

# RETHINKING THE EFFECTS OF A GUILTY PLEA ON THE RIGHT TO CHALLENGE ONE’S STATUTE OF CONVICTION

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## INTRODUCTION

Plea bargains, in which a defendant pleads guilty to a crime in exchange for a reduced sentence and an opportunity to avoid the uncertainty of a trial, are increasingly common in the criminal justice system.<sup>1</sup> Once a defendant accepts a plea bargain, the circuits are split on whether or not the plea inherently waives a defendant's right to challenge her statute of conviction upon appeal.<sup>2</sup> The United States Supreme Court will soon provide clarification on this question in *Class v. United States*.<sup>3</sup>

The government charged Rodney Class, the petitioner in *Class*, with "possession of a firearm" on the grounds of the Capitol building.<sup>4</sup> Appearing pro se, Class pled guilty to the charge in district court.<sup>5</sup> Prior to accepting his plea and "pursuant to Federal Rule of Criminal Procedure 11", the district court informed Class that by pleading guilty he would be "generally giving up [his] rights to appeal", except for his right to challenge the voluntariness of the plea and the legality of his sentence.<sup>6</sup> Class responded that he understood that he was waiving his appellate rights.<sup>7</sup>

Despite his response to the district court, Class later appealed, claiming that the statute prohibiting firearms on Capitol grounds was unconstitutional under the Second Amendment.<sup>8</sup> The D.C. Circuit Court declined to address

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1. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (citing *Missouri v. Frye*, 566 U.S. 133 (2012)) (observing that the criminal justice system functions as a "system of pleas, not a system of trials," and that ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas).

2. See Petition for Writ of Certiorari at 12, *Class v. United States*, 85 U.S.L.W. 3390 (2016) (No. 16-424) (noting that "[s]ome circuits . . . [hold] that a [guilty] plea inherently waives every underlying constitutional claim except the double jeopardy and vindictive prosecution claims"; other circuits hold that "guilty plea[s] only] concede[] factual guilt" and do not necessarily waive the possibility of raising facial or as-applied challenges on appeal; and others still only allow facial challenges).

3. See *Class v. United States*, No. 15-3015, 2016 U.S. App. LEXIS 12620 at \*2 (D.C. Cir. July 5, 2016); *Class v. United States*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/class-v-united-states/> (last visited Dec. 2, 2017) (granting certiorari to decide whether a guilty plea waives a defendant's right to challenge her statute of conviction on appeal).

4. See *Class*, 2016 U.S. App. LEXIS 12620, at \*1 (citing 40 U.S.C. § 5104(e) as the basis for Class's arrest and conviction).

5. See *id.* (noting that Class had previously been represented by court appointed counsel who was later "discharged at [Class's] request", while a "Federal Public Defender served as . . . advisory counsel").

6. See *id.* at \*1-2 (detailing the dialogue between Class and the trial judge).

7. See *id.* at \*2 (implying that the unconditional plea was knowing and intelligent).

8. See *id.* (describing Class's claims as "three grounds of constitutional error and a

the merits of Class' claim.<sup>9</sup> Instead, the Court maintained that in only two situations can an unconditional plea waive a defendant's right to appeal her conviction: (1) when she asserts a "claim that the [lower] court lacked . . . jurisdiction", and (2) when she asserts a claim that the state should not have "haled [her] into court at all".<sup>10</sup> The Court held that because his claim did not fall into one of those two exceptions, Class had no right to challenge the constitutionality of the statute.<sup>11</sup>

This comment argues that the D.C. Circuit's conclusion was incorrect, and that the Supreme Court should follow a different approach upon review. Part II explores the Court's limited case law addressing the effects of guilty pleas on challenges to various procedural errors on appeal. Additionally, Part II discusses the robust jurisprudence concerning the retroactive application of substantive criminal rules.<sup>12</sup>

Part III argues that the retroactivity doctrine cautions against holding that a guilty plea precludes a defendant from challenging the constitutionality of the statute of her conviction.<sup>13</sup> Part III further asserts that the Court's substantive due process doctrine prevents arbitrary impositions on protected conduct, including allowing a guilty plea to bar a defendant from challenging the constitutionality of the statute of her conviction following a guilty plea.<sup>14</sup> Part III also examines the text of the Federal Rule of Criminal Procedure governing pleas and contends that the Rule's ambiguity allows for the possibility that a guilty plea does not waive a defendant's right to pursue constitutional challenges to her statute of conviction on appeal.<sup>15</sup>

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further claim of statutory error").

9. *See id.* (asserting that Class's claims were not properly before the court).

10. *See id.* (citing *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004) (noting that Class's claim does not fall into either of the two categories of claims)).

11. *See id.* (noting that Class also did not reserve any rights to appeal in his plea, so he has no right to review).

12. *See, e.g.,* *Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016) (applying the rule prohibiting mandatory life sentences without parole for juveniles retroactively); *Teague v. Lane*, 489 U.S. 288, 316 (1989) (declining to apply new peremptory challenge rules retroactively); *Mackey v. United States*, 401 U.S. 667, 667 (1971) (Harlan, J., dissent) (arguing that new protections against self-incrimination should apply retroactively).

13. *See infra* Part III(A) (applying retroactivity doctrine to argue that allowing a guilty plea to waive an appellate challenge to the constitutionality of one's statute of conviction would allow the state to criminalize protected conduct).

14. *See infra* Part III(B) (arguing that allowing guilty pleas to waive constitutional challenges to one's statute of conviction would be a judicially imposed arbitrary infringement on protected conduct).

15. *See infra* Part III(C) (analyzing Federal Rule of Criminal Procedure 11 and

Part IV recommends, in lieu of the preferred outcome in *Class*, that Federal Rule of Criminal Procedure 11 be amended to clarify that constitutional challenges to one's statute of conviction are not inherently waived by a guilty plea.<sup>16</sup> Finally, Part V reiterates the relevance of the Court's retroactivity jurisprudence and concludes that those cases provide the most reasonable framework for determining how guilty pleas should affect a defendant's right to challenge the constitutionality of the statute of her conviction on appeal.

## I. BACKGROUND

### A. *Retroactive Application of New Substantive Constitutional Rules.*

One question that often arises in criminal procedure is when to apply new constitutional rules to similar cases that have been litigated under old constitutional rules.<sup>17</sup> Justice Harlan's dissent in *Mackey* outlines the steps a court should take in answering this question.<sup>18</sup> When the new rule is procedural, the Court must apply the law as it existed "at the time [the] conviction became final."<sup>19</sup> Justice Harlan rests this conclusion on the fact that the state has a significant interest in establishing the finality of criminal cases.<sup>20</sup> However, Justice Harlan notes that when substantive due process rules are at issue, the weight given to the state's interest in finality shifts significantly.<sup>21</sup>

The United States Supreme Court defines substantive due process rules as those that determine what kind of conduct can be penalized and how the

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arguing that its text supports the desired holding in *Class*).

16. See *infra* Part IV (arguing for an update to Rule 11 to clarify which appellate rights a guilty plea waives).

17. See *Mackey v. United States*, 401 U.S. 675, 675 (1971) (Harlan, J., concurring in part and dissenting in part) (noting that the same question of the applicability of new rules to cases that have already been finalized is at issue in the three companion cases that the opinion addresses).

