business licensing schemes that require waiver of the right to remove to federal court).
[17] *See* Shapiro v. Thompson, 294 U.S. 618, 629 (1969) (holding that a one-year residency for welfare eligibility requirement unconstitutionally burdens the unenumerated right of travel as there was no other permissible purpose).
[18] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding unconstitutional building permits conditioned on grant of permissive easement); Nollan v. Cal Coastal Comm'n, 483 U.S. 825 (1987).
[19] *See* Harman v. Forssenius, 380 U.S. 528 (1965) (holding unconstitutional a Virginia requirement that federal voters pay a poll tax or file a certificate of residence).
[20] Mazzone, *supra* note 1, at 844.
[21] *Dolan v. City of Tigard,* 512 U.S. 374, 407 n. 12.

and sampling ruling that guilty pleas are valid so long as they are voluntary, knowing, and intelligent. Under this quasi-contractual framework, plea bargains are understood to "represent more, not less choice," and individuals are permitted, if not encouraged, to bargain their rights for prosecutorial benefits or leniency.[22] Due to this lower review threshold, a court can consider factors, like efficiency, that may not be otherwise permissible under strict scrutiny analysis.

The Court has almost always upheld the constitutionality of criminal waivers.[23] Two cases encapsulate the Court's attitude toward plea bargaining: in *Santobello v. New York,* the Court held that plea bargaining was "not only an essential part of the process but a highly desirable part,"[24] vital to the continued efficiency of the criminal legal system; in *United States v. Mezzanato,* the Court found that "plea bargaining necessarily exerts pressure on defendants to abandon series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return."[25] Despite this and other explicit language favoring broad deference to criminal waivers, there are seeds of arguments for applying the unconstitutional conditions doctrine in certain earlier cases and subsequent dissents.

In *US v. Jackson* (1968), before the voluntary, knowing, and intelligent framework was established, the Court deployed the unconstitutional conditions doctrine to strike down a clause of the Federal Kidnapping Act that required a jury recommendation to impose the death penalty.[26] Though the Court refused to invalidate the statute in its entirety, Justice Stewart found the clause reserving the possibility of death penalty to those defendants who exercised their right to a jury trial an unconstitutional burden on that right that review by a judge for coercion could not remedy. Though the Court found the state's interest in reducing death sentences legitimate, the burden was impermissible as there were less restrictive alternatives to achieve the same purpose.[27] As Justice Stewart explained, "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."[28] However, in *Jackson,* the government's argument highlighted the risk that invalidating this federal sentencing scheme could render all plea bargaining vulnerable. As a result, appellees argued that their challenge was distinguishable as an instance of statutory inducement and thus more amenable to remedy than a challenge to prosecutorial plea bargaining which may be beyond judicial review.[29]

In *U.S. v. Brady,* where a defendant similarly challenged his plea as unconstitutionally made under pressure that he may face the death penalty only if he exercised his right to a jury

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[22] Mazzone, *supra* note 1 at 833.
[23] *See, e.g.* Brady v. United States, 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25 (1970); Santobello, 404 U.S. 257; Bordenkircher v. Hayes, 434 U.S. 357 (1978); Corbitt v. New Jersey, 439 U.S. 212 (1978); US v. Goodwin, 457 U.S. 368 (1982); Alabama v. Smith, 490 U.S. 794 (1989); United States v. Mezzanatto, 513 U.S. 196 (1995);
[24] Santobello, 404 U.S. 257, 261.
[25] Mezzanatto, 513 U.S. 196, 209-10.
[26] Justice Stewart cites two First Amendment unconstitutional conditions cases: Shelton v. Tucker, 364 U.S. 479 (1960) and U.S. v. Robel 389 U.S. 258 (1967).
[27] Jackson, 390 U.S. 570, 583.
[28] United States v. Jackson, 390 U.S. 570, 583(1968).
[29] Another Look at Unconstitutional Conditions, 179 (citing Brief for Appellee at 9-10, United States v. Jackson 390 U.S. 570 (1968).

