Can California Pleas Resurrect Its Unconstitutional Conditions Doctrine?

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> Now, is it possible that with the seventy lawyers in this house we shall wrangle here for two days and not be able to settle the jury question? Can no man go to work and write a few lines that will suit the subject and not lead us into danger?
>
> —Patrick Dowling[1]

DOI: https://doi.org/10.15779/Z38P843X21
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* J.D. 2024, University of California, Berkeley, School of Law. My special thanks to Professor David Carrillo, who provided feedback on my first draft; to Professors Andrew Bradt, Katerina Linos, and the members of the Spring 2023 Note Publishing Workshop for their encouragement; and to Calvin Chiu for his feedback. Also, my thanks to the staff of the *California Law Review* for their dedication to this piece. This Note is an expansion of a published blog post: Emily Chuah, *Can California Pleas Resurrect Its Unconstitutional Conditions Doctrine?,* SCOCABLOG (Apr. 23, 2023), https://scocablog.com/can-california-pleas-resurrect-its-unconstitutional-conditions-doctrine [https://perma.cc/FE7F-PPDA].

1. Dowling made this statement during the 1879 California Constitutional Convention debates about how the constitution should address the jury system. *See* 1 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 304 (1881).

The Supreme Court of the United States is more conservative than it has been in decades, so the time is ripe to reexamine how state constitutions can provide broad protections of individual rights. California's unconstitutional conditions doctrine, which prohibits the government from conditioning individual rights on benefits, presents one promising means for this goal. Like all U.S. jurisdictions, California's criminal legal system is largely administered via plea bargains. Although courts characterize plea bargains as fair and necessary, these characterizations do not enjoy strong empirical support. This Note first explores common justifications for plea bargains through examining limited data, empirical studies, and case studies. Then, this Note assesses whether plea bargains violate California's unconstitutional conditions doctrine. This Note concludes that plea bargaining practices likely violate the doctrine and urges state actors to implement reforms. Specifically, courts, defense attorneys, prosecutors, and legislators can take steps to ensure that plea bargaining is less coercive. These actions would help the criminal legal system to strike the proper balance between the pursuit of state interests and greater protection of individual rights.

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INTRODUCTION

It is rare for an American to be exonerated,[2] and it is arguably even rarer for an American to join the National Football League (NFL).[3] California native Brian Banks has achieved both—he successfully prevailed on his innocence claim and became one of the oldest players to join the NFL.[4] At sixteen years old, Banks committed to play collegiate football when a classmate accused him of rape.[5] With his future at stake, Banks had a choice: he could pursue acquittal at trial and risk a forty-one-year sentence, or he could plead guilty and spend six

2. Jared Wadley, *Exoneration Registry Tracks 10 Years of Data, but Innocent Defendants Won't Get Day in Court*, U. MICH.: MICH. NEWS (Apr. 12, 2022), https://news.umich.edu/exoneration-registry-tracks-10-years-of-data-but-innocent-defendants-wont-get-day-in-court/ [https://perma.cc/K8UN-S3PQ].

3. Adam Robinson, *NCAA to the NFL: How Many NCAA Football Players Make It to the NFL?*, JUICE: THE INSIDE LOOK AT SYRACUSE ATHLETICS (July 18, 2022), https://sujuiceonline.com/2022/07/18/ncaa-to-nfl-how-many-ncaa-football-players-make-it-to-the-nfl/ [https://perma.cc/T4G5-XES8] (detailing how it is difficult for even collegiate football players to play for the NFL).

4. Karen Brooks, *Righting a Wrongful Conviction*, AM. U. WASH. COLL. OF L.: NEWS & EVENTS (Aug. 28, 2019), https://www.wcl.american.edu/news-events/news/righting-a-wrongful-conviction/ [https://perma.cc/988Z-5ELM].

5. Maurice Possley, *Brian Banks*, NAT'L REGISTRY OF EXONERATIONS (June 18, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3901 [https://perma.cc/4E76-WFK8].

years in prison.[6] In other words, Banks considered a plea bargain,[7] in which a guilty plea to a criminal charge is conditioned "upon [the] receipt of a particular sentence."[8] Banks accepted the bargain.[9] After pleading guilty, Banks faced an uphill battle. Challenging a plea is difficult,[10] and reversing a plea deal carries risks.[11] Banks only secured an exoneration through a stroke of luck: he secured a statement from his accuser as to the falsity of the accusation.[12]

When deciding to plead, Banks faced a Faustian bargain that is not unique.[13] Like in all U.S. jurisdictions, most of California's criminal cases end with pleas, many of which resulted from plea bargains.[14]

The country's reliance on plea bargains has normalized how plea bargains sacrifice constitutional rights for efficiency. Courts have justified plea bargains by characterizing the practice as necessary for an efficient criminal system.[15] However, some express concerns about the pervasiveness of plea deals. In February 2023, the American Bar Association (ABA) released a report that concluded that "the integrity of the criminal system is negatively affected by the sheer number of cases resolved by pleas."[16] The ABA has expressed various concerns about plea bargaining, such as its coerciveness, its tendency to undermine transparency and accountability, and its encouragement of overcharging.[17] Academics and journalists also recently renewed calls to reassess the value of plea bargaining.[18] They have raised concerns about the rate

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6. *Id.*

7. "Plea bargain" and "plea deal" are interchangeable terms, and this Note uses both.