18. See *Teague v. Lane*, 489 U.S. 288, 306-07 (1989) (citing *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part) (explaining that "it is 'sounder . . . to apply the law prevailing at the time a conviction became final'")).

19. See *Mackey*, 401 U.S. at 688-89 (Harlan, J., dissenting) (assuming the procedures used to convict someone are fair).

20. See *id.* at 692-93 (explaining that states and litigants have an interest in obtaining final resolutions).

21. See *id.* at 692 (defining procedural due process rules as those that govern how valid proscriptions on behavior should be enforced and noting that substantive due process rules should "be placed on a different footing").

government can go about punishing that conduct.<sup>22</sup> The line between procedural and substantive due process rules is often blurry, but procedural rules are distinguished from substantive rules in that, when misapplied or fundamentally unfair, procedural rules may still result in an accurate conviction, while a substantive rule prevents a state from criminalizing certain conduct.<sup>23</sup> Examples of these substantive rules include those that prevent the government from criminalizing flag burning, distribution of contraception, abortion, and interracial marriage.<sup>24</sup> When substantive due process rules are at issue, the state's interest in finality is contrary to the defendant's interest in being free from punishment.<sup>25</sup> The Court condemns punishments that are in violation of substantive rules in the strongest sense.<sup>26</sup> Acknowledging that states generally do have a substantial interest in finality, the Court finds this interest is rendered irrelevant when the state has no power to proscribe conduct in the first place.<sup>27</sup>

The Court has attempted to strike a balance between the two concerns of finality and whether the punishment imposed is valid under the

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22. *Compare Mackey*, 401 U.S. at 692 (Harlan, J., dissenting) (“rules . . . that place . . . certain kinds of . . . private individual conduct beyond the power of the criminal law-making authority to proscribe”) with *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (“rules prohibiting a certain category of punishment for a class of defendants because of their status or offense”).

23. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (distinguishing procedural rules as governing the manner in which the defendant's culpability is determined from substantive rules as controlling the limits of the punitive powers of the state).

24. *See Welch v. United States*, 136 S. Ct. 1257, 1276 (2016) (citing *Mackey*, 401 U.S. at 692, n.7 (Harlan, J., dissenting)) (expounding on Justice Harlan's substantive/procedural distinction); *see also Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a law criminalizing flag burning); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down an abortion prohibition); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that states cannot criminalize interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a law criminalizing the distribution of contraceptives was unconstitutional). *But cf. CROWLEY, LA., CODE OF ORDINANCES* ch. 7, art. II, § 7-57(a) (2013) (criminalizing wearing “saggy” pants, potentially encroaching on the First Amendment rights to free speech and expression).

25. *See Mackey*, 401 U.S. at 693 (Harlan, J., dissenting) (arguing that the state's finality interest should yield when a new rule places certain conduct beyond the state's authority to proscribe).

26. *See, e.g., id.* (finding no use in allowing the “process to rest at a point where it ought properly never to repose”).

27. *See Montgomery*, 136 U.S. at 732 (asserting the state's finality interest is irrelevant when the state cannot impose a punishment “that the Constitution deprives the state of the power to impose”).

Constitution.<sup>28</sup> Though the state's finality interest supersedes the defendant's interests when the new rule affects the procedures used to obtain a conviction, the balance shifts significantly when the rule redefines the scope of conduct the state may proscribe.<sup>29</sup> The risk is not that the conviction occurred under procedural rules that no longer reflect the state of constitutional law, but rather that the defendant will be punished for conduct that is not criminal.<sup>30</sup> Thus, the state's finality interest is entitled to the least deference, and the defendant's interest in being free from punishment is most prominent.<sup>31</sup>

### *B. Guilty Pleas and the State's Power to Bring Charges*

In determining whether the state is authorized to prosecute a defendant for a particular crime, the Court's retroactivity doctrine parallels its holdings on the effects of a guilty plea on a defendant's rights on appeal.<sup>32</sup> In this context, the Court explores the state's power to prosecute a defendant for a particular action.<sup>33</sup> The two cases in which the Court directly addresses how the state's power to prosecute is affected by a guilty plea are *Blackledge v. Perry* and *Menna v. New York*.<sup>34</sup>

In *Blackledge*, the defendant pled not guilty to a misdemeanor assault

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28. See, e.g., *Welch*, 136 S. Ct. at 1266 (describing the balancing test courts must perform when evaluating whether retroactivity will apply to an unconstitutionally vague statute).

29. See *id.* (discussing how the nature of a new rule effects the rule's weight in the balancing test).

30. See *id.* (analogizing the differences between the outcomes when a court finds the new rule procedural or substantive).

31. See *id.* (explaining how the balance shifts from the state's interest in finality to the defendant's liberty interest when a substantive rule is at issue).

32. See generally Brief for Petitioner at 29, *Class v. United States*, 85 U.S.L.W. 3390 (2016) (No. 16-424) (noting that "case law supports a holding that a guilty plea does not inherently waive a defendant's challenge to the constitutionality of the statute of conviction").

33. See *Blackledge v. Perry*, 471 U.S. 21, 30 (1974) (holding that a state did not have the power to vindictively charge a defendant with a felony, and bring him into court, just because the defendant appealed a misdemeanor conviction for the same crime); *Menna v. New York*, 423 U.S. 61 (1975) (per curiam) (holding that where a state is constitutionally "precluded . . . from haling a defendant into court on a charge," the conviction must be set aside notwithstanding a guilty plea).

34. See *Blackledge*, 471 U.S. at 21 (holding that the defendant's guilty plea did not bar him from raising issues of prosecutorial vindictiveness on appeal); *Menna*, 423 U.S. at 61 (per curiam) (holding that a guilty plea does not waive a claim that the state lacks constitutional authority to prosecute the defendant).

charge, was convicted, and then appealed his conviction.<sup>35</sup> After filing his appeal, the prosecutor charged the defendant with a felony for the same conduct of which his first conviction arose.<sup>36</sup> Since he already had one conviction for that assault, the defendant pled guilty to the felony.<sup>37</sup> The defendant later brought a claim asserting that the felony charge was a violation of the Double Jeopardy Clause.<sup>38</sup> The Court held that even though a guilty plea precludes claims relating to the deprivation of constitutionally protected pretrial rights, those limitations do not apply when the issue concerns the power of the state to hale a defendant into court.<sup>39</sup> The Court emphasized the vindictive nature of the second charge as a defect that could not be cured by a procedural rule or safeguard because the denial of due process occurred when the state initiated proceedings against him and tainted the court proceedings from the start.<sup>40</sup> The problem with the State's second charge was not that it failed to comply with the appropriate procedural rules, but that the state attempted to bring charges that were constitutionally prohibited.<sup>41</sup>

*Blackledge* laid the foundation for *Menna*, in which the Court held that a guilty plea does not preclude a defendant from bringing a double jeopardy claim on appeal.<sup>42</sup> In addition to affirming the principles announced in *Blackledge*, *Menna* introduced the element of factual guilt into the Court's analysis of the relevance of guilty pleas in determining what claims can be brought on appeal.<sup>43</sup> The Court notes that a guilty plea only establishes

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35. See *Blackledge*, 417 U.S. at 22 (noting that the defendant's right to appeal under state statute is not contested).