trial, the Court explicitly cabined the application of *Jackson,* making clear that not every plea made in the face of the possibility of the death penalty at trial is invalid. In fact, in *Parker v. North Carolina,* the Court characterized *U.S. v. Brady's* holding as qualifying *Jackson* such that "an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."[30] Similarly, though the Court in *Chaffin v. Stynchcombe* recognized the purpose of plea bargaining to discourage the assertion of rights and the possible application of *Jackson,* the Court further narrowed the decision, noting that *Jackson* applies only in instances where the *only* objective is to chill the assertion of rights.[31]

Non-Plea Bargaining Supreme Court Cases

Jackson is not the only case where the Court has hinted at application of unconstitutional conditions doctrine in the criminal rights context. In *Green v. US (1957)*, the Court found that a presumption that defendants waive their privilege against double jeopardy by exercising their right to appeal was an unconstitutional condition.[32] In *Slochower,* the Court held that dismissal of a professor (or any official) for invocation of the Fifth Amendment was unconstitutional.[33] On similar grounds, in *Garrity v. New Jersey,* the Court found that incriminating testimony made by officers was coerced, and therefore inadmissible under the Fourteenth Amendment, because the New Jersey statute required them to choose between continued employment or their privilege against self-incrimination.[34] Before listing a series of unconstitutional conditions holdings, the Court noted that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."[35]

Ironically, the *Garrity* Court, in deeming waiver constitutionally infirm, seemed to follow *Brady* in conflating an unconstitutional condition with voluntariness. In a companion case, the Court found that disbarment was too powerful a threat for waiver of privilege against self-incrimination to be voluntary.[36] As explained by the dissent in *Parker v. North Carolina,*

> "There is some intimation in the Court's opinions in the instant cases that, at least with respect to guilty pleas, 'involuntariness' covers only the narrow class of cases in which the defendant's will has been literally overborne. At other points, however, the Court apparently recognizes that the term 'involuntary' has traditionally been applied to situations in which an individual, while perfectly capable of rational choice, has been confronted with factors that the government may not constitutionally inject into the decision-making process. For example, in Garrity v.

[30] Parker v. North Carolina, 397 U.S. 790, 794–95, (1970).
[31] *See* Chaffin v. Stynchcombe, 412 U.S. 17, 33, 93 S. Ct. 1977, 1986, 36 L. Ed. 2d 714 (1973)("Jackson and Pearce are clear, and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'").
[32] Green v. United States, 355 U.S. 184, 193–94 (1957) ("Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.").
[33] Slochower v. Bd. of Higher Ed. of City of New York, 350 U.S. 551 (1956).
[34] Garrity v. State of N.J., 385 U.S. 493, 500 (1967).
[35] Garrity v. State of N.J., 385 U.S. 493, 500 (1967).
[36] Spevack v. Klein, 385 U.S. 511, 516 (1967):

> New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), we held a surrender of the self-incrimination privilege to be involuntary when an individual was presented by the government with the possibility of discharge from his employment if he invoked the privilege. So, also, 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. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea nonetheless may be invalid.[4] Thus the legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce."[37]

The dissent in *Garrity* clarifies this nuance, explaining that the question is not whether the condition renders the waiver involuntary as a matter of fact, but rather whether, as a matter of law, the condition is unconstitutional under the doctrinal analysis, regardless of whether the waiver was factually voluntary.[38]

Circuit and Lower Court Decisions

Clemency Interviews Conditioned Waiver of Fifth Amendment

Though ultimately overruled by the Supreme Court, the Sixth Circuit in *Woodard v. Ohio Adult Parole Authority* demonstrates how a court might apply the doctrine in the criminal context. There, the Sixth Circuit overruled the district court and endorsed defendant's argument that the unconstitutional conditions doctrine required strict scrutiny of Ohio's clemency procedure: "In every respect, Ohio's clemency interview procedure appears to fall within the doctrine's parameters. In Woodard's case, the 'benefit' is the uncounseled clemency interview, and the 'unconstitutional condition' is the requirement that he waive his Fifth Amendment right against self-incrimination." [39] In applying strict scrutiny, the Sixth Circuit found that there was little evidence of compelling state interest to require waiver of Fifth Amendment rights for clemency interviewees. Furthermore, the court recognized, that a defendant in post-conviction proceedings clearly has a "measurable interest in avoiding self-incrimination."[40]

