Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract

by BRITTANY SCOTT*

Introduction

First Amendment free speech doctrine is built on the understanding that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[1] However, despite this understanding, the First Amendment is not inviolable. The Supreme Court has acknowledged that it is possible to waive (intentionally relinquish a right or privilege) First Amendment speech rights.[2] But in doing so, the Supreme Court did not affirmatively establish the applicable test for cases involving First Amendment rights. Instead, the lower courts have been left to their own devices to determine the appropriate standard to apply in cases involving waiver of freedom of speech.

Waiver doctrine has its roots in *Johnson v. Zerbst,* a 1938 case on the Sixth Amendment right to assistance of counsel, in which the Supreme Court began to outline the requirements for waiver.[3] Prior to *Zerbst*, while the Supreme Court had suggested that it was possible to waive constitutional rights, it had not clearly established the elements for waiver.[4] In *Zerbst*, the defendant was arrested for possession of counterfeit bills and indicted, convicted, and sentenced at trial without assistance of counsel.[5] Defendant petitioned for *habeas corpus* and his petition was denied.[6] The government

* J.D. Candidate 2019, University of California, Hastings College of the Law; B.A. 2016, University of California, Berkeley. Special thanks to Christopher Robinson, Professor Matt Coles, and Professor Jennifer Dunn for their guidance, comments, and support. Further thanks to the editors of *Constitutional Law Quarterly* who dedicate countless hours to the publication of this journal every year.

1. W. Va. State Board of Educ. v. Barnette, 319 U.S. 624, 641 (1943).
2. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135 (1967).
3. Johnson v. Zerbst, 304 U.S. 458, 459 (1938).
4. *See* Powell v. Alabama, 287 U.S. 45 (1932).
5. *Zerbst*, 304 U.S. at 460.
6. *Id.* at 458.

argued that Defendant waived his right to counsel.[7] On review, the Supreme Court held that waiver requires an "intentional [voluntary] relinquishment or abandonment of a known right or privilege."[8] Further, the Supreme Court concluded that waiver is dependent on the particular facts and circumstances of the case—including background, experience, and conduct of the waiving individual.[9] This requirement has since been expanded in subsequent criminal rights cases to a requirement that waiver be knowing, voluntary, and intelligent.[10]

First Amendment waiver in contrast to waiver of rights in criminal proceedings (criminal waiver), does not have a robust history. While the Supreme Court has stated that waiver of First Amendment rights are waivable, any jurisprudence has remained lacking. First Amendment waiver by contract exists in a gap between the Supreme Court's prior restraint doctrine, which prohibits judicial suppression of speech prior to its occurrence,[11] and the unconstitutional conditions doctrine, which prohibits the government from conditioning benefits on an agreement to waive a constitutional right.[12] This Note asserts that First Amendment free speech rights may be waived by contracts between private parties and enforced when waiver is knowing, voluntary, and intelligent—the same standard required for waiver of criminal rights. First, this Note will examine the set of circumstances under which First Amendment waiver was established. Second, this Note will discuss how enforcement of private contracts constitutes sufficient state action (governmental interference with a constitutional right)[13] to implicate the First Amendment. Third, this Note will review the requirements of criminal waiver, compare them as applied in First Amendment waiver cases, and outline an expanded test for waiver to aid in analysis of First Amendment waiver. Finally, this Note will discuss how the courts justify First Amendment waiver, and provide examples of how the courts have weighed First Amendment interests against the interests favoring enforcement of contracts.

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

8. *Id.*

9. *Id*. at 459.

10. *See infra* Section VI.

11. New York Times Co. v. United States, 403 U.S. 713, 725 (1971).

12. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988).

13. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

I. The Supreme Court Has Not Expressly Stated a Standard for First Amendment Waiver

First Amendment waiver doctrine has not been explored extensively by the Supreme Court. The Supreme Court has not articulated a test for First Amendment waiver and has instead left this determination to the lower courts. Frequently, First Amendment waiver is found in contracts of silence—such as employment, settlement agreements, and trade secrets.[14] In such situations, it appears that the Court weighs First Amendment rights against the interests in confidentiality or prohibiting particular speech.[15] Further, in the above circumstances, the consideration or policy supporting waiver is very clear because it is based on negotiated contractual or quasi-contractual agreements.[16]

The Court rarely overtly discusses First Amendment waiver in its opinions. It is somewhat baffling that the Court has been willing to articulate a waiver test in other constitutional rights cases but has not expressly articulated a standard for evaluating First Amendment waiver. Instead, the Court appears to engage in a totality of the circumstances analysis, without identifying the elements that would trigger a finding of First Amendment waiver.

Snepp v. U.S. is one of the few cases in which the Court implies that First Amendment waiver has occurred.[17] In 1968, Snepp signed a contract with the Central Intelligence Agency ("CIA") conditioning his employment on Snepp's agreement not to publish any information relating to his employment without agency approval.[18] When Snepp published a book about CIA activities in Vietnam, the CIA sued seeking enforcement of the employment agreement.[19] In response, Snepp alleged that enforcement of the contract was a prior restraint on speech in violation of the First Amendment.[20] The Supreme Court, in a footnote to the opinion, determined that Snepp voluntarily signed the agreement in exchange for employment and that obtaining such an agreement was within the CIA's power.[21] The

14. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech,* 83 CORNELL L. REV. 261, 265 (1998).

15. *Id*. at 296.

16. A quasi-contract is a variant of an implied-in law contract where an obligation is imposed by law on individuals due to a special relationship between the parties. *Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014). This term may be applied to all noncontractual obligations which are treated as if they are contracts for the purpose of affording a remedy. *Id.*

17. Garfield, *supra* note 14, at 354 (citing Snepp v. United States, 444 U.S. 507, 508 (1983)).

18. *Snepp*, 444 U.S. at 508.

19. *Id*. at 507.

20. *Id*. at 503 n.3.

21. *Id*.

Supreme Court held that Snepp's confidentiality agreement with the CIA was enforceable as a matter of national security and enforcement did not violate the First Amendment.[22] In determining that the agreement was enforceable, the Supreme Court implied that a party may voluntarily waive their First Amendment rights. Beyond that brief footnote, the Court did not perform any additional waiver analysis, nor did it expressly comment on waiver in the opinion.