36. See *id.* at 23 (describing the defendant's double jeopardy claim).

37. See *id.* at 23 n.2 (explaining why the defendant pled guilty).

38. See *id.* (noting that the defendant also claimed that his due process rights had been violated).

39. See *id.* at 29-30 (explaining that complaints about "antecedent constitutional violations" involving a plea bargain are limited to voluntariness of the plea).

40. See *Blackledge*, 417 U.S. at 30-31 (holding that the "very initiation of proceedings against [the defendant] . . . thus operated to deny him due process of law").

41. See *id.* at 31 (emphasizing that the Due Process Clause sometimes functions to "prevent a trial from taking place at all rather than to prescribe procedural rules that govern the conduct of a trial").

42. See *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam) (holding that the refusal to speak before a grand jury, after receiving immunity, did not preclude his Double Jeopardy claim).

43. See *id.* at 63 n.2 (expressing that a guilty plea "renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt," but in this case, the state has no power to punish the defendant "no matter how validly his factual guilt is established").

factual guilt and does not inherently authorize the state to criminalize certain conduct; rather it substantiates conclusions a fact finder may reasonably draw.<sup>44</sup> Thus, even following a guilty plea, a conviction is still vulnerable to attack on the grounds that the state had no power to prosecute the case.<sup>45</sup>

Commentators have struggled to reconcile the *Blackledge* and *Menna* decisions with other opinions concerning the function of a guilty plea on subsequent constitutional challenges.<sup>46</sup> Many scholars argue that the distinction between constitutional claims waived by a guilty plea and constitutional claims not waived lies in whether the constitutional defect could have been remedied, which would have resulted in a fair trial.<sup>47</sup> However, this comment asserts that under *Blackledge*, *Menna*, and the Court's retroactivity doctrine, the relevant inquiry is not how and when a constitutional defect can be cured, but whether the state is constitutionally prohibited from prosecuting a certain case or punishing certain conduct.

## II. ANALYSIS

### *A. Requiring A Guilty Plea to Inherently Waive a Defendant's Right to Challenge Her Statute of Conviction Allows the State to Punish Conduct Constitutionally Beyond Its Reach.*

The State has no interest in punishing conduct that is constitutionally protected.<sup>48</sup> Allowing statutes that punish protected conduct to go unchallenged enables states to circumvent the substantive protections provided by the Constitution in favor of preserving an illegitimate state interest.<sup>49</sup> This potential loophole is especially troubling given the

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44. See *id.* (asserting that a guilty plea is “an admission of factual guilt so reliable that . . . it quite validly removes the issue of factual guilt from the case”).

45. See *id.* (holding that “a plea of guilty to a charge does not waive a claim that . . . the charge is one which the State may not constitutionally prosecute”).

46. See Albert Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 19 (1975) (observing that there is no “meaningful device for separating claims that should survive a guilty plea from claims that should not”).

47. See, e.g., *Augustine v. Cheng*, *Appellate Review of Double Jeopardy Claims in the Guilty Plea Context*, 56 FORDHAM L. REV. 983, 991 (1988) (arguing that “the nature of the constitutional defect,” and the state’s ability “to correct it, is dispositive in determining whether the defendant will be allowed to raise a given claim”).

48. See, e.g., *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (calling such punishment “erroneous,” “void,” and “contrary to law”); *Mackey v. United States*, 401 U.S. 675, 693 (Harlan, J., dissenting) (noting the “obvious interest in freeing individuals from punishment for conduct that is constitutionally protected” is significant and outweighs the state’s interest in finality).

49. See, e.g., *Montgomery*, 136 S. Ct. at 729-730 (calling convictions under a statute



prevalence of plea bargains in the criminal justice system.<sup>50</sup>

A reasonable defendant might plead guilty to a charge simply because there are no questions of fact for a judge or jury to answer.<sup>51</sup> However, a guilty plea does not imply a concession by the defendant that the state has the constitutional authority to proscribe the conduct that gave rise to the charge; rather it is an admission that one did, in fact, engage in the allegedly prohibited conduct.<sup>52</sup> If it is determined upon review that the state has no authority to punish that conduct, the defendant is essentially innocent of wrongdoing, regardless of the plea she entered.<sup>53</sup>

The Court anticipates that its retroactivity doctrine, which supersedes the state's finality interest and applies new substantive rules to finalized cases, will inconveniently result in more litigation and retrials for the state.<sup>54</sup> The same would certainly be true of the issue in *Class*, which in allowing defendants who plead guilty to launch constitutional challenges to their statutes of conviction will undoubtedly place some burden on the state to defend its statutes.<sup>55</sup>

However, the state's interest in finality is completely irrelevant when the issue at hand is a matter of substantive due process, such as whether the state has the power to criminalize certain behavior, and this finality interest must yield to the defendant's liberty interest.<sup>56</sup> Similarly, the state must undergo

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prohibited by the Constitution "unlawful").

50. See generally *Brady v. United States*, 397 U.S. 742, 752 (1970) (describing the ubiquity of plea bargains in American courts and exploring the reasons prosecutors and some defendants tend to prefer taking a plea bargain to facing trial).

51. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (indicating a guilty plea sometimes functions as an admission of fact, not law, which removes the need for fact finding proceedings); see also *Loving v. Virginia*, 388 U.S. 1, 2-4 (1967) (noting that the Lovings pled guilty to violating Virginia's anti-miscegenation law but never disputed the fact that they were members of different races as defined by the statute).

52. See *Menna*, 423 U.S. at 62 n.2 (reiterating that factual guilt is not sufficient for a prosecution if the charge is such that "the State may not convict petitioner no matter how validly his factual guilt is established").

53. See *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726-27 (1971) (Brennan, J., concurring) (asserting that "the government has no . . . interest in punishing those innocent of wrongdoing" when defendants are accused of conduct beyond the state's power to sanction).

54. See *id.* at 723 (discussing the likelihood that the state "will be required to undergo the relatively insignificant inconvenience involved in defending any lawsuits that may be anticipated").

55. See, e.g., *Mackey v. United States*, 401 U.S. 675, 691-92 (1971) (Harlan, J., dissenting) (discussing the state's resources saved by avoiding appeal).