8. People v. Hoffard, 899 P.2d 896, 902 (Cal. 1995).

9. *Id.*; Brooks, *supra* note 4.

10. Brooks, *supra* note 4.

11. STEPHANIE CLARKE, FIRST DIST. APP. PROJECT, GUILTY PLEA APPEALS: TYPES OF ERROR, LIMITATIONS ON REVIEW 5 (2011), https://www.fdap.org/wp-content/uploads/2020/11/GuiltyPleaIssuesTypesLimitations2011.pdf [https://perma.cc/3JRA-RYYT].

12. Possley, *supra* note 5.

13. A Faustian bargain is "a pact whereby a person trades something of supreme moral or spiritual importance . . . for some worldly or material benefit." *Faustian Bargain*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Faustian-bargain [https://perma.cc/8CCL-8KQT].

14. JUD. COUNCIL OF CAL., 2022 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2011–12 THROUGH 2020–21, at 55, 83 (2022) [hereinafter 2022 COURT STATISTICS REPORT]; JUD. COUNCIL OF CAL., 2023 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2012–13 THROUGH 2021–22, at 65–66 (2023) [hereinafter 2023 COURT STATISTICS REPORT]; *see* Isidoro Rodriguez, *"Outrageous Outcomes": Plea Bargaining and the Justice System*, CRIME REP. (Apr. 8, 2022), https://thecrimereport.org/2022/04/08/outrageous-outcomes-plea-bargaining-and-the-justice-system/ [https://perma.cc/3V6W-3TZN].

15. *See* Brady v. United States, 397 U.S. 742, 752 (1970).

16. THEA JOHNSON, AM. BAR ASS'N CRIM. JUST. SECTION, 2023 PLEA BARGAIN TASK FORCE REPORT 6 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf [https://perma.cc/B56M-X29F].

17. *See id.* at 10–11.

18. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-

at which factually innocent people plead guilty as part of plea deals and how the burdens of plea deals are borne disproportionately by poor defendants.[19]

Thus, it is imperative to explore how California, with one of the world's largest court systems[20] and highest incarceration rates,[21] can strike a balance between efficiency and respecting constitutional rights. This Note argues that plea bargains' benefits do not universally justify their impairment of constitutional rights, which means the practice likely violates California's unconstitutional conditions doctrine. The unconstitutional conditions doctrine limits the government's ability to condition benefits on the waiver of constitutional rights. This Note will explore criticisms around plea bargaining that academics, journalists, and the ABA have raised via the unconstitutional conditions doctrine.

An often-cited criticism of plea bargaining is that the practice violates the federal unconstitutional conditions doctrine because plea bargains benefit defendants who waive their rights in exchange for shorter sentences.[22] This Note is the first to assess whether plea bargains violate California's unconstitutional conditions doctrine. California's doctrine is broader than the federal doctrine.[23] The application of this doctrine to plea deals will require balancing the practical realities of the criminal system and the importance of constitutional rights.

This Note's significance is in how it demonstrates one way in which a state constitution can provide broader protections for individual rights than the Federal Constitution.[24] Some worry that the U.S. Supreme Court's recent

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cases-justice [https://perma.cc/F3UE-C3WG]; Clark Neilly, *The ABA's 2023 Plea Bargain Task Force Report*, CATO INST. (Feb. 22, 2023), https://www.cato.org/blog/plea-bargaining-stands-accused [https://perma.cc/YXM8-YWVP]; PLEA BARGAINING INST., https://pleabargaininginstitute.fairtrials.org/ [https://perma.cc/BEP8-34PQ] ("The Plea Bargaining Institute (PBI) is a groundbreaking project that will provide a global intellectual home for academics, policymakers, advocacy organizations, and practitioners working in the plea bargaining space to share knowledge and collaborate.").

19. *See infra* Part III.B.2.c.iii.

20. SONYA TAFOYA & VIET NGUYEN, PUB. POL'Y INST. OF CAL., CALIFORNIA'S CRIMINAL COURTS 1 (2015), https://www.ppic.org/wp-content/uploads/content/pubs/jtf/JTF_CriminalCourtsJTF.pdf [https://perma.cc/GTB6-6NDL].

21. DAN CANON, PLEADING OUT: HOW PLEA BARGAINING CREATES A PERMANENT CRIMINAL CLASS 263 (2022).

22. *See, e.g.*, Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 36 (2007).

23. *See* DAVID A. CARRILLO & DANNY Y. CHOU, CALIFORNIA CONSTITUTIONAL LAW 764–65 (2021).