Similarly, in *Cohen v. Cowles Media Company,* the Court upheld a claim for promissory estoppel that prohibited reporters from engaging in free speech.[23] In *Cohen*, Cohen agreed to provide documents relating to a candidate in the 1982 gubernatorial election to Cowles Media reporters.[24] Cohen's agreement to provide information was predicated on the reporters' agreement to not disclose his identity in relation to the released information.[25] However, the reporters breached the agreement upon publication by unilaterally deciding to reveal Cohen's identity to the public.[26] Cohen subsequently sued for breach of contract.[27] Cowles Media argued that the First Amendment barred enforcement of the agreement because it would infringe on their free speech.[28] The *Cohen* Court held that a promissory estoppel claim was not in violation of the First Amendment because it was permitted under state law and did not specifically target the press.[29] Further, while enforcement of the agreement in *Cohen* had First Amendment implications, it did not substantively offend the First Amendment because any effects on the press were incidental to enforcement.[30] However, in *Cohen*, the Supreme Court did not address a standard for waiver, and instead concluded that enforcement of generally applicable laws will not offend the First Amendment.[31] There, the parties knowingly restricted their own ability to speak because they voluntarily agreed to not disclose their source.[32] Therefore the Court, in relying on the promissory estoppel claim, found that the parties waived their First Amendment rights.[33] *Cohen* suggests that when parties have agreed to

22. *Snepp*, 444 U.S. at 507.
23. Cohen v. Cowles Media Company, 501 U.S. 663, 671–72 (1991).
24. *Id.* at 664.
25. *Id.*
26. *Id.* at 666.
27. *Id.*
28. *Id*.
29. *Cohen,* 501 U.S. at 670.
30. *Id.* at 669.
31. *Id.*
32. *Id.* at 661.
33. *Id*.

restrict their First Amendment rights (in this case by agreeing not to disclose a source's name), there is no offense to the First Amendment, and therefore the Court will not engage in any First Amendment analysis.

In both *Snepp* and *Cohen*, the Supreme Court failed to give substantive guidance to help in making a determination of First Amendment waiver. The single similarity between the two cases is that at their foundation the obligations that created the waiver are contractually based. Perhaps the closest the Court has come to articulating a test for First Amendment waiver was in a case in which there was no contract, *Curtis Publishing v. Butts*.

In *Curtis*, the Saturday Evening Post accused a university athletic director of fixing a college football game.[34] The director filed a libel action and on appeal Curtis Publishing raised waiver of the director's First Amendment rights as a defense against the claim because he failed to raise any constitutional arguments before trial.[35] The Court held that waiver must be of a known right or privilege and that the defense has the burden of proving that the waiver occurred through clear and compelling evidence.[36] Accordingly, First Amendment rights may not be waived simply by showing that an argument was not presented in earlier litigation.[37] Any waiver must be made *knowingly*.[38] This case is the only case specifically addressing First Amendment waiver and to that extent, it is incomplete in comparison to the standard the lower courts have applied to First Amendment waiver.

II. First Amendment Waiver by Contract Is Permitted by the Third and Ninth Circuit Courts

The Third and Ninth Circuits have established that contracts between non-governmental parties may waive First Amendment rights. Waiver is generally permitted in employment contracts,[39] collective bargaining agreements,[40] and consent decrees. Both courts have applied the criminal proceeding waiver standard from *Johnson v. Zerbst* to First Amendment waiver. The Third and Ninth Circuits will enforce waiver of First

34. Curtis Publishing Co. v. Butts, 388 U.S. 130, 135 (1967).

35. *Id.* at 135.

36. *Id*. at 145.

37. *Id.*

38. *Id.*

39. *See* Garfield, *supra* note 14, at 265.

40. Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993); Barnard v. Lackawanna Cty., 194 F.Supp.3d 337 (2016).

Amendment rights by contract when waiver is made knowingly, voluntarily, and intelligently.[41]

A. First Amendment Waiver Is Enforceable in the Ninth Circuit

1. National Abortion Federation v. Center For Medical Progress*: First Amendment Waiver by Contract Permits Judicial Suppression of Speech.*

In *National Abortion Federation v. Center. For Medical Progress*, the defendants, David Daleiden and Troy Newman, on behalf of the Center for Medical Progress ("CMP"), infiltrated National Abortion Federation ("NAF") annual meetings in 2014 and 2015 and secretly recorded presentations and conversations for the CMP's Human Capital Project.[42] CMP claimed their recordings were intended to prove that NAF members, including Planned Parenthood executives, were allegedly engaged in criminal activity by profiteering from the sale of fetal tissue.[43] NAF required meeting participants to sign non-disclosure agreements prohibiting recording and distribution of NAF materials to third parties.[44] Beginning in July 2015, CMP began publishing video recordings that it had covertly recorded of Planned Parenthood executives, and threatened to publish similar surreptitiously recorded videos that CMP had taken at NAF's confidential meetings.[45] Plaintiff NAF sued Defendants seeking damages for breach of contract, violation of 18 U.S.C. Section 1964 (the Racketeer Influenced and Corrupt Organizations Act),[46] and a preliminary injunction to prevent CMP from releasing NAF materials obtained in 2014 and 2015.[47] Judge Orrick of the U.S. District Court for the Northern District of California granted a temporary restraining order, and after further proceedings, a preliminary injunction to the NAF, enjoining CMP from the following:

> 1. Publishing or disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned during any NAF annual meetings;

41. *Leonard*, 12 F.3d at 886; Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 206–07 (3d Cir. 2012); *Barnard,* 194 F.Supp.3d at 343; Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *58–*59 (N.D. Cal. Feb. 5, 2016).

42. *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485, at *5.

43. *Id.* at *6.

44. *Id.* at *15.

45. Complaint. at ¶ 98, *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485.

46. *Id*. at ¶ 108.

47. *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485 at *1, *5.

> 2. Publishing or disclosing to any third party the dates and locations of any future NAF meetings; and
> 3. Publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any annual NAF Meetings.[48]

Defendants argued that the injunction infringed on their First Amendment rights because it prohibited them from releasing any video or recordings demonstrating alleged criminal wrongdoings by abortion providers and de-sensitization of the abortion industry as a whole.[49] Thus, CMP claimed the injunction would be an unconstitutional prior restraint.[50] CMP argued public policy was on their side because the criminality and de-sensitization of abortion providers is of significant public interest.[51] Judge Orrick, however, ruled that while the injunction did infringe on speech, the defendants had waived their First Amendment rights by signing multiple contracts, including confidentiality agreements that were mandatory for exhibitors to attend the 2014 and 2015 NAF annual meetings[52] due to increasing hostility against abortion providers.[53]

Judge Orrick, applying the criminal right waiver standard,[54] held that First Amendment speech rights can be knowingly, voluntarily, and intelligently waived by contract, and he thereby granted the injunction.[55] He found that CMP had knowingly and intelligently waived its First Amendment rights by signing the NAF confidentiality agreements.[56] Analyzing whether CMP's waiver should be set aside on public policy grounds under Ninth Circuit law,[57] Judge Orrick balanced the public policy interest on both sides, ultimately ruling in NAF's favor that public policy supported enforcing CMP's First Amendment waiver.[58] He based this on a number of considerations, including the existing constitutional right to abortion, NAF members' right to associate in safety and privacy, and California's acknowledgment through legislative findings that abortion providers are often subjected to increased danger because of their profession

48. *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485, at *89.
49. *Id.* at *64,*67.
50. *Id.* at *6.
51. *Id.* at *64.
52. *Id.* at *57.
53. Complaint at ¶ 6, *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485.
54. *See infra* Section VI.
55. *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485, at *58–59.
56. *Id*.
57. *See* Leonard v. Clark, 12 F.3d 885, 886 (9th Cir. 1993).
58. *Nat'l Abortion Fed'n,* 2016 U.S. Dist. LEXIS 14485, at *80.

and their private information requires special protections, and the absence of any evidence supporting CMP's claims that NAF or its members were engaged in any alleged "criminal wrongdoing."[59]

Defendants subsequently appealed to the Ninth Circuit. In a non-precedential memorandum opinion, the Ninth Circuit upheld the preliminary injunction, stating that the district court did not err in finding First Amendment waiver based on the defendants' knowing agreement to the confidentiality clause in NAF's conference agreements, or in concluding that a balancing of the competing interests favored enforcement of those agreements.[60] Defendants subsequently petitioned for certiorari to the Supreme Court,[61] which Supreme Court denied on April 2nd, 2018.[62]

2. *Leonard v. Clark:* First Amendment Waiver is Enforceable in a Union Collective Bargaining Agreement.