56. See, e.g., *Montgomery v. Louisiana*, 136 U.S. 718, 732 (2016) (asserting the state's finality interest is insignificant when the state seeks to impose a punishment that

the inconvenience of further litigating and defending appellate challenges to statute's constitutionality to ensure that the statute has not criminalized conduct beyond its reach.<sup>57</sup> If on appeal the statute is held to be an unconstitutional infringement on constitutionally protected conduct, then the state has no interest in continuing to punish the defendant, regardless of whether or not she did in fact engage in that conduct.<sup>58</sup>

If a state sought to circumvent substantive constitutional protections and guarantees, a rule allowing guilty pleas to inherently waive a defendant's right to challenge her statute of conviction would be ideal. For example, in Crowley, Louisiana, it is illegal under a local ordinance to wear "saggy" pants.<sup>59</sup> This ordinance would be vulnerable to a reasonable and well-founded challenge under the Free Speech Clause of the First Amendment, meaning it potentially encroaches on protected conduct.<sup>60</sup> However, rather than pleading not guilty to preserve the right to challenge the ordinance on appeal, a rational defendant who has violated this ordinance may decide to forgo a trial given the uncertainty of trial proceedings, the weight of the evidence indicating that he did in fact violate the ordinance, the time and money that must be invested to procure an attorney, and because there is no genuine issue of fact the defendant wishes to contest or raise.<sup>61</sup>

Instead, this defendant may determine that his best option is to accept a plea offer, which will ensure that the matter is resolved swiftly and with a lesser penalty than may have been imposed by a fact finder.<sup>62</sup> However, the

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the Constitution prohibits).

57. See *U.S. Coin*, 401 U.S. at 726 (emphasizing that the state's interest in avoiding further litigation must yield to the defendant's liberty interest when the government has no power to criminalize the defendant's conduct in the first place).

58. See, e.g., *id.* at 727 (holding that in the retroactivity context, the state may not continue to punish an individual for engaging in conduct that is beyond its reach pursuant to a new substantive constitutional rule).

59. See CROWLEY, LA., CODE OF ORDINANCES ch. 7, art. II, § 7-57(a) (2013) ("It shall be unlawful for any person to wear outer clothing or garments, including but not limited to trousers, pants, shorts, and/or other outer garments designed to be worn at or below the waist of the body and in such a manner as to expose a person's underwear or undergarments in a public place or in public view").

60. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (holding a prohibition on wearing red pins as a symbol of organized resistance violates the Free Speech Clause); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (noting that wearing armbands is akin to 'pure speech', which is afforded "comprehensive protection under the First Amendment").

61. See *Brady v. United States*, 397 U.S. 742, 752 (1970) (indicating that accepting a plea deal offer conveys advantages to the defendant as well as the state).

62. See, e.g., *id.* (noting that plea bargains are valuable to defendants in that they reduce the defendant's exposure, allow the correctional process to begin more quickly,

question remains as to whether the state has any cognizable authority to regulate how members of the public wear their pants with a threat of criminal penalties.<sup>63</sup> While the Court has yet to confront this issue directly, and extend First Amendment protections to the height at which an individual chooses to wear his pants, denying the defendant an opportunity to present this question for appellate review and argue its merits is a gross distortion of the principles of judicial review.<sup>64</sup>

Criminalizing potentially protected conduct while preventing defendants from challenging that conduct's criminalization violates the notions of fundamental fairness undergirding in the criminal justice system.<sup>65</sup> In this hypothetical, the state could argue that the defendant still has the possibility of obtaining relief in the event that another individual is charged with violating the ordinance, pleads not guilty, is convicted, and challenges the ordinance's constitutionality on appeal.<sup>66</sup> Setting aside the practical burdens placed on the defendant who pled guilty, the Court's retroactivity jurisprudence was clear that the state had already exceeded its constitutionally prescribed limits by bringing charges against the defendant and punishing him for his conduct.<sup>67</sup>

Additionally, the state may not anticipate more prosecutions under this law following the defendant's conviction because the state simply wanted to make an example of the defendant to deter future violations of the ordinance.<sup>68</sup> If the defendant's prosecution in this hypothetical was an effort

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and eliminate the practical difficulties associated with trial).

63. See CROWLEY, LA., CODE OF ORDINANCES ch. 7, art. II, § 7-57(c) (prescribing fines of up to \$200 and/or at least sixty days in jail for a defendant's first violation).

64. See *Montgomery v. Louisiana* 136 S. Ct. 718, 731 (2016) ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees").

65. See, e.g., *Teague v. Lane*, 489 U.S. 288, 314 (1989) (emphasizing the importance of fundamental fairness in the criminal justice system and public confidence in its fairness).

66. *Cf. Poe v. Ullman*, 367 U.S. 497, 532-33 (1961) (Harlan, J., dissenting) (discussing a Connecticut birth control proscription that was only prosecuted once prior to that instance in an explicit effort by the state to deter violation of the statute).

67. See *Desist v. United States*, 394 U.S. 244, 261 n. 2 (1969) (Harlan, J., dissenting) (explaining that since "the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail"); *Mackey v. United States*, 401 U.S. 675, 693 (1971) (Harlan, J., dissenting) (condemning "permitting the criminal process to rest at a point where it ought properly never to repose").

68. See, e.g., *Poe*, 367 U.S. at 532-33 (Harlan, J., dissenting) (providing an example

to deter further violation of the law, it is unlikely that another case would create a substantive rule that the defendant could argue should be retroactively applied to his case so that he could obtain relief on appeal.<sup>69</sup> The draconian result of this hypothetical is that this defendant would have no opportunity for relief despite the fact that the statute of his conviction may violate the First Amendment and infringe on constitutionally protected expression.<sup>70</sup>

The above argument, however, does not suggest that prosecutors would maliciously take advantage of a rule that allows a guilty plea to preclude a constitutional challenge on appeal, or would seek to manipulate or coerce a defendant into pleading guilty in order to trick her into surrendering her substantive due process rights. On the contrary, sometimes a guilty plea is the best and most rational choice for both the state and the defendant.<sup>71</sup> Defendants could easily resolve cases in which the guilty pleas were obtained through coercive or deceptive means by arguing the voluntary and intelligent nature of the plea.<sup>72</sup> However, as the Court noted in *Blackledge*, the defect in the Defendant's second charge was not actual vindictiveness on the part of the prosecutor, but rather was perceived prosecutorial vindictiveness.<sup>73</sup>

*B. Allowing a Guilty Plea to Prohibit a Defendant from Challenging the Constitutionality of the Statute of Her Conviction Would Be Akin to a Judicially-Imposed Arbitrary Infringement on Protected Conduct Barred by the Due Process Clause.*

Another substantive due process theory supporting the conclusion that a guilty plea does not prohibit a defendant from challenging the constitutionality of the statute of her conviction is the Court's arbitrariness doctrine.<sup>74</sup> Courts use this doctrine, particularly in the civil realm, to analyze

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of a state using sporadic enforcement of a statute as a deterrent).

69. See *id.* at 531 (noting that there had been only one prosecution under the Connecticut statute before the Court).

70. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (holding a prohibition on wearing red buttons as a political symbol violates the Free Speech Clause).

71. See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970) (discussing the advantages of accepting a guilty plea for the defendant and the advantages of obtaining a guilty plea for the prosecutor).

72. See, e.g., *id.* at 748 (affirming that pleas must be voluntarily, knowingly, and intelligently made).

73. See *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (stating that defendants need sufficient protection to be free from the 'fear of vindictiveness').