24. This analysis is especially relevant due to the recent U.S. Supreme Court case that struck down the right to abortion, a significant substantive due process right. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022) (overturning the federal constitutional right to abortion). Many states have responded by codifying a right to abortion in their state constitutions, thus creating broader protections for individual rights than the Federal Constitution. Kate Zernike, *A Volatile Tool*

departure from precedent foreshadows greater restrictions on substantive due process rights.[25] Now is the time to renew Justice Brennan's call to use state constitutions to accord greater protections to individual rights.[26] One way we can implement Justice Brennan's call is through California's unconstitutional conditions doctrine.[27] This doctrine is broader than its federal counterpart and is based on substantive due process principles.[28] Thus, applying this doctrine to California's plea bargaining can afford greater protections to defendants' constitutional rights. Also, a similar doctrine can be used by other states.[29]

Emerges in the Abortion Battle: State Constitutions, N.Y. TIMES (Jan. 29, 2023), https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html [https://perma.cc/R8XQ-UU9Y] (describing how the South Carolina state constitution protects abortion); Veronica Stacqualursi, Devan Cole & Paul LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the US*, CNN (Nov. 9, 2022), https://www.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms/index.html [https://perma.cc/593M-EDW8] (describing how Michigan, California, and Vermont voters added a right to abortion to their respective state constitutions); *see also* Rachel Roubein, *How Liberal States Are Shoring Up Abortion Rights*, WASH. POST (Jan. 30, 2023), https://www.washingtonpost.com/politics/2023/01/30/how-liberal-states-are-shoring-up-abortion-rights/ [https://perma.cc/L4HW-PF36] (describing how Washingtonians considered protecting abortion rights in Washington's state constitution).

25. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring) (opining that substantive due process lacks basis in the Constitution); Nina Totenberg & Sarah McCammon, *Supreme Court Overturns* Roe v. Wade*, Ending Right to Abortion Upheld for Decades*, NPR (June 24, 2022), https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn [https://perma.cc/EZL6-PB85]; Olivia Goldhill, *Supreme Court Decision Suggests the Legal Right to Contraception Is Also Under Threat*, STAT (June 24, 2022), https://www.statnews.com/2022/06/24/supreme-court-decision-suggests-the-legal-right-to-contraception-is-also-under-threat/ [https://perma.cc/7CEG-7KY8]; Becky Sullivan & Juliana Kim, *These 3 Supreme Court Decisions Could Be at Risk After* Roe v. Wade *Was Overturned*, NPR (June 24, 2022), https://www.npr.org/2022/05/05/1096732347/roe-v-wade-implications-beyond-abortion [https://perma.cc/TFW4-MWQ3]; Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/FFH2-ENTS] (describing how the most recent Supreme Court term produced many dramatic changes in the law and how this will be the nation's Supreme Court "for the next quarter century").

26. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977).

27. *Constitution Annotated: Analysis and Interpretation of the U.S. Constitution: Amdt. 1.7.13.1 Overview of Unconstitutional Conditions Doctrine*, U.S. CONG., https://constitution.congress.gov/browse/essay/amdt1-7-13-1/ALDE_00000771/ [https://perma.cc/NZY4-72ZD].

28. CARRILLO & CHOU, *supra* note 23, at 764–65, 771 (describing how California developed its own unconstitutional conditions doctrine and how California used the doctrine to strike down government actions even in contexts similar to where the federal Supreme Court declined to use the federal doctrine).

29. As mentioned above, all U.S. states resolve most of their criminal caseloads via plea bargains. *See* Rodriguez, *supra* note 14. Other states can follow the analysis outlined in this Note to combat this issue by developing their own state unconstitutional condition doctrines like California has. Levine, Remy, and Schapiro have encouraged states to do this generally. *See* Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *Protecting State Constitutional Rights from Unconstitutional Conditions*, 56 U.C. DAVIS L. REV. 247, 254–58 (2022).

This Note acknowledges that courts will likely not use this doctrine to invalidate plea bargains and that the abolition of plea bargains is unlikely. Due to jurisdictional differences and difficulties with facial challenges, litigating the constitutionality of plea bargains statewide would likely require an as-applied approach. This Note maintains that an abolition of plea bargains is not impossible but also acknowledges its improbability. However, even without a court entertaining challenges to plea bargaining or abolition, this doctrine still serves as a valuable way for state actors to examine this issue. Viewing the problem of excessive plea bargains through this doctrinal lens can help guide legislators, judges, and criminal attorneys in ensuring greater protections for fundamental constitutional rights.

Part I of this Note describes why plea bargains present an unconstitutional conditions doctrine problem and how the waiver doctrine relates to this Note's analysis. Next, Part II discusses the constitutional rights waived by plea deals, California's unconstitutional conditions doctrine, and judicial use of the doctrine. Part III applies California's doctrine to plea deals by examining limited statewide data, empirical studies, and case studies. Considering how plea deals likely violate California's unconstitutional conditions doctrine, Part IV proposes four solutions: using the doctrine to challenge plea deals, changing prosecutorial practices, relying on bench trials as a less restrictive alternative, and seeking legislative reforms.