Judge Orrick decided *National Abortion Federation v. Center For Medical Progress* against the backdrop of Ninth Circuit law, as reflected in decisions like *Leonard v. Clark*, in which the Ninth Circuit affirmed the U.S. District Court of the District of Oregon's finding of First Amendment waiver that resulted from a collective bargaining agreement.[63] In *Leonard*, the Plaintiffs Portland Firefighters Association (hereinafter, the "Union") signed a collective bargaining agreement with Portland, agreeing to Article V—which established that any increase in payroll costs resulting from legislative changes endorsed or supported by the Union would be charged against the Union-City Salary Agreement when such legislation went into effect.[64] The Union sued Portland and sought to have the district court declare Article V of their collective bargaining agreement invalid as a violation of the Unions' First Amendment rights.[65] Portland's defense was that the Union waived its First Amendment rights by signing the collective bargaining agreement.[66]

The Ninth Circuit agreed with Portland, holding that "First Amendment rights may be waived upon clear and convincing evidence that waiver is

59. *Nat'l Abortion Fed'n,* 2016 U.S. Dist. LEXIS 14485, at *80.

60. Nat'l Abortion Fed'n v. Ctr. For Med. Progress, 685 Fed. App'x 623, 626 (9th Cir. 2017).

61. Brief for Petitioner at 18, Daleiden v. Nat'l Abortion Federation, 2017 WL 3393651 (U.S. 2017) (No. 17-202).

62. Newman v. Nat'l Abortion Fed'n, 2018 U.S. LEXIS 2168, *1; Daleiden v. Nat'l Abortion Fed'n, 2018 U.S. LEXIS 2115, *1.

63. Leonard v. Clark, 12 F.3d 885, 892 (9th Cir. 1993).

64. *Id.* at 886.

65. *Id.*

66. *Id.* at 887.

knowing, voluntary, and intelligent,"[67] and finding that standard satisfied because the Union "as advised by competent counsel during the negotiations," "explicitly objected to Article V" during the negotiations, yet "voluntarily signed the labor agreement" notwithstanding its objections.[68] The Ninth Circuit held that "[i]f the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement."[69, 70] Accordingly, the Ninth Circuit has established that contracts can evidence knowing, voluntary, and intelligent waiver because parties have the ability to exchange rights in the bargaining process.[71]

B. First Amendment Waiver is Enforceable in the Third Circuit

The Third Circuit is in agreement with the Ninth Circuit's position on First Amendment waiver. In two cases, *Barnard v. Lackawanna County* and *Democratic National Committee. v. Republican National Committee*, the Third Circuit has upheld contracts waiving the parties' First Amendment rights.

In a case factually similar to *Leonard*, in *Barnard*, the plaintiff was suspended from her position after participating in union picketing.[72] The plaintiff was a participant in a collective bargaining agreement that required the parties not participate in sympathy protests.[73] The Third Circuit held that a party may waive their First Amendment rights when there is clear and convincing evidence of knowing, voluntary, and intelligent waiver.[74] The Third Circuit affirmed the district court's determination that waiver is more likely to have occurred when the facts indicate that the parties have engaged in bargaining or negotiation, and the parties were represented by counsel in the negotiations.[75]

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67. *Leonard*, 12 F.3d at 889 (citing D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). In *D.H. Overmyer Co*, the Supreme Court discusses waiver of due process rights and applies the criminal waiver standard to a non-criminal right. The *Leonard* Court's opinion claims that *D.H. Overmyer Co.* refers to First Amendment waiver, but on review, that it refers to waiver of due process rights.

68. *Id*. at 890.

69. *Id*.

70. The Ninth Circuit went on to address whether the Union's knowing, voluntary, and intelligent waiver should be set aside and rendered non-enforceable on public policy grounds. *Leonard*, 12 F.3d at 890. However, this prong of the analysis is not the focus of this Note and therefore will not be further addressed.

71. *Id*. at 890.

72. Barnard v. Lackawanna Cty., 194 F.Supp.3d 337, 338 (2016).

73. *Id*. at 343.

74. *Id.*

75. *Id*. at 344.

The *Barnard* court relied on the waiver standard established in *Democratic National Committee v. Republican National Committee,* a Third Circuit case from 2012.[76] The Republican National Committee ("RNC") sought modification of a consent decree with the Democratic National Committee ("DNC") limiting its ability to engage or assist in voter fraud prevention without advanced court approval.[77] RNC claimed that the consent decree violated the First Amendment because its advanced approval requirement was a prior restraint on their right to engage in political speech and the order forced speech by requiring a list of unlawful practices to be distributed with any ballot provided to a state party.[78] The *Democratic National Party* court held that a party may waive constitutional rights when there is clear and compelling evidence of knowing, voluntary, and intelligent waiver.[79] Several factors demonstrated that the RNC had waived its rights. First, the RNC had equal bargaining power with the DNC, and had not contended it did not know the significance of the consent decree.[80] Second, the RNC had obtained consideration for entering the agreement through a release of DNC's claims.[81] Cumulatively, these factors established that there was clear and convincing evidence that RNC knowingly, voluntarily, and intelligently waived its First Amendment rights.[82]

The Third and Ninth Circuit courts agree that First Amendment rights may be waived by contract. Further, both Circuits require a showing that waiver by contract was made knowingly, voluntarily, and intelligently, and that evidence of waiver must be clear and convincing. Thus, First Amendment waiver by contract mirrors the requirements laid out in the doctrine for waiver of criminal rights, only deviating in regard to the applicable evidentiary standard. Civil waiver requires a clear and convincing standard,[83] while criminal courts apply a preponderance standard in criminal proceedings.[84]

76. *Barnard*, 194 F.Supp.3d at 343.

77. Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 200 (3d Cir. 2012).

78. *Id.* at 204.

79. *Id.* at 205.

80. *Id.* at 206–07.

81. *Id.*

82. *Id.*

83. Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993); Barnard v. Lackawanna Cty., 194 F.Supp.3d 337, 343 (2016).

84. *See* Johnson v. Zerbst, 304 U.S. 458, 469 (1938); Lego v. Twomey, 404 U.S. 477, 489 (1972); Colorado v. Connelly, 479 U.S. 157, 168 (1986).

III. Court Enforcement of a Contract Is Sufficient State Action to Implicate the First Amendment

First Amendment waiver requires state action. Absent state action, the First Amendment cannot be invoked because it is a limitation on the government, not individuals.[85] This necessarily raises a threshold question to defenses asserting waiver of First Amendment rights. If First Amendment rights may be waived by contract between private parties, how does judicial enforcement of those contracts involving solely non-government actors implicate "state action?" As discussed below, the Supreme Court has not directly addressed this question.[86] Traditionally, state action requires the state's interference with a constitutional right.[87] This reflects the Supreme Court's desire to uphold a division between government and private action in relation to constitutional rights.[88] The courts can only enforce First Amendment waiver between third party contracts if there is state action. This is because the First Amendment is a limitation on state action, not private action.[89] As it is a prohibition on the government, in the absence of governmental interference of speech, the First Amendment will not normally be implicated by a non-governmental party's interference with free speech.