74. See generally *Poe*, 367 U.S. at 543 (Harlan, J., dissenting) (noting that the liberty

Fourteenth Amendment due process claims when a particular government action pits individual liberty interests against the needs of society.<sup>75</sup> In this context, the needs of society are two-fold: the need for finality in resolving criminal prosecutions and the needs that prompt the passing of legislation that potentially infringes on protected conduct.<sup>76</sup> However, the individual's needs remain unchanged and the relevant question is to what extent the state infringes upon "the right to be let alone."<sup>77</sup>

When the Court conducts its substantive due process analysis, it asks whether a state's interests justify a corresponding infringement upon the fundamental rights of individuals.<sup>78</sup> However, an interesting phenomenon would occur if a guilty plea barred a challenge to the constitutionality of the statute of her conviction; the guilty plea itself would become an arbitrary justification for continued infringement upon an individual's protected conduct.<sup>79</sup> The individual's punishment under the unconstitutional statute, be it incarceration, state supervision, a monetary fine, or some combination of the three, is based on the state's finality interest and manifested by the defendant's guilty plea.<sup>80</sup>

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interest protected by the Fourteenth Amendment exists on a "rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints").

75. See *id.* at 542; see also *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (asserting that individuals do not have a fundamental liberty interest in assisted suicide under the Fourteenth Amendment); *Youngberg v. Romeo*, 457 U.S. 307, 319-24 (1982) (holding that involuntarily committed persons have a significant liberty interest in safety and freedom from unreasonable restraints under the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring) (agreeing with the majority that married couples have a fundamental liberty interest in privacy under the Fourteenth Amendment).

76. See, e.g., *Mackey v. United States*, 401 U.S. 667, 690 (1971) (Harlan, J., dissenting) (noting that the state's finality interest is always at play in criminal law).

77. See generally *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) (writing about the Fourth Amendment, which became a cornerstone for the right to privacy).

78. See, e.g., *Washington*, 521 U.S. at 755-56 (Souter, J., dissenting) (examining the substantive due process claims made by individuals negatively affected by a statute prohibiting physician-assisted suicide).

79. See generally *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (noting that the Fourteenth Amendment protects against "arbitrary impositions" upon liberty).

80. See, e.g., *id.* at 548 (concluding that the state's interest in enforcing moral judgment by criminalizing the use and distribution of contraceptives is insufficient to justify intruding upon marital privacy).

Consider the “saggy pants” hypothetical.<sup>81</sup> If it reached an appellate court on the merits, the court would find the ordinance in violation of the First Amendment because the state has no compelling interest in regulating citizens’ waistbands.<sup>82</sup> Thus, the state would be prohibited from continuing to fine, supervise, or incarcerate the defendant who successfully challenged this ordinance.<sup>83</sup> To allow a guilty plea, which is both the procedural embodiment of the state’s and defendant’s practical interests in avoiding trial and a concession of factual guilt, to prevent an appellate court from striking down such an unconstitutional statute is absurd.<sup>84</sup> A prohibition on claims with similar merits and procedural postures is akin to an arbitrary imposition on liberty protected by the Fourteenth Amendment Due Process Clause.<sup>85</sup> The Court has previously struck down arbitrary impositions on liberty by the legislative and executive branches, and it would be illogical to forbid arbitrary impositions on liberty by the judicial branch.<sup>86</sup>

Given that courts analyze substantive due process issues by weighing the competing interests of the state and the defendant, the Court may examine this question through the lens of the strict scrutiny test used to determine when an infringement on a substantive due process right is permissible.<sup>87</sup> Strict scrutiny is a two prong test requiring: (1) that the statute or policy

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81. See CROWLEY, LA., CODE OF ORDINANCES ch. 7, art. II, § 7-57(a) (2013) (criminalizing wearing saggy pants in public).

82. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding wearing red pins as a symbol of political resistance is protected by the Free Speech Clause); see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (noting that “there are limits to” a statute’s “presumption of constitutionality . . . especially where the liberty of the person is concerned”).

83. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879) (holding that “[a]n unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment”).

84. See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970) (noting the practical benefits of plea bargains to both prosecutors and defendants); see also *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975) (finding that a guilty plea is merely an admission of factual guilt rather than a concession by the defendant that the state has the power to prosecute a particular charge).

85. See *Poe*, 367 U.S. at 543 (noting that the Fourteenth Amendment Due Process Clause protects against “arbitrary impositions” on liberty by the government).

86. See, e.g., *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (first citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); then citing *Rochin v. California*, 342 U.S. 165 (1952)) (observing that substantive due process limits both the legislative and executive powers of government).

87. See generally *Poe*, 367 U.S. at 543 (laying the foundation for the strict scrutiny test to be applied to substantive due process questions).

infringing upon protected conduct be in furtherance of a compelling government interest, and (2) that the statute or policy be narrowly tailored to accomplish that compelling interest.<sup>88</sup> In *Roe v. Wade*, the Court applied strict scrutiny in striking down a law criminalizing abortion.<sup>89</sup> The state argued that it had a compelling interest in protecting prenatal life.<sup>90</sup> The petitioner, on the other hand, asserted that the law infringed on her right to privacy.<sup>91</sup> The Court held that while the state has a compelling interest in preserving and protecting life, the lack of consensus among scientists, religious leaders, and philosophers as to when life begins means that the interest is not significantly compelling until a person is actually born.<sup>92</sup> In *Roe*, the competing interests to be weighed were clear: the state's interest in protecting life versus the petitioner's countervailing interest in privacy.

Sensitive to the relationship between the state's and defendant's interests, the Court recognized that as the pregnancy progresses and the fetus' potential for life grows, the state's interest in protecting that potential life also increases and becomes more compelling.<sup>93</sup> The state has an interest, the Court held, in protecting the life and health of the mother too, and that interest also fluctuates depending on the point in a pregnancy at which the abortion is sought.<sup>94</sup> The Court asserted that once a pregnancy reaches the point that the interest of protecting the life of a child becomes compelling, the state may regulate abortion practices, but only if the state narrowly tailors the regulations.<sup>95</sup> Thus, the Court created a sliding scale based on the trimester timeline to illustrate how the state's interest increases while the

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88. See *Strict Scrutiny*, CORNELL L. SCHOOL, [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last visited Dec. 11, 2017); see also *Griswold v. Connecticut*, 381 U.S. 479, 487-89 (1965) (Goldberg, J., concurring) (noting that some fundamentally protected rights are not explicitly mentioned in the Constitution).

89. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (specifying that certain fundamental rights can only be infringed upon when the state satisfies strict scrutiny).

90. See *id.* at 156 (describing the state's interest in protecting prenatal life "from and after conception").

91. See *id.* at 120 (discussing petitioner's asserted right to privacy under the Fourteenth, Ninth, Fifth, Fourth, and First Amendments).

92. See *id.* at 160-61 (detailing the various explanations as to when life begins across disciplines).

93. See *id.* at 162-64 (outlining the trimester framework that determines how compelling the state's interest is in the fetus's life at each point in the pregnancy).

94. See *id.* at 163-64 (explaining how the states' interests in the health of the mother and preserving the child's life become more conflicted as the pregnancy progresses).