I. THE PROBLEM

A. Plea Bargains as an Unconstitutional Conditions Problem

Plea deals present an unconstitutional conditions problem. The unconstitutional conditions doctrine limits the government's "otherwise broad authority to condition the grant of a privilege or benefit" on the waiver of constitutional rights.[30] This doctrine applies to plea bargains because they involve prosecutors promising defendants sentencing or charging leniency in exchange for a guilty plea.[31] A guilty plea requires a defendant to waive, at minimum, their constitutional rights to a jury trial and to confront adversarial witnesses, as well as their privilege against self-incrimination.[32] In other words, a criminal defendant receives prosecutorial leniency in exchange for waiving constitutional rights. There are two elements to an unconstitutional conditions claim: (1) the government directly orders someone to give up the rights at issue

30. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 988 (Cal. 2015).

31. People v. Orin, 533 P.2d 193, 197 (Cal. 1975).

32. Wan, *supra* note 22, at 37. Sometimes defendants waive additional constitutional rights as part of a plea bargain. *See* Johnson, *supra* note 18 (describing plea bargains that involve defendants waiving their constitutional right to receive exculpatory information).

and (2) the government promises a benefit to the individual in exchange for the waiver of the constitutional right. Plea bargains meet both elements.

Plea bargains meet the first requirement for unconstitutional conditions claims. The first requirement of an unconstitutional conditions claim is that the government cannot induce someone to give up their constitutional rights if the government could not otherwise directly take away those rights.[33] The government cannot unilaterally deprive defendants of the rights that are waived in plea bargains. A state cannot threaten a defendant to convince them to give up their privilege against self-incrimination.[34] Also, the state's improper denial of a defendant's right to a jury trial constitutes a structural error,[35] which is an error that requires automatic appellate reversal.[36] Lastly, the government cannot interfere with a defendant's right to confront the witnesses against them.[37] Thus, plea deals meet the predicate requirement for unconstitutional conditions claims.

Plea bargains also meet the second requirement for unconstitutional conditions claims as they involve the state granting a benefit to induce waivers of rights. Plea bargains involve the government granting defendants sentencing and charging leniency predicated on a waiver of constitutional rights. The Supreme Court of California has applied this doctrine to a wide range of government-granted benefits.[38] Cases that examine this doctrine have involved benefits extended to a class of individuals (for example, public housing) and benefits available to the public at large (for example, access to a public forum).[39] Lower courts have defined a public benefit as any "benefit conferred by a government entity," regardless of whether it is conferred to a discrete group or the public.[40] Thus, although sentencing leniency only benefits the accused, its limited scope does not prevent it from being a benefit. Prosecutorial leniency is a public benefit because it benefits defendants and is conferred by government actors.[41] A corollary to the second element of unconstitutional conditions claims says that conditioning a benefit on waivers of rights punishes those who exercise

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33. *See Cal. Bldg. Indus. Ass'n*, 351 P.3d at 989–90 (quoting Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013)).

34. *See, e.g.*, People v. Forney, 208 Cal. Rptr. 3d 289, 296 (Cal. Ct. App. 2016) (holding that it is unconstitutional when a State has compelled a criminal defendant to abandon their privilege against self-incrimination).

35. *See* People v. Ernst, 881 P.3d 298, 303 (Cal. 1994) ("It long has been established that the denial of the right to a jury trial constitutes a structural defect[] in the judicial proceedings that, by its nature, results in . . . a miscarriage of justice." (internal quotations and citations omitted)).

36. *In re* Angela C., 120 Cal. Rptr. 2d 922, 926 (Cal. Ct. App. 2002).

37. People v. Ochoa, 18 Cal. Rptr. 3d 365, 372–73 (Cal. Ct. App. 2004) (acknowledging that government interference with a defendant's confrontation rights would be improper).

38. *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 786 (Cal. 1981).

39. *Id.*

40. San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. Cal., 220 Cal. Rptr. 3d 346, 375 (Cal. Ct. App. 2017).

41. *See id.*

that right.[42] Jury trial convictions typically carry a "trial penalty," a phenomenon in which those who exercise their right to a jury trial receive longer sentences than those who accept plea bargains.[43] Plea bargains satisfy the corollary because those who accept plea bargains benefit and receive shorter sentences relative to those who do not waive their rights. Thus, plea deals meet this second element.

Plea bargaining presents an unconstitutional conditions problem because the practice meets both elements of the unconstitutional conditions doctrine. First, the government cannot directly deprive the accused of the constitutional rights that they waive during plea bargains. Second, plea bargains involve the government extending benefits to the accused for the waiver of their rights.

B. Waiver Does Not Negate the Unconstitutional Conditions Doctrine

Some argue that plea bargains do not present an unconstitutional conditions problem because defendants can otherwise freely waive their constitutional rights outside of plea bargaining.[44] However, this argument fails because the validity of conditional waivers is questionable and otherwise valid waivers do not satisfy California's unconstitutional conditions doctrine.[45]

Conditional waivers in plea bargains are coercive and are thus not valid waivers. Criminal defendants can only waive constitutional rights in a knowing, intelligent, and voluntary manner.[46] Coerced waivers cannot be voluntary; coercion includes "penalizing a defendant for exercising a constitutional right or promising leniency to a defendant for refraining from exercising a right."[47] Plea deals involve coercion as they promise leniency to defendants who do not

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42. Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 887 (1980).