The opinion surveyed possible objections to the application of the unconstitutional conditions doctrine. First, they highlighted the claim that the clemency interview would not qualify as a benefit since it presents only the opportunity to benefit, not a guarantee of clemency. The court disagreed as a clemency interview "dramatically increases" a defendant's chances of

[37] Parker v. North Carolina, 397 U.S. 790, 801–02 (1970).
[38] Garrity v. State of N.J., 385 U.S. 493, 506 (1967) (Harlan, J., dissenting) ("What is really involved on this score, however, is not in truth a question of 'voluntariness' at all, but rather whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible.").
[39] Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1189 (6th Cir. 1997), rev'd, 523 U.S. 272, 118 (1998).
[40] *Id.*

being granted clemency and always provides the benefit of "the sense that [the defendant] had participated meaningfully in the process, even if he were ultimately denied."[41]

Secondly, and most importantly for this memo, the court assessed whether the doctrine can be applied in the context of the Fifth Amendment at all. The Sixth Circuit acknowledged that the doctrine "has only consistently been applied to protect First Amendment Rights," but then highlighted other areas in which the Court had applied it, specifically the takings clause[42] and right to interstate travel,[43] to conclude they were "unable to discern any logical reason for holding the doctrine inapplicable to the Fifth Amendment here."

Lastly, the Sixth Circuit acknowledged that applying the unconstitutional conditions doctrine to invalidate the clemency procedure in this instance may conflict with the continued constitutionality of USSG § 3E1.1 of the Federal Sentencing Guidelines, which offers decreased offense levels for pleading guilty, and the ability of defendants to testify at their own trial given waiver of Fifth Amendment right against self-incrimination. [44] The court acknowledged the doctrine could only be relevant in all or none of these contexts. The court avoided the potential conflict by noting the two examples may survive application of the doctrine: both may be narrowly tailored to further a compelling governmental interest, unlike the clemency review procedure.[45]

In reversing the Sixth Circuit, the Supreme Court relied on Due Process and Fifth Amendment grounds, refusing to address the application of the unconstitutional conditions doctrine: "While the Court of Appeals accepted respondent's rubric of "unconstitutional conditions," we find it unnecessary to address it in deciding this case. In our opinion, the procedures of the Authority do not under any view violate the Fifth Amendment privilege."[46] Implicitly, however, it was this comparison to the constitutionality of a defendant's ability to testify subject to waivers of the Fifth Amendment that the Court found the doctrine inapplicable. Under the Court's reasoning and precedent, the choice to testify (or be interviewed for the purposes of clemency) could never amount to compulsion. Thus, without a violation of the Fifth Amendment, choice could not involve a waiver of the Fifth Amendment's protection against "compelled" testimony.

Fourth Amendment Waiver of Protection Against Unreasonable Searches and Seizures

US v. Scott (9th Cir. 2006) contains some of the most explicit application of the unconstitutional conditions doctrine in the criminal context, characterizing it as "especially important in the Fourth Amendment context."[47] The Ninth Circuit found the trial court's

[41] *Id* at 1190.
[42] Citing Dolan, 512 U.S. 374 at 385–87 and Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 (1987).
[43] Citing Shapiro v. Thompson, 394 U.S. 618, 629 – 31 (1969).
[44] Woodard, 107 F.3d 1178, 1191.
[45] *Id* at 1191-92 (positing the possible strict scrutiny analyses).
[46] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998).
[47] United States v. Scott, 450 F.3d 863, 865-67 (9th Cir. 2006) ("It may be tempting to say that such transactions—where a citizen waives certain rights in exchange for a valuable benefit the government is under no duty to grant—are always permissible and, indeed, should be encouraged as contributing to social welfare. After all, Scott's options

imposition of a waiver of the Fourth Amendment violated the unconstitutional conditions doctrine as "the right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions."[48] Significantly for the question of civil versus criminal application of the doctrine, the Ninth Circuit noted that "the government is obviously subject to no fewer constraints when acting as sovereign than as employer, and deciding whether someone charged with a crime will be incarcerated before a determination of guilt is unquestionably a sovereign prerogative."[49]