95. See *id.* at 163 (allowing the state to set regulations that protect the health of the mother only during the first trimester, but then permitting the state to set regulations that preserve the potential life of the fetus after viability).

woman's interests decrease as the pregnancy progresses.<sup>96</sup> However, a spectrum approach such as the trimester framework adopted in *Roe* would be inappropriate in this case as the strength of two interests at play do not change over time.<sup>97</sup>

Using the same strict scrutiny framework, the Court has struck down several statutes, including those that prohibit interracial and same-sex marriage and those that ban the use of illegal drugs in religious ceremonies.<sup>98</sup> In each of these cases, the Court concluded that the state was infringing on protected conduct.<sup>99</sup> Additionally, the Court found the state either lacked a compelling interest or failed to narrowly tailor legislation to achieve a compelling interest.<sup>100</sup>

However, in addressing the issue in *Class*, it is not immediately clear which state interest the Court should examine: the state's interest in the finality of a guilty plea or the interest in prohibiting the conduct proscribed by the underlying statute of conviction.<sup>101</sup> Reaching the latter interest requires the Court to address the merits of the claim, thus the Court would probably also examine the state's finality interest. The end result of this analysis is a familiar equation with the state's finality interest on one side and the defendant's liberty interest on the other.<sup>102</sup> The Court emphatically

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96. See *id.* at 163-64 (holding Texas' law on abortion too broad and limiting because it only allows for abortions to protect the health of the mother and does not distinguish between different trimesters).

97. See *Mackey v. United States*, 401 U.S. 667, 693 (2016) (Harlan, J., dissenting) (implying that the time between the conviction and the appeal do not typically affect the weight of the defendant's or state's interests).

98. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (striking down a statute that prohibited recognition of same-sex marriages performed in another state); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (finding constitutional grounds to preclude criminalization of the ceremonial use of controlled substances).

99. See *Obergefell*, 135 S. Ct. at 2608 (holding that refusing to recognize same-sex marriages infringed upon the right to marry); *Gonzales*, 546 U.S. at 439 (holding that applying drug laws to religious sects infringed upon the right to engage in certain religious ceremonies).

100. See *Obergefell*, 135 S. Ct. at 2608 (concluding the state has no compelling interest in refusing to recognize same-sex marriage); *Gonzales*, 546 U.S. at 439 (holding the state has no compelling interest in criminalizing the sacramental use of controlled substances).

101. Compare *Obergefell*, 135 S. Ct. at 2608 (examining the state's interest in prohibiting same-sex marriages) with *Mackey*, 401 U.S. at 693 (Harlan, J., dissenting) (weighing the state's interest in finality against the defendant's liberty interests).

102. See, e.g., *Mackey*, 401 U.S. at 693 (balancing the state's interest in finality and the defendant's interest in being free from punishment using the retroactivity doctrine);



declined to hold a state's finality interest sufficiently compelling when compared to a defendant's liberty interest in the retroactivity context, which means the state's encroachment on protected conduct would likely fail strict scrutiny.<sup>103</sup>

*C. The Ambiguity of Federal Rule of Criminal Procedure 11 Prevents a Guilty Plea from Waiving the Defendant's Right to Challenge the Statute of Her Conviction on Appeal.*

The Court defines the waiver of a right as the deliberate surrender "of a known right or privilege."<sup>104</sup> Generally, waivers arise in the context of procedural due process rights, not substantive ones.<sup>105</sup> In determining whether the waiver was valid, the Court evaluates whether the waiver was made intelligently, knowingly, and voluntarily.<sup>106</sup> However, these waivers only apply to rights affecting the integrity of the fact-finding process and are irrelevant to the state's power to prosecute.<sup>107</sup>

The Court has repeatedly held that procedural due process rights can be waived.<sup>108</sup> In several procedural rights cases, the Court discourages presuming the waiver of constitutional rights.<sup>109</sup> Similarly, the Court has

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Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) (noting that when retroactively applying substantive rules, the state's finality interest yields to the defendant's liberty interest).

103. See, e.g., *Mackey*, 401 U.S. at 693 (Harlan, J., dissenting) (stressing that the defendant's liberty interest outweighs the state's finality interest when retroactively applying new substantive rules to old cases).

104. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing the waiver of the right to counsel guaranteed by the Sixth Amendment).

105. See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 259 (1973) (holding that defendant waived his Fourteenth Amendment right to be indicted by a constitutionally selected grand jury); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (defining how an accused individual can waive his Sixth Amendment right to counsel and Fifth Amendment right to remain silent).

106. See, e.g., *Johnson*, 304 U.S. at 465 (asserting that the trial judge must determine whether the defendant's waiver is "intelligent and competent"); *Brady v. United States*, 397 U.S. 742, 748 (1970) (affirming that waivers of constitutional rights must be voluntary, "knowing [and] intelligent . . . with sufficient awareness of the . . . [probable] consequences").

107. See *Estelle v. Williams*, 425 U.S. 501, 524 (1976) (discussing waivers "with respect to constitutional rights affecting the fairness and accuracy of the factfinding process").

108. See, e.g., *North Carolina v. Butler*, 441 U.S. 369, 371-72 (1979) (discussing the ways a defendant waived his rights to counsel and to remain silent, which are explained in the *Miranda* warning).

109. See, e.g., *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (urging "every

declined to presume the acceptance by litigants of the loss of “fundamental” rights.<sup>110</sup> However, the Court has not extended the defendant’s ability to waive constitutional protections to cover the waiver of substantive rights because doing so would allow the defendant to empower the government to bypass constitutional limitations on what conduct the government may proscribe.<sup>111</sup>

Allowing a guilty plea to function as a waiver of substantive due process rights presents two significant problems. First, the contours of a particular substantive right may not be known at the time of a plea and might only be determined through the appeals process.<sup>112</sup> For example, in the “saggy pants” hypothetical, there may be a substantive right to free expression via one’s clothing that the Court has yet to pronounce and precisely define, and one may reasonably predict that an appellate court would hold that such right exists.<sup>113</sup>

However, until the issue reaches the appellate level, it may be unclear to the prosecutor, judge, defendant, and even the legislature exactly what shape that right will ultimately take, thus the right is to some degree unknown.<sup>114</sup> But a defendant can only waive known rights announced by the Court.<sup>115</sup> Therefore, only procedural rights can be waived, because the contours of the right to a jury trial or the right to counsel, for example, are much more straight-forward, well-established, and easier to define than the substantive

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reasonable presumption” against the waiver of the right to a jury trial); *see also* *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (holding that all reasonable presumptions against the waiver of the right to a jury trial should be exhausted before presuming the waiver of this right).

110. *See* *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n of Ohio*, 301 U.S. 292, 307 (1937) (indicating that “acquiescence [to] the loss of fundamental [property] rights” should not be presumed).

111. *See, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (discussing only a defendant’s waiver of procedural protections, such as the right to counsel and the right to remain silent).

112. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 765-766 (1997) (discussing the building of substantive due process rights through judicial jurisprudence).

113. *See* CROWLEY, LA., CODE OF ORDINANCES ch. 7, art. II, § 7-57(a) (2013) (criminalizing wearing “saggy” pants, potentially in violation of the First Amendment’s substantive protections).