43. *See* Jeffery T. Ulmer & Mindy S. Bradley-Engen, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 662–64 (2006); NAT'L ASS'N OF CRIM. DEF. LAW. TRIAL PENALTY RECOMMENDATION TASK FORCE, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 15–16 (2018); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 195–97 (1979). *But see* RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 41–43 (2020) (suggesting that whether a significant trial penalty exists depends on the jurisdiction). There are also academics that deny the existence of a trial penalty. *Compare* David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 783 (2013) (suggesting that there is plea penalty rather than a trial penalty), *with* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1221 (2015) (concluding that Abrams did not use the correct methodology in his study and that the data Abrams references support the existence of a trial penalty).

44. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832–33 (2003).

45. *See* Parrish v. Civ. Serv. Comm'n of Alameda Cnty., 425 P.2d 223, 230 (Cal. 1967) (noting that even "well-informed and voluntary" waivers of rights must satisfy the unconstitutional conditions doctrine when benefits are conditioned upon those waivers).

46. Cowan v. Superior Ct., 926 P.2d 438, 439–41 (Cal. 1996).

47. People v. Dixon, 63 Cal. Rptr. 3d 637, 642 (Cal. Ct. App. 2007).

exercise their rights.[48] If coercion vitiates the waivers involved in plea deals, then those waivers are involuntary and invalid.

Additionally, under California's unconstitutional conditions doctrine, even a knowing, intelligent, and voluntary waiver is improper. The Supreme Court of California has held that knowing, intelligent, and voluntary waivers are still invalid when wrongly conditioned upon receipt of a public benefit.[49] As discussed above, plea bargains condition waivers of defendants' constitutional rights on sentencing leniency, which is a public benefit. Thus, the voluntariness of the waiver involved in plea deals does not resolve whether plea bargains satisfy the unconstitutional conditions doctrine.

II.
BACKGROUND

A. California Constitutional Rights Implicated in Plea Deals

Plea deals implicate at least three fundamental federal and state constitutional rights: the privilege against self-incrimination, the right to a jury trial, and the right to confront witnesses.[50] The federal and California constitutions protect each of these rights,[51] and courts consider these rights fundamental under both constitutions.[52]

State constitutions can protect individual rights to a greater degree than the Federal Constitution.[53] However, California courts often decline to interpret the state constitution as broader than the Federal Constitution. The Supreme Court of California has often asserted that the California Constitution does not depend on how the federal high court interprets the Federal Constitution.[54] However, the California Supreme Court often defers to federal interpretations of the Federal Constitution when interpreting the California Constitution.[55] As relevant to plea bargaining, the state high court has subjected the state right to confront witnesses

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48. *See* Wan, *supra* note 22, at 34.

49. *See Parrish*, 425 P.2d at 230; *see also* Alhusainy v. Superior Ct., 48 Cal. Rptr. 3d 914, 918–19 (Cal. Ct. App. 2006) (holding that a voluntary and knowing waiver did not validate a plea deal that violated the unconstitutional conditions doctrine).

50. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

51. U.S. CONST. amends. V–VI; CAL. CONST. art. I, §§ 15–16.

52. *See* People v. Collins, 27 P.3d 726, 733–35 (Cal. 2001) (right to jury trial); People v. Barnum, 64 P.3d 788, 796–97 (Cal. 2003) (privilege against self-incrimination and right to confront witnesses).

53. *See* CARRILLO & CHOU, *supra* note 23, at 48 (describing that the Supreme Court of California normally demands "cogent reasons" before departing from the Federal Supreme Court's interpretation of the Federal Constitution).

54. *See, e.g.*, People v. Fields, 914 P.2d 832, 835 (Cal. 1996) ("[T]he California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution, as construed by the United States Supreme Court." (citations omitted)).

55. *See* CARRILLO & CHOU, *supra* note 23, at 72–73.

and the privilege against self-incrimination to its deference to federal constitutional law.[56]

By contrast, the California Supreme Court has tied the scope of California's right to a jury trial to the right's history rather than the federal right to a jury trial.[57] Because the state constitutional right to a jury trial has a unique scope and the scope of this right informs plea bargaining, this Note will detail the extent of this right.

State constitutional language implies that the jury trial right is absolute, but historical context limits the scope of this right. The California Constitution implies the right is absolute by stating that the right to a jury trial is "inviolate" and "secured to all."[58] However, the Supreme Court of California has held that the common law of 1850 controls the scope of the right.[59] During the nineteenth century, California courts utilized summary proceedings (the historical equivalent of bench trials) for some offenses.[60] Often, offenses subject to summary proceedings were petty offenses, but sometimes courts utilized summary proceedings for serious crimes.[61] Additionally, many colonies did not use juries for petty offenses, and courts have found this practice to be consistent with state constitutions' jury trial rights.[62] For example, New York as both a colony and a state made extensive use of summary proceedings for petty offenses.[63] New York courts rely on its colonial history when determining the scope of the jury trial right under the New York Constitution.[64] New York's practices are relevant because the New York Constitution influenced the 1849

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56. *See* People v. Krebs, 452 P.3d 609, 649 n.14 (Cal. 2019); People v. DeLeon, 27 Cal. Rptr. 2d 818, 821 (Cal. Ct. App. 1994); *In re* Martin, 744 P.2d 374, 392 (Cal. 1987); People v. Mitchell, No. B204569, 2008 WL 4694970, at *4 (Cal. Ct. App. Oct. 27, 2008) (calling the state right to compulsory process "equivalent" to its federal counterpart); *see generally* People v. Sanchez, 374 P.3d 320 (Cal. 2016) (relying on the Supreme Court's interpretation of the federal confrontation right to resolve the case).