Though *Scott's* Fourth Amendment holding has been negatively treated, subsequent cases have followed and cited *Scott's* application of the unconstitutional conditions doctrine.[50] Invalidating a pretrial release condition of drug testing, the Washington Appeals Court highlighted the expansive nature of *Scott's* holding: "While the *Scott* court did focus on the accused's Fourth Amendment rights, the overarching theme of the decision was an accused's protection from unconstitutional deprivation of rights during the pretrial period. The doctrine of unconstitutional conditions is not limited to searches; it protects those constitutional rights that preserve spheres of autonomy."[51] In this vein, though later reversed by the appeals court on the grounds that the search was reasonable, a Massachusetts district court applied *Scott* to find that a plea bargain conditioned on submitting DNA evidence was an unconstitutional condition, meaning there could be no waiver of the Fourth Amendment right against unreasonable searches and seizures.[52]

As mentioned, *Scott* and other cases following its unconstitutional conditions doctrine holding have been negatively treated or overruled. Like the Supreme Court's analysis in *Woodard,* this is partly due to a doctrinal loophole in the Fourth Amendment, not misapplication of the unconstitutional conditions doctrine to criminal rights. As explained by a Ninth Circuit decision on the constitutionality of conditioning welfare benefits on home visits, "a plaintiff alleging a violation of the unconstitutional conditions doctrine, however, must first establish that a constitutional right is infringed upon. Here, Appellants must establish that San Diego County

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were only expanded when he was given the choice to waive his Fourth Amendment rights or stay in jail….The 'unconstitutional conditions' doctrine, *cf. Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary… Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections…")

[48] *Scott*, 450 F.3d at 867

[49] Scott, 450 F.3d 863, 868.

[50] *See* US v. Stewart (in invalidating a plea bargain conditioned on submission of a DNA sample pursuant to the DNA Backlog Elimination Act, the court noted that waiver could not cure the unconstitutional search because the unconstitutional conditions doctrine as articulated in *Scott* prohibits inducing a waiver through the provision or withholding of benefits); Sanchez v. Cty. of San Diego, 464 F.3d 916 (9th Cir. 2006) (Though held on other grounds, the court highlights that the expectation of privacy was not reduced by consent because applicant's choice was burdened by the risk of losing welfare); Butler v. Kato, 137 Wash. App. 515, 530-31 (2007) (Rejects drug testing as a condition of DUI release as an unconstitutional condition); Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1284 (M.D. Fla. 2011), aff'd sub nom. Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202 (11th Cir. 2013) (holding that even if plaintiff had not revoked consent, the State's conditioning of TANF benefits on an unreasonable search violated the doctrine of unconstitutional conditions).

[51] Butler v. Kato, 137 Wash. App. 515, 530-31 (2007)

[52] United States v. Stewart, 468 F. Supp. 2d 261 (D. Mass. 2007), rev'd, 532 F.3d 32 (1st Cir. 2008)

is conditioning the receipt of welfare benefits on the waiver of a constitutional right. Because we have held that the Project 100% home visits are reasonable, the receipt of welfare benefits is not being conditioned upon the waiver of a constitutional right under either the California or federal constitutions because the Fourth Amendment and Article 1 § 13 only create a right to be free from *unreasonable* government intrusions into the home."[53]

Plea Bargain Conditioned on Waiver of Brady Material

In *United States v. Medina-Hernandez,* a defendant challenged the validity of her plea bargain as it was conditioned on the waiver of the right to receive undisclosed Brady evidence.[54] The court ultimately deferred to a Ninth Circuit companion case*, United States v. Ruiz*, which had ruled favorably for the defendant but was overruled by the Supreme Court.[55] In *Ruiz,* the defendant had only raised the unconstitutional conditions issue *post hoc* as an alternative argument to her core claim that her plea could not be knowing and intelligent without first receiving Brady evidence. As a result, the applicability of the unconstitutional conditions argument was never ruled on.