For example, in *National Abortion Federation v. Center for Medical Progress*, state action was necessary in order for the defendants' First Amendment rights to be implicated. In the above case, the defendants' First Amendment Rights could not have been violated in the absence of state action. The First Amendment was only implicated in this case because the court issued a preliminary injunction enjoining defendants' ability to release digital media and names of conference attendees.[90] Therefore, unless state action is has occurred, waiver of First Amendment rights is not at issue in cases involving third party contracts.

The Supreme Court addressed state action in third party contracts in its 1991 opinion *Cohen v. Cowles*.[91] In *Cohen*, after Cohen sued for breach of contract, defendant Cowles Media argued that the First Amendment barred enforcement of the agreement because it would infringe on its free speech.[92] The Minnesota Supreme Court concluded the Cohen's breach of contract

85. *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV.

86. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (addressing enforcement of a promissory estoppel claim which operated in the absence of a valid contract.).

87. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

88. *Id.*

89. Cent. Hardware Co. v. N.L.R.B., 407 U.S. 539, 547 (1972).

90. Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *89 (N.D. Cal. Feb. 5, 2016).

91. *Cohen*, 501 U.S. at 667.

92. *Id*. at 667.

claim was an unenforceable "moral commitment,"[93] but that he could proceed under a promissory estoppel theory (which the Minnesota Supreme Court raised on its own initiative).[94] On review, the Supreme Court held that a promissory estoppel claim between private actors involved state action within the meaning of the Fourteenth Amendment.[95] The Court concluded that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedom is sufficient to support a finding of state action.[96] Specifically, in *Cohen*, the Minnesota Supreme Court's holding that Cohen could recover under a promissory estoppel theory was sufficient to establish state action.[97] The fact that the state court could enforce the legal obligations established by the promissory estoppel theory was enough to constitute state action.[98] The Court's decision in *Cohen* shares this with Ninth and Third circuit courts' opinions discussed above. For example, in *National Abortion Federation v. Center for Medical Progress*, NAF asserted a claim for breach of contract under California law and Defendants argued that enforcement of the contract infringed on First Amendment rights.[99] Following *Cohen's* holding, when NAF sought enforcement of the contract under state law and Defendants alleged that enforcement violated their First Amendment rights, state action was established. In other words, when a court enforces legal obligations established by a contract under state law, it is state action and the First Amendment can be implicated and waived.

IV. The Unconstitutional Conditions Doctrine Does Not Apply to First Amendment Waiver by Contract When an Agreement Is Between Private Parties

Some academics have argued that waiver of constitutional rights is governed by the unconstitutional conditions doctrine in all cases except criminal rights.[100] The unconstitutional conditions doctrine holds that the government itself cannot condition benefits on an agreement to surrender

93. Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990) ("The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract.").

94. *Id.*

95. *Cohen*, 501 U.S. at 668.

96. *Id.*

97. *Id.*

98. *Id.*

99. Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *44, *3 (N.D. Cal. Feb. 5, 2016).

100. Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 460 (1995); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003).

(waive) a constitutional right.[101] Thus, in cases in which the government has offered a benefit in exchange for waiver of First Amendment rights, the waiver will ordinarily not be enforced.[102] However, the Supreme Court has expressly stated that the unconstitutional conditions doctrine does not apply in cases where the government is not involved.[103] Accordingly, while state action exists, the unconstitutional conditions doctrine is not invoked in this context because the government is not a party to the original agreement and the requisite exchange of consideration necessary to invoke the doctrine. Because the unconstitutional conditions doctrine does not apply to waiver of criminal rights,[104] the criminal rights waiver doctrine provides a pathway for evaluating waiver of First Amendment rights by contract. In fact, this is just what the lower courts have done—rather than create a new standard for First Amendment waiver, the Third and Ninth Circuits have relied on the criminal rights waiver standard in reviewing First Amendment waiver by contract.[105]

V. The Criminal Rights Waiver Standard Requiring Knowing, Voluntary, and Intelligent Waiver Is the Standard Applied to First Amendment Waiver

As discussed above, waiver doctrine is firmly rooted in criminal procedure, having its origins in *Johnson v. Zerbst,* a Sixth Amendment case in which the Supreme Court held that waiver was the relinquishment or abandonment of a known right or privilege.[106] In 1966, in *Miranda v. Arizona*, the Supreme Court concluded that criminal waiver must be made knowingly, voluntarily, and intelligently.[107] The Supreme Court established that individuals may waive the Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, the Sixth Amendment rights to a jury trial, confrontation, the assistance of counsel, and disclosure of material impeachment evidence.[108] Similarly, the Supreme Court has indicated First Amendment waiver is

101. Epstein*, supra* note 12, at 7.

102. *Snepps v. United States* suggests that the unconstitutional conditions doctrine is not an absolute prohibition against government agreements to surrender a constitutional right. In *Snepps*, the CIA was permitted to restrict Snepp's speech because of his employment agreement due to the CIA'S concern that Snepp's book was a risk to national security. 444 U.S. 507, 515–16 (1983).

103. Rust v. Sullivan, 500 U.S. 173, 197 (1991).

104. Mazzone, *supra*, note 100, at 832.

105. Leonard v. Clark, 12 F.3d 885, 886 (9th Cir. 1993); Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 206–07 (3d Cir. 2012); Barnard v. Lackawanna Cty., 194 F.Supp.3d 337, 343 (2016); Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *58–*59 (N.D. Cal. Feb. 5, 2016).

106. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

107. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

108. Mazzone, *supra*, note 100 at 831.

permissible in circumstances in which the government is not involved, and the unconstitutional conditions doctrine is not the appropriate standard to apply to First Amendment waiver by contract.[109] In the absence of further direction from the Supreme Court, the Third and Ninth Circuits have subscribed to the criminal rights waiver standard in cases involving waiver of First Amendment rights by contract.[110] Therefore, a full understanding of how the criminal rights waiver standard is applied can be derived from Supreme Court cases involving waiver of criminal rights and serve to illuminate how to analyze First Amendment waiver.

A. The First Amendment Is a Fundamental Right and Should Be Afforded the Same Level of Review as Criminal Trial Rights

The First Amendment deserves the same protections afforded by the presumption against waiver of constitutional rights because it is a fundamental right. The criminal rights waiver standard requiring knowing, voluntary, and intelligent waiver applies to rights intended to guarantee a fair trial.[111] Further, the Supreme Court has held that the '"courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"[112] It is without question that the First Amendment right to freedom of speech is a fundamental right.[113] However, in *Schneckloth v. Bustamonte*, a Fourth Amendment search and seizure case, the Supreme Court claimed the criminal rights waiver standard was applied "almost without exception to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[114] Despite the holding in *Schneckloth*, the First Amendment is entitled to the same protections afforded to fair trial rights.