57. The California Supreme Court has "looked to Blackstone, not the [federal] Sixth Amendment," to determine the scope of the jury trial right in criminal cases. Price v. Superior Ct., 25 P.3d 618, 637 (Cal. 2001). The Sixth Amendment to the Federal Constitution guarantees a jury trial right in criminal cases. U.S. CONST. amend VI. The California Supreme Court also looks to historical common law to determine the scope of the jury trial right in civil cases. *See* People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 834–35 (Cal. 1951).

58. CAL. CONST. art. I, § 16.

59. *See Price*, 25 P.3d at 637 (explaining that the California Supreme Court "look[s] to Blackstone, not the [federal] Sixth Amendment," to determine the scope of the jury trial right in criminal cases); *One 1941 Chevrolet Coupe*, 231 P.2d at 835 ("It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question . . . . The right is the historical right enjoyed at the time it was guaranteed by the [state] Constitution.").

60. *One 1941 Chevrolet Coupe*, 231 P.2d at 843–44.

61. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 927 (1926).

62. *See id.* at 937, 964–65.

63. *See id.* at 944–49.

64. *Id.*

California Constitution's provision for the right to a jury trial.[65] Thus, similar to New York, the California right to the jury trial only extends to the kinds of cases for which nineteenth-century courts used juries.[66]

Because historical context limits the scope of the jury trial right, the right does not apply to all criminal cases. State courts will look to history as instructive when determining if the jury trial right extends to crimes that did not exist in the 1800s.[67] Additionally, California's legislature can decline to extend the jury trial right to those accused of crimes that nineteenth-century courts delegated to summary proceedings.[68] The state legislature has determined that those accused of infractions do not have a right to a jury trial.[69] By contrast, those accused of misdemeanors or felonies do have a jury trial right.[70]

Additionally, the framers of California's constitution provided for a particular way to waive the right to a jury trial: bench trials. When the framers of the 1879 California Constitution debated whether parties should be able to waive the right to a jury trial, they assumed that a waiver would result in a bench trial.[71] The framers, concerned about a lack of judicial resources, allowed parties to waive jury trials for misdemeanors in the revised constitution.[72] Legislators amended the California Constitution in 1928 to allow for the waiver of the right to a jury trial in felony cases in order to preserve judicial resources.[73] The arguments offered in support of this amendment also envisioned that the waiver of a jury trial would result in a bench trial.[74] Thus, under an originalist analysis, which is the analysis that California courts should use to determine the scope of the right to a jury trial,[75] one could conclude that the framers never meant waivers of the jury trial to occur via plea bargains. Instead, the constitution's architects, aware of the cost of jury trials, permitted for waiver to occur via bench trials.

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65. Christian G. Fritz, *More than Shreds and Patches: California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13, 22 (1989). In general, California's 1849 constitution was largely based on Iowa's and New York's constitutions at the time, and California courts often use Iowa's and New York's constitutional histories when interpreting the California Constitution. *See* CARRILLO & CHOU, *supra* note 23, at 62–64.

66. *Ex parte* Wong You Ting, 39 P. 627, 628 (Cal. 1895) ("[T]he general rule at common law proper was that . . . all crimes involving loss of liberty as a punishment were triable by a jury; but parliament . . . provided by various statutes that there should be summary trials by justices of the peace . . . of certain petty offenses.").

67. *Id.* at 627–28.

68. *See id.*

69. CAL. PENAL CODE § 19.6; People v. Kus, 162 Cal. Rptr. 3d 789, 792–93 (Cal. App. Dep't Super. Ct. 2013).

70. PENAL § 19.6; *Kus*, 162 Cal. Rptr. 3d at 793.

71. 1 WILLIS & STOCKTON, *supra* note 1, at 253.

72. CAL. CONST. of 1879, art. I, § 7.

73. *See* Waiving Jury Trials in Criminal Cases, Cal. Proposition 20 (1928) (codified as CAL. CONST. of 1879, art. I, § 7 (1928)).

74. *Id.*

75. *See* sources cited *supra* note 59 and accompanying text.

B. California's Unconstitutional Conditions Doctrine

The Supreme Court of California has applied its unconstitutional conditions doctrine to analogous situations where the U.S. Supreme Court had declined to extend the federal doctrine.[76] The history of the state's unconstitutional conditions doctrine must be examined to establish that California's doctrine is distinct from the federal doctrine.[77] This history demonstrates that this doctrine is one way that California's constitution can provide broader protections to individual rights.