Sentencing and Parole Benefits Conditioned on Waiver of Appeals Rights

In *Patton v. State of North Carolina,* the Fourth Circuit, stating that the "[e]njoyment of a benefit or protection provided by law cannot be conditioned upon the waiver of a constitutional right,"[56] found a practice of imposing harsher sentences at retrials of defendants who successfully challenged their first trials an unconstitutional condition on their right to appeal.[57] On similar grounds, the Sixth Circuit struck down a statute mandating a one-year extension of time until eligibility for probation for unsuccessful habeas applicants.[58]

Reviving and Extending Jackson *to the LWOP Context*

Patton and *Smartt*, both decided in 1967, the year before *Jackson,* had clear overlaps with *Jackson*'s reasoning. More recent cases have also attempted to extend *Jackson* to invalidate various sentencing frameworks that pressure defendants to waive their criminal rights. In *Robtoy v. Kincheloe* (9th Cir. 1989*),* a defendant challenged his sentence of life without parole (LWOP) as unconstitutional under *Jackson* because the maximum sentence he would have received had he pled guilty was life with parole. The Ninth Circuit found *Jackson* was not limited to death penalty cases, and, therefore, the sentence was "unconstitutional under *Jackson* because his assertion of his right to a jury trial was penalized."[59]

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[53] Sanchez v. Cty. of San Diego, 464 F.3d 916, 930–31 (9th Cir. 2006) (*internal citations omitted*)
[54] United States v. Medina-Hernandez, 22 Fed. Appx. 823 (9th Cir. 2001).
[55] United States v. Ruiz, 536 U.S. 622 (2002).
[56] Patton v. State of N.C., 381 F.2d 636, 640 (4th Cir. 1967) (cert. denied)
[57] Patton, 381 F.2d 636.
[58] Smartt v. Avery, 370 F.2d 788, 790 (6th Cir. 1967) (finding that just as the government may not deny the privilege of habeas corpus, "[n]o more may its exercise be discouraged by the withholding of a privilege (which would otherwise be accorded).").
[59] Robtoy v. Kincheloe, 871 F.2d 1478, 1481 (9th Cir. 1989)

However, *Robtoy* has received both positive and negative treatment. Significantly, *Duhaime v. Ducharne* (9th Cir. 2000) questioned the precedential weight, though refused to overrule, *Robtoy*. There, the Ninth Circuit refused to follow *Robtoy* or to extend *Jackson* to invalidate the aggravated death penalty statute, a similar LWOP sentencing scheme as in *Robtoy*.[60] The district court had denied the motion, and, because of the 1996 AEDPA amendments, the court could no longer reverse a state court decision unless it "involved an unreasonable application of clearly established federal law as determined by the Supreme Court."[61] Though the Ninth Circuit explicitly stated they were not ruling *Robtoy* erroneous, they found, because *Jackson* had ruled exclusively on the death penalty, *Robtoy*'s extension to the LWOP context was not sufficiently supported to meet the statutory standard for reversal.[62]

Potential Overlap with Prosecutorial and Judicial Vindictiveness Cases

In *U.S. v. Melancon*, the Fifth Circuit considered the constitutionality of a plea agreement conditioned on waiver of the right to appeal, also known as a "*Sierra* Waiver" for the case that held the practice constitutional.[63] Though the majority, bound by precedent, upheld the validity of the waiver as "knowing, intelligent, and voluntary," Judge Parker's concurrance specially advocated for overruling the *Sierra* rule because, along with other constitutional infirmities, it imposed an unconstitutional condition on the defendant's right to appeal a decision.[64] In establishing this argument, Judge Parker deployed prosecutorial vindictiveness precedent to demonstrate the doctrinal relevance of the unconstitutional conditions doctrine in this instance.[65]

Similarly, another constitutional realm that may be relevant is the invalidation of waivers made subsequent to judicial statements – either favorable or threatening.[66] Cast in the light of the unconstitutional conditions doctrine, judicial leniency, governmentally provided benefit, is conditioned on the waiver of criminal defense rights.

Conclusion: Can Unconstitutional Conditions be Applied to Criminal Rights?