While the First Amendment is heavily implicated in the criminal context,[115] it is not a right intended to guarantee a fair trial and would not be subject to the criminal waiver standard under *Schneckloth*. The First Amendment is intended to guarantee the preservation of an effective system

109. Mazzone, *supra*, note 100 at sections II and V.

110. *Leonard*, 12 F.3d at 889; *Democratic Nat'l Comm*., 673 F.3d at 205; *Barnard,* 194 F.Supp.3d at 343; *Nat'l Abortion Fed'n*, 2016 U.S. Dist. LEXIS 14485, at *60.

111. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

112. *Zerbst*, 304 U.S. at 464 (citing Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937)).

113. Gitlow v. New York, 268 U.S. 652, 666 (1925).

114. *Schneckloth*, 412 U.S. at 237.

115. Dan T. Cohen*, Freedom of Speech and The Criminal Law*, 97 B.U. L. REV. 1533 (2017).

of free expression.[116] As the Supreme Court acknowledged in *West Virginia Board of Education v. Barnette*, "if there is any fixed star in our constitution it is that no official can prescribe what shall be orthodox . . . [in] matters of opinion or forces citizens to confess by word or act their faith therein."[117] The Supreme Court has long acknowledged that the First Amendment is entitled to a similar heavy presumption toward the constitutional validity of prior restraints.[118] A claim that the First Amendment is less deserving of the strict scrutiny afforded to waiver of criminal trial rights would be antithetical to the Supreme Court's First Amendment jurisprudence. Thus, because the First Amendment falls firmly within the realm of the fundamental constitutional rights the courts must strictly scrutinize cases in which waiver is implicated.

B. The Fourth Amendment Is an Exception to the Criminal Waiver Standard Because It Is Not a Fair Trial Right

Of the three criminal rights in the Constitution derived from the original Bill of Rights (the right against search and seizure, the right against self-incrimination, and the right to counsel), the Supreme Court has acknowledged that the Fourth Amendment against warrantless search and seizure is the only criminal right not offended by unknowledgeable or unintelligent waiver.[119] The Fourth Amendment is an exception to the criminal right waiver standard because it is not intended to preserve a fair trial.[120]

In *Schneckloth v. Bustamonte*, police officers seized a stolen check that was located while the officers searched Bustamonte's vehicle with consent.[121] Bustamonte was charged with possessing a check with intent to defraud and filed a motion to suppress the check, arguing he had not waived his Fourth Amendment rights because his consent was not voluntary.[122] The Supreme Court held that the knowing, voluntary, and intelligent requirements were not required for Fourth Amendment waiver because the test is "almost without exception . . . applied only to those rights which the constitution guarantees to a criminal defendant in order to preserve a fair trial."[123] The Supreme Court further determined that Fourth Amendment

116. Thomas I. Emerson, *Toward A General Theory of the First Amendment,* 72 YALE L.J. 877, 878 (1963).

117. W. Va. State Board of Educ. v. Barnette 319 U.S. 624, 642 (1943).

118. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

119. *Schneckloth*, 412 U.S. at 227.

120. *Id*. at 238.

121. *Id.*

122. *Id*. at 227.

123. *Id*. at 237.

protections are not wholly indispensable to obtaining a fair trial and therefore do not require knowing or intelligent waiver.[124] This anomaly should be considered a by-product of the Court's effort to balance constitutional rights against the government's ability to enforce the law.[125] Therefore, the Fourth Amendment should be viewed as a unique circumstance rather than the rule. Accordingly the First Amendment should be subject to the same standards as the rights guaranteeing a fair trial because it is intended to preserve a system of free expression.[126]

VI. Breaking Down Knowing, Voluntary, and Intelligent

A. "Knowing" Waiver Occurs When the Waiving Party Was Cognizant or Aware of the Rights Prior to Waiving

Proper waiver of fundamental constitutional rights mandates that the waiver be made knowingly.[127] Knowing waiver requires that the waiving party was cognizant or aware of their rights prior to waiving.[128] In 1938, the Supreme Court in *Johnson v. Zerbst* held that knowing relinquishment of a right is dependent on the circumstances of the case.[129]

According to Black's Dictionary, "*knowing"* means cognizant or aware.[130] Knowing waiver is consistent with the dictionary definition insofar as it concerns the Fifth and Sixth Amendments. For example, in *Miranda v. Arizona*, the Court held that waiver of the right against self-incrimination was knowing when the Defendant had been read his Miranda warnings, and given the opportunity to invoke the warnings.[131] In *Colorado v. Spring*, the Defendant was informed of his Fifth Amendment rights twice by law enforcement, and he indicated he knew his rights and signed a form waiving Fifth Amendment protections.[132] In *Brewer v. Williams*, the Respondent did not knowingly waive his right to Sixth Amendment counsel when he led police officers to the body of a child he was charged with murdering after the officer made the infamous "Christian Burial Speech.[133] There, Respondent was in continual contact with his attorney, and he asserted on

124. *Schneckloth*, 412 U.S. at 238.

125. Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 618 (2007).

126. *See infra* section VI(A); Emerson, *supra* note 116, at 878.

127. *See infra* section VI.

128. *See infra* section VII.

129. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

130. *Knowing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

131. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

132. Colorado v. Spring, 479 U.S. 564, 572 (1987).

133. Brewer v. Williams, 430 U.S. 387, 404 (1977).

multiple occasions, that he would discuss the murder after consulting his attorney.[134] Accordingly, Respondent did not knowingly waive his rights because he was aware of his rights and invoked them.[135] In each case above, the waiving party was required to actually know which right they were waiving and intentionally abrogate that right. Therefore, per the case law discussed, knowing waiver is made when facts indicate the person waiving is cognizant or aware of their rights and relinquished the right with that knowledge in mind.

Similarly, both the Third and Ninth Circuits recognize knowing waiver in the First Amendment context. In *Leonard v. Clark*, the Ninth Circuit held that waiver was knowing because the Union was represented by counsel and explicitly objected to Article V of their collective bargaining agreement.[136] Furthermore, Portland suggested the language of the collective bargaining agreement.[137] In *Barnard v. Lackawanna*, the Third Circuit held that a union can explicitly or implicitly waive an employee's rights during the collective bargaining process.[138] Barnard's waiver was made knowingly, because it is made in exchange for a promise not to lock out union employees in exchange for waiver of the right to participate in strikes and protests.[139] In both cases, the knowing requirement was met by evidence that the parties bargained for the terms of waiver and it was done intentionally in exchange for some consideration.

The First, Fifth, and Sixth Amendments all employ the same standard for knowing waiver. In the above cases, the parties were either aware that they were exchanging one right for another, or that they agreed to accept the terms of the agreement. Accordingly, the courts apply the dictionary definition in their analysis of knowing waiver. This analysis is even simpler in the context of contracts, because often all parties bargained over and agreed to the contracts by signing the documents, and in so doing, knowingly waived their rights.[140] Ultimately, the courts look for facts that indicate that the person waiving the right was cognizant or aware of their rights and relinquished the right because of their awareness.

134. *Brewer*, 430 U.S. at 405–06.

135. *Id.*

136. 12 F.3d 885, 890 (1993).