Carrillo and Chou suggest that California's distinct unconstitutional conditions doctrine developed in response to the inconsistent application of the federal doctrine.[78] The federal Supreme Court first articulated its unconstitutional conditions doctrine in the twentieth century.[79] However, since 1970, it has declined to apply its doctrine to cases.[80] In contrast, California continued to apply its state doctrine through the 1980s.[81] The state high court applied its doctrine to cases factually like federal cases where the U.S. Supreme Court declined to apply the federal doctrine.[82] This demonstrates that California's doctrine has been interpreted more broadly than the federal doctrine.

The California Supreme Court introduced the unconstitutional conditions doctrine in the 1940s. In *Danskin v. San Diego Unified School District*, the Supreme Court of California first used the unconstitutional conditions doctrine to strike down a government action, namely the government conditioning the use

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76. *Compare* Lehman v. City of Shaker Heights, 418 U.S. 298, 301–02 (1974) (refraining from applying the federal unconstitutional conditions doctrine to political ads on public buses), *with* Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 984–85 (Cal. 1967) (applying the California unconstitutional conditions doctrine to political ads on public buses); *compare* U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (refraining from applying the federal unconstitutional conditions doctrine to a statute that barred federal government employees from participating in political campaigns), *with* Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 413–15 (Cal. 1966) (applying the California unconstitutional conditions doctrine to a public hospital statute that barred state government employees from participating in certain political campaigns); *compare* Harris v. McRae, 448 U.S. 297, 315–16 (1980) (refraining from applying the federal unconstitutional conditions doctrine to the Hyde Amendment, which limited the use of federal monies to fund abortions for Medicaid recipients), *with* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 799–800 (Cal. 1981) (applying the California unconstitutional conditions doctrine to a statute that restricted the use of state monies to fund abortions for Medi-Cal recipients); *compare* Wyman v. James, 400 U.S. 309, 317–18 (1971) (refraining from applying the federal unconstitutional conditions doctrine to a statute that conditioned the receipt of state welfare on a government employee visiting the recipient's residence to ensure the absence of fraudulent behavior), *with* Parrish v. Civ. Serv. Comm'n of Alameda Cnty., 425 P.2d 223, 231–33 (Cal. 1967) (applying the California unconstitutional conditions doctrine to a county welfare director's initiative to search homes of welfare recipients without warrants in an attempt to discover welfare fraud).

77. *See* CARRILLO & CHOU, *supra* note 23, at 768.

78. *Id.* at 764.

79. *Id.*

80. *Id.*

81. *Id.* at 764–65.

82. *Supra* note 76 and accompanying text.

of a school auditorium on users signing a loyalty oath to the government.[83] The state high court first determined that the State could not directly compel private actors to refrain from engaging in certain speech.[84] Doing so would violate the constitutional right to freedom of speech without a sufficient justification.[85] Then, the court noted that although the government did not have to allow the public to use auditoriums, it could not restrict speech as a condition for use.[86] The loyalty oath that the government required of auditorium users would only accomplish indirectly what the State could not accomplish directly.[87] The state high court relied on the federal unconstitutional conditions doctrine in reaching this decision.[88]

Then, in the 1960s, the California Supreme Court developed its own unique doctrine. In *Bagley v. Washington Township Hospital District*, the court developed a three-part test for the state's unconstitutional conditions doctrine. *Bagley* involved the court applying the doctrine to restraints that a public hospital placed on employees' political activities.[89] The court recognized that the unconstitutional conditions doctrine had limits, so it developed a balancing test.[90] The court determined that a restriction on constitutional rights in furtherance of a legitimate state interest would be permissible only if it met this test. The court required the government to prove (1) that the conditions on employees' political activity "rationally relate[d] to the enhancement of the public service," (2) that the benefits the government sought "outweigh[ed] the resulting impairment of constitutional rights," and (3) that "no alternatives less subversive of constitutional rights [were] available."[91]

The California Supreme Court applied this balancing test from *Bagley* and *Danskin-San Diego Unified School District* to other cases.[92] This balancing test seems to be a combination of the rational basis test[93] and the strict scrutiny test.[94] *Danskin-Bagley*'s first element mirrors rational basis in requiring a relationship between a government action and a government interest. *Danskin-Bagley*'s last element reflects strict scrutiny's requirement of a narrow drawing of government

83. 171 P.2d 885, 887–88 (Cal. 1946).
84. *Id.* at 889–92.
85. *Id.*
86. *Id.* at 891–92.
87. *Id.* at 893.
88. *Id.* at 891–92.
89. 421 P.2d 409, 411 (Cal. 1966).
90. *Id.* at 413–14.
91. *Id.* at 411.
92. *See, e.g.*, Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 789–90 (Cal. 1981) (describing the three-pronged *Bagley* test and applying it to the facts in the case); *see also* Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885, 890 (Cal. 1946).
93. *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test [https://perma.cc/VGQ8-JKHC].
94. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/Q837-9MPS].

restrictions. The *Danskin-Bagley* test considers the government interests in restricting constitutional rights and weighs those interests against individuals' interests in their rights.[95] This test considers both the practical realities of government actions and the importance of safeguarding individual rights. This makes it an apt vehicle for evaluating plea bargains, which sacrifice individual rights presumably for the practical sake of a functioning criminal system.