114. *See, e.g., Glucksberg*, 521 U.S. at 722 (noting the difficulty of defining substantive due process rights and commenting that those rights are “perhaps incapable of being fully clarified”).

115. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining a waiver as “an intentional relinquishment or abandonment of a known right or privilege”).

rights upon which the government cannot legally infringe.<sup>116</sup>

The second problem is that the Federal Rule of Criminal Procedure governing pleas, Rule 11, does not clearly state that the defendant waives the right to challenge the constitutionality of the statute of her conviction upon appeal.<sup>117</sup> This rule states that, prior to accepting a defendant's guilty plea, the court must directly address the defendant in court to ensure that the plea is voluntary and inform her of the various trial rights she has, including the right to a jury trial, the right to counsel, and the right to confront adverse witnesses.<sup>118</sup> The court must then inform the defendant that by pleading guilty she waives the trial rights explicitly mentioned in Rule 11.<sup>119</sup> The court must also inform the defendant of any conditions of the plea resulting in a waiver of the right to appeal or to collaterally attack the sentence imposed.<sup>120</sup> The rule's text is unclear as to which appellate rights the plea agreement waives.<sup>121</sup>

This text may refer to the provision of Rule 11 allowing defendants to "reserve[e] . . . the right to have an appellate court review an adverse ruling of a [specific] pretrial motion" while simultaneously pleading guilty.<sup>122</sup> These motions include those alleging defects in the indictment, motions to suppress evidence, motions alleging defects in instituting the prosecution, motions to sever, and discovery motions.<sup>123</sup> However, this reservation only refers to the right to appeal certain pretrial motions, and not to the right to appeal the constitutionality of the statute under which the defendant was

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116. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (noting that the liberty protected by the Fourteenth Amendment Due Process clause "has not been reduced to any formula; its content cannot be determined by reference to any code").

117. See FED. R. CRIM. P. 11(b)(1) (listing the factors the court must inform the defendant of before she accepts her guilty plea, including the appellate rights she waives).

118. See FED. R. CRIM. P. 11(b)(1)(A)-(O) (listing the right not to plead guilty, the right to be protected from compelled self-incrimination and the right to present evidence and compel the attendance of witnesses, as well as other rights the defendant enjoys).

119. See FED. R. CRIM. P. 11(b)(1) (noting that a *nolo contendere* plea also functions as a waiver of these trial rights).

120. See FED. R. CRIM. P. 11(a)(2) (referencing the terms of a plea agreement provision to which the defendant agreed and signed).

121. Compare FED. R. CRIM. P. 11(b)(1)(N) (referring to the defendant's waiver of her right to appeal her sentence that may be placed in some plea agreements) with FED. R. CRIM. P. 11(a)(2) (mentioning only that the defendant can reserve certain appellate rights).

122. See FED. R. CRIM. P. 11(a)(2) (requiring "the consent of the court" in reserving this right).

123. See FED. R. CRIM. P. 12(b)(3)(A)-(E) (listing the various types of defenses that must be asserted by motions prior to trial).

charged.<sup>124</sup> The text does not mention the right of the defendant to reserve the right to challenge the constitutionality of the statute on appeal.<sup>125</sup>

Another possible meaning of this cryptic provision is that appellate rights under the statute only include post-conviction challenges to the defendant's sentence, but not the constitutionality of the statute of conviction.<sup>126</sup> Because Rule 11 does not require the trial court to explicitly tell the defendant that she is waiving the right to challenge the constitutionality of the statute by pleading guilty, the plea cannot possibly be intelligently made for the purposes of waiving that right.<sup>127</sup> Rights waived must, by definition, be waived intentionally.<sup>128</sup> Because the court does not explicitly inform a defendant that her plea will prohibit her from raising a constitutional challenge to the statute of her conviction on appeal, she has not intentionally relinquished or waived that appellate right; rather, she has only relinquished appellate rights that she has been informed of by the court.<sup>129</sup>

There is one potential safe harbor for a defendant wishing to challenge the constitutionality of the statute that indicted her while also avoiding trial: a pretrial motion to dismiss for the indictment's failure to state an offense.<sup>130</sup> Because a defendant is permitted appellate review of certain pretrial motions, notwithstanding a guilty plea, such a motion could possibly get her constitutional challenge before an appellate court even after she pleads guilty to the indictment.<sup>131</sup> However, courts evaluate motions alleging the failure to state a criminal offense based on whether there is a defect in the indictment

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124. See *id.* (failing to mention the defendant's rights to challenge the constitutionality of an underlying statute).

125. See FED. R. CRIM. P. 11 (a)(2) (allowing for appellate review of adverse determinations of certain pretrial motions).

126. See FED. R. CRIM. P. 11(b)(1)(N) (requiring courts to inform defendants of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence").

127. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970) (reiterating that pleas must be voluntarily, knowingly and intelligently made).

128. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waivers as "an intentional relinquishment" of rights).

129. See FED. R. CRIM. P. 11(b)(1) (including the various trial rights that are rendered irrelevant in the absence of a trial and the right to appeal the sentence in certain circumstances).

130. See FED. R. CRIM. P. 12(b)(3)(B)(v) (listing a defective indictment, for failure to state an offense, as a motion that must be made before trial).

131. See FED. R. CRIM. P. 11(a)(2); FED. R. CRIM. P. 12(b)(3)(B)(v) (allowing conditional guilty pleas in which the defendant "reserve[es] the right to have an appellate court review [] adverse determination[s] of . . . [certain] pretrial motions", such as a motion alleging a "failure to state [a criminal] offense" in the indictment).

or information, rather than whether there is a constitutional defect in the statute that led to the defendant's indictment and conviction.<sup>132</sup>

When an appellate court examines a pretrial motion alleging a failure to state a criminal offense, the relevant inquiry is not based on whether the government had the power to criminalize the defendant's conduct, but whether the factual allegations contained in the indictment constitute an offense as defined under the relevant statute.<sup>133</sup> If the factual allegations do constitute an offense, then the indictment is valid and the trial court is deemed to have denied the motion appropriately.<sup>134</sup> As in *Menna*, the defendant's contention would not be that she did not perform the acts that constitute a statutory crime, but that the state had no authority to prosecute her for performing such acts.<sup>135</sup>

Thus, the defendant who wants to avoid the practical burdens of trial while asserting that the state infringed upon protected conduct has no viable procedural options.<sup>136</sup> This defendant must either plead guilty and forfeit her right to challenge this infringement, or face an unnecessary prosecution that the state has no power to initiate.

### III. POLICY RECOMMENDATION

The resolution of *Class v. United States* is likely to have a tremendous impact on our plea-reliant criminal justice system.<sup>137</sup> Prosecutors often use the threat of more serious charges and longer sentences to pressure defendants into pleading guilty to a lesser charge.<sup>138</sup> Indigent defendants are

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132. See, e.g., *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004) (examining a pretrial motion alleging a failure to state an offense in an indictment for driving while intoxicated).

133. See *id.* (explaining the limited scope of the appellate court's review of the indictment).

134. See, e.g., *id.* (noting that courts are to examine the factual basis of the indictment and plea, and determine whether those facts satisfy the elements of a crime based on the statute).

135. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (expounding "the claim . . . that the State may not convict petitioner no matter how validly his factual guilt is established").

136. See, e.g., FED. R. CRIM. P. 11(a)(2) (providing a procedure for a defendant who wishes to challenge an adverse pretrial ruling, but not a defendant who wishes to challenge the constitutionality of the statute under which she is charged).

137. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (citing *Missouri v. Frye*, 566 U.S. 133 (2012)) (noting that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions . . . result [from] guilty pleas").

138. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1128 (2011) (discussing the

more susceptible to the intense pressure to accept a plea deal, and thus have higher rates of guilty pleas than other defendants.<sup>139</sup> Consider the case of Shanta Sweatt, an indigent defendant from Nashville, Tennessee.<sup>140</sup> Facing a felony conviction and a prison sentence ranging from two to twelve years after police found a small amount of marijuana in her home, Ms. Sweatt pled guilty to a misdemeanor possession charge and received a six-month suspended sentence, no probation, and a total of \$1,396.15 in fines and fees.<sup>141</sup>

Ms. Sweatt maintains that the drugs belonged to her boyfriend, but she was willing to accept the plea offer to significantly reduce her and her family's exposure.<sup>142</sup> Given the growing political support for legalizing marijuana and the potentially severe consequences of a possession charge, Ms. Sweatt hypothetically could have argued on appeal that criminalizing the possession of marijuana or imposing such severe sentences for possession is unconstitutional.<sup>143</sup> However, Ms. Sweatt must now live with a misdemeanor conviction and pay a sizable fine for making the rational choice to limit her exposure, without the opportunity to assert her rights in an appellate court.<sup>144</sup>

While the drug possession charge may be resolved, Ms. Sweatt now joins many other Americans who face long-term consequences for criminal convictions, including significant barriers to gainful and lawful

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broad discretion of prosecutors to pursue inflated charges with severe sentences in order to secure a plea).

139. See Brief of Nat'l Ass'n of Crim. Def. Lawyers et al. as Amici Curiae Supporting Petitioner, at 9-10, *Class v. United States*, (2017) (No. 16-424) (describing the imbalance of bargaining power between indigent defendants and prosecutors).

140. See Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC MONTHLY (Sep. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171> (examining the troubling state of plea bargaining and innocence in the criminal justice system).

141. See *id.* (describing Sweatt's alleged crime and the plea offer she accepted to avoid trial).

142. See *id.* (detailing Sweatt's fear that her son would be charged for the marijuana if she denied that it belonged to her).

143. See, e.g., Julia Marsh, *Ex-Jets Player Sues Jeff Sessions to Legalize Marijuana*, N.Y. POST (July 24, 2017), <http://nypost.com/2017/07/24/ex-jets-player-sues-jeff-sessions-to-legalize-marijuana/> (describing a recent civil suit that challenges the constitutionality of marijuana's Schedule I classification under the Controlled Substances Act on substantive due process grounds).

144. See Emily Yoffe, *supra* note 140 (noting that Sweatt's guilty plea likely waived her right to appeal).

employment.<sup>145</sup> Given the pervasiveness of plea bargaining, most of these convictions were undoubtedly secured via the plea-bargaining process.<sup>146</sup>

Given the prevalence of plea bargaining in the criminal justice system, the unequal bargaining power between defendants and prosecutors, and the serious consequences of accepting a plea to avoid the uncertainty of trial, a guilty plea should not waive a defendant's right to challenge the constitutionality of her statute of conviction.<sup>147</sup> In lieu of a holding that a guilty plea does not waive a defendant's right to challenge the constitutionality of her statute of conviction, Congress should amend Federal Rule of Criminal Procedure 11 to clarify precisely which rights are being waived.<sup>148</sup> Specifically, Congress should amend Rule 11(e), which governs the finality of guilty pleas, to include the following clause: "However, the plea may be rendered invalid if the defendant successfully exercises her right to appeal the constitutionality of the statute of her conviction."<sup>149</sup> Additionally, Congress should eliminate Rule 11(b)(1)(N), which requires the judge to inform the defendant of the terms of the plea agreement that waive appellate rights, as this provision would be rendered irrelevant by the proposed changes to Rule 11(e).<sup>150</sup>

## V. CONCLUSION

When the Supreme Court decides *Class v. United States* in October Term 2017, there will have several grounds to hold that a guilty plea does not inherently waive a defendant's right to challenge the constitutionality of the statute of her conviction.<sup>151</sup> The Court can use the guidance of Justice Harlan's retroactivity doctrine to determine that the state's interest in finality

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145. MICHELLE NATIVIDAD RODRIGUEZ, ET AL., NAT'L EMPL'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011) (estimating that over sixty-five million American adults face limited employment opportunities due to a criminal conviction).

146. See Brief of Nat'l Ass'n of Crim. Def. Lawyers et al. as Amici Curiae Supporting Petitioner, at 6-7, *Class v. United States*, (2017) (No. 16-424) (noting the statistical significance of cases resolved using plea bargains).

147. See generally *id.* at 5 (explaining the practical necessity of allowing appellate rights to survive a guilty plea).

148. See FED. R. CRIM. P. 11(b)(1) (listing the waived rights that the court must inform the defendant of before she accepts the plea deal).

149. See FED. R. CRIM. P. 11(e) (allowing for a "plea to be set aside only on direct appeal or collateral attack for involuntariness").

150. See FED. R. CRIM. P. 11(b)(1)(N) (requiring the judge to inform the defendant of any waivers of appellate rights contained in the plea agreement).

151. See *supra* Part III (arguing that a guilty plea should not waive a defendant's right to challenge the constitutionality of the statute of her conviction on appeal).

is vastly outweighed by the defendant's liberty interest in engaging in protected behavior without government interference.<sup>152</sup> The Court could take a more traditional substantive due process approach and hold that allowing a guilty plea to prevent the defendant from challenging state infringement on protected conduct would be an arbitrary imposition on a right protected by the Due Process Clause.<sup>153</sup> Additionally, the Court could examine Federal Rule of Criminal Procedure 11 and determine that the ambiguous text and the presumption against waivers of fundamental rights indicates that guilty pleas should not result in a waiver of substantive due process rights that can be asserted on appeal.<sup>154</sup> Regardless of which framework the Court uses to analyze the question presented in *Class*, the most logical holding would be that a guilty plea does not inherently waive a defendant's right to challenge the statute of her conviction on appeal.<sup>155</sup>

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152. See *supra* Part III(A) (drawing parallels between the Court's retroactivity doctrine and the issue in *Class*).

153. See *supra* Part III(B) (arguing that the Court's substantive due process doctrine provides a basis for holding that a guilty plea does not inherently waive a defendant's right to challenge the constitutionality of the statute of her conviction on appeal).

154. See *supra* Part III(C) (examining the text of the federal rule governing pleas, noting its ambiguity and its unfavorable presumption of a waiver of appellate rights).

155. See *supra* Part III (providing three possible grounds on which the Court may hold that a guilty plea does not inherently waive a defendant's right to challenge the constitutionality of her statute of conviction on appeal).