137. *Id.*

138. 696 Fed. App'x. 59, 62 (2017).

139. *Id.* at 62.

140. *Leonard*, 12 F.3d at 889; Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 205 (3d Cir. 2012); Barnard v. Lackawanna Cty., 194 F.Supp.3d 337, 343 (2016); Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522 2016, U.S. Dist. LEXIS 14485, at *60 (N.D. Cal. Feb. 5, 2016).

B. "Voluntary" Waiver Is Determined by Reviewing the Evidence and Facts for Words or Actions Indicating Non-Coerced Permission to a Waiver of Rights

The Supreme Court requires voluntary waiver in criminal proceedings.[141] The Fourth Amendment right against search and seizure may be waived voluntarily when there is a showing of consent.[142] The Fifth Amendment right against self-incrimination requires that the waiver (in the context of confessions) be voluntary.[143] In *Miranda v. Arizona*, the Supreme Court made it clear that the voluntariness of the waiver of the Fifth Amendment right against self-incrimination was a fundamental concern central to the creation of Miranda Warnings.[144] There, the Court was concerned about the coercive effect of interrogations and sought to protect individuals from coercion by requiring the iteration of Miranda Warnings in order to establish the admissibility of confessions.[145] In *Zerbst*, the Court held that Sixth Amendment waiver of the right to counsel required an intentional relinquishment of the right.[146] In *Henderson's Distilled Spirits,* the parties were permitted to waive their right to jury trial by stipulation.[147] Despite this comprehensive body of case law, pinpointing situations where waiver is voluntary remains tricky.

Voluntary waiver occurs when a party's words or actions indicate permission to a waiver of their rights. Consent to waive a right cannot be given when it results from coercion, intimidation, or force.[148] When the Supreme Court reviews cases dealing with voluntary waiver, it engages in a totality of the circumstances analysis looking for evidence of coercion or facts indicating a clear willingness of a party to waive their rights.[149]

Miranda v. Arizona is perhaps the most famous waiver case in the whole body of jurisprudence. *Miranda* is an aggregate of four separate cases, all of which involved the custodial interrogation of defendants in police custody and oral admissions made during the course of interrogation.[150] In each case in *Miranda*, the Defendants appealed their convictions, arguing that their confessions were inadmissible as a violation of their Fifth

141. Miranda v. Arizona, 384 U.S. 436, 445 (1966).
142. Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973).
143. *Miranda*, 384 U.S. at 457.
144. *Id*.
145. *Id*. at 445.
146. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
147. *In re* Henderson's Distilled Spirits, 81 U.S. 44, 52 (1871).
148. *Id.*
149. *Miranda*, 384 U.S. at 457; Schneckloth v. Bustamonte, 412 U.S. 218, 233–34 (1973).
150. *Miranda*, 384 U.S. at 440.

Amendment right against self-incrimination.[151] The Supreme Court's concern regarding coercive conduct is at the forefront of the Supreme Court's opinion. However, ironically, the best articulation of the Supreme Court's coercion jurisprudence is found, not in the majority opinion, but the minority in Justice White's dissent. In his dissent, Justice White outlined the Court's coercion analysis, stating that conduct is coercive when a defendant is deprived of free choice, or physical or psychological actions were of such a degree that a defendant's will is overborne.[152] Ultimately, coercion is an important component of analyzing the actions, not of the waiving party, but the party seeking the waiver of the right.

Voluntary waiver not only requires a lack of coercion, but also a showing of consent. Although the Fourth Amendment is an exception to the general waiver standard, it is still useful in demonstrating how the Supreme Court analyzes voluntariness. In *Schneckloth v. Bustamonte,* the Supreme Court discussed two cases in which they reviewed voluntariness in the waiver context. First, in *Davis v. United States*, the Court found voluntary waiver occurred when the Plaintiff unlocked a door at the request of federal agents.[153] The act of unlocking the door served as sufficient action to demonstrate "acquiescence to the demand."[154] While the Court examined other salient facts in its analysis, it is evident that the most significant indicator of voluntariness was in the Plaintiff's actions.

By contrast, the Court in *Bumper v. North Carolina* found that the consent was not affirmative because Defendant claimed to have authority to search Plaintiff's home with a warrant, but did not physically possess the warrant.[155] Accordingly, the Plaintiff did not affirmatively consent to the search, because Defendant misrepresented his authority, effectively coercing Plaintiff into permitting entry onto the property.[156] The Court's discussions of *Bumper* and *Davis* provide examples as to what the Supreme Court is looking for when they analyze the issue of voluntariness. Accordingly, voluntary waiver can be found under the following circumstances: (1) Where there is evidence demonstrating that the waiving parties' words or actions clearly indicated a willingness to give up a right, and where (2) consent is given in the absence of any coercion by either party.

Voluntary waiver by contract applies the same principles as voluntary waiver of criminal rights. In fact, a contract makes the evaluation simpler,

151. *Miranda*, 384 U.S. at 445.

152. *Id.* at 534 (White, B., dissenting).

153. *Schneckloth*, 412 U.S. at 233 (citing Davis v. United States, 328 U.S. 582, 593–94 (1946)).

154. *Id.*

155. *Id.* at 234 (citing Bumper v. North Carolina, 391 U.S. 534, 548–49 (1968)).

156. *Schneckloth*, 412 U.S. at 234 (citing *Bumper*, 391 U.S. at 550).

because the contract reduces the waiver to written word, therefore embodying the terms of the waiver and the consideration exchanged for the waiver. In *Leonard v. Clark*, *Barnard v. Lackawanna*, and *National Abortion Federation ('NAF') v. Center. For Medical Progress*, the courts reiterate that voluntariness is a requirement of waiver. In *Leonard*, the waiver was voluntary because the parties had the opportunity to object to Article V in their agreement, and refused to sign the agreement based on their concerns.[157] The fact that the parties signed the agreement despite their concerns made the waiver voluntary.[158] Similarly, in *Barnard*, Plaintiff was a member of a Union involved in a collective bargaining agreement.[159] Because Plaintiff chose to be a member of the Union, she voluntarily waived her rights through the collective bargaining agreement.[160] In *NAF*, the fact that defendants chose to attend the 2014 and 2015 meetings, and signed the exhibition agreement, was sufficient to demonstrate they voluntarily waived their First Amendment rights in exchange for the right to attend the NAF meetings.[161] Thus, the Ninth and Third circuit courts agree that in the First Amendment context, voluntariness can be demonstrated through evidence the parties consented to the terms of a contract. In all three cases, the parties took part and acted to sign the agreements at issue, they were not coerced into waiving the rights. Consequently, in exchanging their rights for some consideration, the parties voluntarily waived their First Amendment rights.

The voluntary element is featured prominently in criminal cases involving the Fourth Amendment right against search and seizure[162], Fifth Amendment right against self-incrimination,[163] and the Sixth Amendment right to counsel.[164] As demonstrated by the Third and Ninth Circuit courts, voluntariness is no different in the First Amendment context—the courts simply required a showing that the parties willingly exchanged their right, and that they did so without any coercion.[165] Accordingly, in all cases involving the waiver of a constitutional right, waiver must be made voluntarily.