Given the Supreme Court's explicit endorsement of criminal waivers in the plea bargaining context as not just permissible but "to be encouraged,"[67] some scholars believe that

[60] Duhaime v. Ducharme, 200 F.3d 597, 599 (9th Cir. 2000) (Defendant claimed the statute "unfairly enticed a defendant to plead guilty (by offering a maximum sentence of life with the possibility of parole for a guilty plea), and penalized a defendant who was convicted after pleading not guilty (by allowing for a sentence of life without the possibility of parole).").
[61] Duhaime, 200 F.3d 597, 602 (quoting 28 U.S.C. § 2254(d)).
[62] *Id* at 602 – 603.
[63] United States v. Sierra, No. 91-4342 (5th Cir. Dec. 6, 1991).
[64] United States v. Melancon, 972 F.2d 566, 577 (5th Cir. 1992) (Parker, J., concurring) ("This rule reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty.")
[65] Melancon, 972 F.2d 566, 578 (citing United States v. Rodriguez, 959 F.2d 193, 197-198 (11th Cir.1992); Blackledge v. Perry, 417 U.S. 21, 25-28, 94 (1974); North Carolina v. Pearce, 395 U.S. 711, 724-725 (1969); and United States v. Chagra, 957 F.2d 192, 195 (5th Cir.1992).
[66] *See, e.g.* US v. Walker, 346 F.2d 428 (4th, 1965); Euziere v. US, 249 F.2d 293 (10th Cir. 1957); Thomas v. US 368 F.2d 941 (4th Cir. 1966); US v. Tateo, 214 f. Supp. 560 (S.D.N.Y 1963)
[67] Santobello, 404 U.S. 257, 261.

that even applying the unconstitutional conditions doctrine, the Court would deem plea bargaining to meet strict scrutiny. Two scholars have argued that the current plea bargaining system might fail as a less restrictive alternative exists: a bench trial rather than trial by jury.[68] However, when approaching this fractured constitutional paradox, a more immediate concern may arise: could the Court justify disparate doctrinal treatments for the waivers of different constitutional rights?

The strength and grounding of the unconstitutional conditions doctrine in First Amendment rights has led some to argue that it only reinforces constitutional rights that serve public goals – "public rights" – and not individual ones that can constitutionally be waived in exchange for a benefit. The argument is that, unlike individual rights, public rights require more scrutiny for waiver as the individual's interest fails to account for the full public benefit or harm accorded by the right's exercise or waiver.[69] For example, the speech clause's public function promotes the marketplace of ideas, keeps government in check, facilitates informed self-governance, and reinforces many other democratic principles. However, some of the Court's earliest unconstitutional conditions cases extend the doctrine to protect classically individual rights in the business context,[70] and, subsequently, the doctrine has continued to be applied in individual rights domains, such as the Fifth Amendment's taking clause[71] and the individual right to travel.[72]

Lastly, though criminal rights may be cast as individual rights, the right to jury trial clearly serves a public function to encourage political participation by citizens and a check on the power of government.[73] Similarly, the Fifth Amendment's right against compelled testimony, protects reliability in criminal prosecutions and serves as a vital check on the abuse of government power. A judicial distinction based on an individual versus public for what rights to qualify for the unconstitutional conditions doctrine would not justify why waivers of criminal rights falls outside of this doctrine. By extension, some argue there can be no distinction between individual and public rights: they all serve a public interest in constitutionally sufficient rights, and none can be burdened by a government condition without public harm.

The Court has yet to provide any rationale for the dissonance in the standards for waiver of equally fundamental rights. As defendants and lower courts continue to press the unconstitutional conditions application in the criminal context, the Court may finally be forced to reconcile its inconsistent jurisprudence.

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[68] Mazzone, *supra* note 1, at 874-878; Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and Not-So-Least Restrictive Alternative*, 17 S. Cal. Rev. L. & Soc. Just. 33 (2007).
[69] Mazzone, 865 ("When the value of a constitutional right lies in protecting the interests of the public at large, the right transcends the interests of any single person.").
[70] *See* Western Union Tel. Co. v. State of Kansas, 216 U.S. (1910). (invalidating business licensing schemes that require waiver of the right to remove to federal court); Frost & Frost Trucking Co, 271 U.S. 583 (holding that an act requiring private carriers to become common carriers as a condition of using public highways violated the Due Process Clause of the Fourteenth Amendment).
[71] *See* Dolan, 512 U.S. 374; Nollan, 483 U.S. 825.
[72] *See* Harman,, 380 U.S. 528.
[73] Mazzon, *supra* note 1, at 850-51.