157. Leonard v. Clark, 12 F.3d 885, 890 (1993).

158. *Id.*

159. Barnard v. Lackawanna Cty.,194 F.Supp.3d 337, 343 (2016).

160. *Id*. at 343.

161. Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *61 (N.D. Cal. Feb. 5, 2016).

162. *See generally* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

163. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

164. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938).

165. *See infra* discussion VII.

C. "Intelligent" Waiver Requires an Awareness of the Constitutional Right Waived and the Consequences of Waiving the Right

"Intelligent" waiver is the awareness of one's constitutional rights *and* the consequences of waiving those rights. According to the Supreme Court, intelligent waiver is determined using the same method as applied for making a finding of voluntary or knowledgeable waiver; in other words, the Court applies a totality of the circumstances analysis.[166]

In all likelihood, this analysis is a carry-over from *Powell v. Alabama*, the first case in which the Court implicated the Sixth Amendment right to counsel.[167] In *Powell*, the Defendants were young African American men who were "ignorant and illiterate."[168] The Court partially relied on the defendants' ignorance in establishing the right to counsel, arguing that even an intelligent layman has little knowledge of the law.[169] While waiver was not a defense presented in *Powell*, it can be implied that the Defendants could not intelligently waive the right to counsel because of their "ignorance and illiterateness" nor could they adequately defend themselves in the absence of counsel. The *Zerbst* Court relied on *Powell* in establishing the waiver of the right to counsel.[170] In reality, this element could potentially be removed from the test and incorporated into the knowledge element. In fact, as discussed below, the Court generally performs the intelligence analysis as part and parcel of the knowledge analysis.

In *Patterson v. Illinois*, the Court reflects on cases in both the Fifth and Sixth Amendment context, holding that "intelligent" refers to choices "made with eyes open" or awareness of "the consequences of the decision to abandon a right."[171] However, this discussion is certainly conjunctive, requiring that the accused "kno[w] what he is doing" and "the nature of the right being abandoned."[172] In *Patterson*, the defendant was made aware of his right to counsel by virtue of being read his Miranda rights and the Miranda rights made him aware of the consequences if he chose to waive.[173] Intelligent waiver does not require that the defendant know all possible consequences that could "flow" from his waiver.[174] This holding suggests

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

167. *See* Powell v. Alabama, 287 U.S. 45 (1932).

168. *Powell*, 287 U.S. at 52.

169. *Id.* at 45.

170. *Zerbst*, 304 U.S. at 463, 463 n.10.

171. Patterson v. Illinois, 487 U.S. 285, 292 (1988) (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Moran v. Burbine, 475 U.S. 412, 421 (1986)).

172. *Patterson*, 487 U.S. at 292.

173. *Id*. at 294.

174. *Id.*

that an individual cannot have an intelligent waiver in the absence of knowledge. Intelligent waiver thus requires that the person waiving is aware of their rights *and* the consequences of waiving the right.

The Ninth Circuit performs the intelligence analysis for the First Amendment waiver by applying the same analysis as described in *Patterson*. In *Leonard v. Clark*, the court held that waiver was intelligent because the parties were represented by competent counsel during negotiations.[175] In *Leonard*, the court subscribed to the idea that because the Union was represented, it was aware of the rights being abandoned in the collective bargaining agreement.[176] The court also believed the Union "intelligently" waived First Amendment rights because the parties commented on the terms' potential First Amendment implications.[177] This commentary was sufficient to make a showing that the parties knew of the consequences of waiving in accordance with the terms of the agreement. In *NAF*, the court viewed Defendant's knowing decision to sign the exhibitor agreement as sufficient evidence that he intelligently waived his right.[178] Thus, it is apparent that the intelligence element occurs in conjunction with the knowledge analysis that occurs in both criminal and First Amendment waiver.

The "intelligent" element of waiver appears consistent across First, Fifth, and Sixth Amendment waiver. Often, the "intelligent" is analyzed as part of the "knowing" requirement. Thus, unsurprisingly, courts generally appear to analyze the "knowing" and "intelligent" requirements conjunctively. Accordingly, when courts analyze waiver, they seek evidence that the person waiving their rights was aware of their rights (knowing) and the consequence of waiving their rights (intelligent). Therefore, while the waiver is easily read as having three separate elements, the "knowing" and "intelligent" elements appear to be analyzed at the same time.

VII. The Evidentiary Standards as a Barrier to a Coherent Doctrine

It is evident from the above discussion that in both the criminal and First Amendment context, the courts rely on the same test to make a finding on waiver. The sole difference between the two waiver doctrines lies in the differing evidentiary standards that the courts require in order to make such findings. Perhaps the justification for the different evidentiary standards is

175. Leonard v. Clark, 12 F.3d 885, 890 (1993).

176. *Id*. at 890.

177. *Id*.

178. Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *61 (N.D. Cal. Feb. 5, 2016).

simply a preference for protecting First Amendment free speech rights over risking errors favoring suppression of speech.[179] The clear and convincing standard is theoretically a heightened evidentiary standard, and it bolsters the Supreme Court's express holding that there is a strong presumption against waiver of fundamental constitutional rights.[180]

First Amendment and criminal waiver each apply two different burdens of proof. However, this discrepancy is not a barrier to creating a cogent theory of waiver. The circuit courts apply a clear and convincing standard to First Amendment waiver.[181] By contrast, the Supreme Court applies a preponderance of the evidence standard in criminal waiver.[182] This means the Court requires a showing that there is greater than a 50-percent likelihood that Defendant waived their right.[183] Facially, the preponderance standard is the easier to meet than other burdens of proof because it is a lower threshold.

In contrast, the lower courts have applied a clear and convincing standard in cases involving First Amendment waiver.[184] The clear and convincing standard theoretically translates to a showing that there is a greater than 75-percent likelihood that Defendant waived their rights.[185] A survey of ten Eastern District of New York judges performed by Judge Jack Weinstein indicated that judges felt that the clear and convincing evidence standard fell somewhere between 60 percent and 75 percent.[186] Another survey of 170 federal judges by C.M.A McCauliff determined that judges considered clear and convincing to mean somewhere between 55 percent and 95 percent, averaging around a threshold of 74.99 percent.[187] This disparity indicates evidentiary standards are not absolutes, and as one honest judge expressed in Judge Weinstein's survey on the different burdens of proof:

> I suspect all we do by talking about proof by clear and convincing evidence or proof that something does or does not persuade us by

179. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 688 (1978).

180. Johnson v. Zerbst, 304 U.S. 458, 469 (1938).

181. *Leonard*, 12 F.3d at 885; Barnard v. Lackawanna Cty., 194 F.Supp.3d 337, 343 (2016.)

182. *See Zerbst*, 304 U.S. at 469; Lego v. Twomey, 404 U.S. 477, 489 (1972); Colorado v. Connelly, 479 U.S. 157, 168 (1986).

183. James Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 85 (1982).

184. *Leonard*, 12 F.3d at 889; *Barnard,* 194 F.Supp.3d at 343.

185. Fredrick E. Vars, *Toward A General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 18 (2010).

186. United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979).

187. C. M. A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, Or Constitutional Guarantees*, 35 VAND. L. REV. 1293, 1328, 1332 (1982).

> a margin of 60%, 70% or 80% is to give ourselves some language to explain a result that we have already reached by other means (e.g., where we do not wish to reach a result, we say that the evidence was not clear [unambiguous? undisputed?] and was not convincing [i.e., *we* are not convinced]).[188]

Other judges, in response to McCauliff's survey stated that burdens of proof were semantics, for lay people with no understanding of the law, or simply a question of a factfinder's satisfaction with the evidence.[189] Therefore, while the preponderance standard is a lower threshold, judges appear to vary greatly in their application of the clear and convincing standard and their application may be much less stringent than the application of a percentage of belief. Further, a deeper analysis of the preponderance versus the clear and convincing standard of proof has shown that in operation the standards rarely result in any variance in the outcome of a case.[190] Accordingly, the different evidentiary standards do not have any significant consequences on the operation of the waiver rules.

VIII. First Amendment Waiver by Contract Contravenes the Purpose of the First Amendment but May be Justified When Interests Outbalance First Amendment Concerns.

When the courts enforce a contract and suppress First Amendment rights, the courts are, by definition, imposing a prior restraint on speech and thus the same concerns governing prior restraint jurisprudence apply to cases enforcing contractual waiver. As the Supreme Court has stated, waiver of (most) constitutional rights should be considered with every reasonable presumption against it and under First Amendment waiver, there is a heavy presumption against prior restraints.[191] However, the Supreme Court's holding does not ban prior restraints in every case. Prior restraints are permissible in cases where there is judicial superintendence over the prior restraint and an immediate determination regarding the validity of the restraint.[192] In holding as such, the Supreme Court has acknowledged that not every prior restraint on speech is a threat to the freedom of speech. Contracts appear to fall within the category of prior restraints where judicial superintendence is employed, therefore making their enforcement valid.

188. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 362 (1992).

189. McCauliff, *supra* note 187, at 1333.

190. *Id.* at 1334.

191. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

192. *Id.* at 71.

Permitting First Amendment waiver by contract is directly opposed to the theories on which First Amendment jurisprudence is founded. The First Amendment's primary purpose is to protect individuals from governmental interference with free speech, publication, assembly, and religion.[193] As the Supreme Court has recited in its prior restraint decisions, "[i]t is better to leave a few . . . noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour [sic] of those yielding the proper fruits."[194] Enforcing contracts of silence is most certainly a "pruning of noxious branches" because it prohibits speech that is considered "noxious" as determined by the writer of the contract. Certainly, it has great implications because waiving a First Amendment right will vary from contract to contract and therefore can range from a minor restriction on speech to a broad and burdensome constraint on speech and there is no way to know the level of speech constrained until enforcement is required.[195] The courts are making value judgment when they balance enforcement of contracts and waiver of First Amendment rights. In choosing to enforce these waivers, the courts signal a preference for enforcing contracts over protecting First Amendment rights. That said, the justifications behind such contracts can be significant and the outcomes that could result from a lack of enforcement can be very serious and are therefore deserving of this preferential treatment.

Contracts that employ suppression of speech as an enforcement mechanism are not without justification. Such contracts can be used to protect the safety, privacy, and reputation of individuals, preserve national security, protect economic interests in the form of trade secrets and confidential interests, and prevent exposure to civil liability.[196] Further, the courts appear to balance the interests underlying the contract against the rights being waived. For example, in *Snepp v. United States,* the Supreme Court, in reviewing Snepp's non-disclosure agreement, held that enforcement of the contract in the interest of national security was sufficient to justify the imposition on Snepp's First Amendment rights.[197] In doing so, the Supreme Court considered the impact of the speech against the interests protected by the contract. As a second example, the court's injunction in *National Abortion Federation v. Center For Medical Progress* is undoubtedly a prior restraint because it prohibits CMP from releasing information obtained during the NAF meetings. The outcome produces

193. New York Times Co. v. United States, 403 U.S. 713, 716 (1971).

194. Near v. Minnesota, 283 U.S. 697, 718 (1931) (quoting REPORT ON THE VIRGINIA RESOLUTIONS, MADISON'S WORKS, vol. iv, 544.).

195. Perricone v. Perricone, 292 Conn. 187, 208 (2009).

196. *See* Nat'l Abortion Fed'n v. Ctr. For Med. Progress, No. C15-3522, 2016 U.S. Dist. LEXIS 14485, at *38 (N.D. Cal. Feb. 5, 2016); Garfield, *supra* note 14, at 269–72.

197. Snepp v. United States, 444 U.S. 507, 516 (1980).

some conflicting feelings. Legally, the defendants waived their First Amendment rights. In refusing to void the contract in *NAF*, and therefore finding waiver, the court is protecting abortion and reproductive health providers from doxing (publicly posting private information as a form of revenge or punishment)[198] and attacks that such providers are susceptible to.[199] In enforcing the contract, the court prevents NAF providers and members from experiencing serious and potentially deadly harassment. Despite the suppression of speech in *NAF,* enforcement of the *NAF* contract results in an emotionally justifiable outcome because it protects an individual's privacy and prevents their exposure to harm. In both examples, the courts seek to balance the interests protected by the contract against the infringement on speech, showing that the courts will not always give preference to First Amendment rights, where a contract is controlling, and the interests outweigh the burden on speech.

Ultimately, this tension between First Amendment rights and contractual interests will remain unless the Supreme Court chooses to confront First Amendment waiver by contract head on. First Amendment waiver certainly disregards much of the justifications for the First Amendment's existence. However, the interests that can justify waiver by contract are also persuasive in force. In the absence of contracts waiving First Amendment rights, individuals would be left at risk of significant exposure that has the potential to be more damaging than a limited imposition on First Amendment rights.

Conclusion

Contracts are an everyday part of life. From quickly accepting a clickwrap agreement to signing agreements for the privilege of attending a conference or class, contracts are everywhere. Some contracts are minor and unburdensome, while others require the exchange of fundamental constitutional rights to varying degrees. While the Supreme Court has been primarily silent and has not fleshed out the doctrine of First Amendment waiver, lower courts have taken the onus upon themselves and transposed the waiver standard of criminal waiver into First Amendment waiver doctrine. First Amendment waiver must be knowing, voluntary, and intelligent, meaning:

198. *Dox,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/dox (last visited Apr. 12, 2018).

199. *Nat'l Abortion Fed'n*, U.S. Dist. LEXIS 14485, at *38 (citing NAF Statistics stating there have been over 60,000 incidents of harassment against abortion providers between 1997 and 2014).

1. The individual waiving was aware of their rights (knowing) and the consequences of abandoning said right at the time of waiver (intelligent) and;
2. The waiving individual's words or actions clearly indicated a willingness to give up a right, and their consent was given in the absence of coercion (voluntary).

Waiver of First Amendment rights is controversial because it is antithetical to First Amendment jurisprudence on freedom of speech. In enforcing contractual obligations through orders suppressing speech, the courts are employing prior restraints on speech and giving deference to contracts and the interests they purport to protect. In doing so, the courts must consider the interests at issue in the contract against the First Amendment rights being waived. While waiver of First Amendment rights by contract is in tension with the theories underlying the First Amendment, in application the lower court's deference to contracts serves to protect interests that could otherwise subject individuals and groups to great harm.

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