The Supreme Court of California continued to apply its three-pronged *Danskin-Bagley* test to a range of situations until 1985; since then, the test has fallen into disuse.[96] The last time the court explicitly considered the test was in a 2006 case called *Evans v. City of Berkeley*.[97] In *Evans*, the court considered Berkeley's requirement that all who accessed berths in the marina had to comply with the city's nondiscrimination policy.[98] The court ultimately sidestepped the application of *Danskin-Bagley*. It concluded that Berkeley's policy did not affect the plaintiff's rights to free speech or to freedom of association because the plaintiff did not seek to engage in discrimination.[99] *Evans* did not explicitly reject the *Danskin-Bagley* test,[100] but its disuse has caused some to question whether the *Danskin-Bagley* test remains viable.[101] In response to the disuse of *Danskin-Bagley*, lower courts have adopted a variety of different approaches when analyzing unconstitutional conditions problems, which Part III.A will explore.

C. Judicial Application of the Unconstitutional Conditions Doctrine to Plea Bargains

The Supreme Court of California has never applied the unconstitutional conditions doctrine to plea bargains. Three California lower courts have applied the unconstitutional conditions doctrine to plea bargains, and all refrained from utilizing the *Danskin-Bagley* test.[102] These lower court cases also suggest judicial hostility to facial applications of the doctrine,[103] supporting this Note's argument that definitively determining whether plea deals violate California's unconstitutional conditions doctrine would require a case-by-case analysis.

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95. *See Danskin*, 171 P.2d at 890.
96. CARRILLO & CHOU, *supra* note 23, at 771–85.
97. 129 P.3d 394, 403–04 (Cal. 2006).
98. *Id.* at 400.
99. *Id.* at 403–04.
100. *Id.*
101. *See, e.g.*, CARRILLO & CHOU, *supra* note 23, at 787.
102. Thompson v. Spitzer, No. 30-2021-01184633-CU-MC-CXC, 2021 Cal. Super. LEXIS 32602, at *4–5 (Orange Cnty. Super. Ct. Oct. 8, 2021); Thompson v. Spitzer, 307 Cal. Rptr. 3d 183, 203–04 (Cal. Ct. App. 2023); Alhusainy v. Superior Ct., 48 Cal. Rptr. 3d 914, 918–20 (Cal. Ct. App. 2006).
103. *See Thompson*, 2021 Cal. Super. LEXIS 32602, at *4–5; *Alhusainy*, 48 Cal. Rptr. 3d. at 919; *Thompson*, 307 Cal. Rptr. 3d at 204 ("Based on the [plaintiffs'] allegations, we cannot find [that the plea deal] program facially violates the unconstitutional conditions doctrine.")

The cases that have applied the unconstitutional conditions doctrine to plea deals have utilized a case-specific inquiry. In *Alhusainy v. Superior Court*, the Fourth District Court of Appeal held that a plea deal that required a defendant to leave California was invalid as it impermissibly burdened their constitutional rights to travel, assembly, and association.[104] The court concluded that these burdens would be permissible if they were narrowly tailored for the government's purpose: keeping the defendant from the victim.[105] The court also held that conditions that burden constitutional rights must be reasonably related to the crime at issue.[106] In requiring a balancing of the government's goal and the plea deal's burdens on constitutional rights, the *Alhusainy* court employed an analysis that required a case-by-case inquiry.[107]

Similarly, in *Thompson v. Spitzer*, the Fourth District Court of Appeal and the Superior Court of Orange County also concluded that evaluations of unconstitutional conditions claims should use a case-by-case analysis.[108] The *Thompson* court considered how the doctrine applied to the Orange County District Attorney (OCDA)'s policy of collecting misdemeanants' DNA during plea deals.[109] OCDA prosecutors offered favorable case dispositions in exchange for the waiver of individuals' constitutional right to privacy in their DNA.[110] The trial court rejected the facial challenge to this policy.[111] But, the trial court left open the possibility for an as-applied challenge.[112] Likewise, the Fourth District appellate court that reviewed *Thompson v. Spitzer* held that the facial unconstitutional conditions doctrine challenge to OCDA's policy was not properly pled.[113] The court reasoned that holding that the policy was unconstitutional would mean finding that "taking a DNA sample from an alleged misdemeanant will *never* outweigh the resulting impairment of constitutional rights."[114] Because misdemeanors encompass serious and violent offenses, obtaining DNA from a misdemeanant could be sufficiently tailored to public safety in some cases.[115] The appellate court did not suggest that the OCDA

104. 48 Cal. Rptr. 3d. at 918.
105. *Id.* at 918–19.
106. *Id.* at 918.
107. *See id.* at 918–19.
108. *See* 2021 Cal. Super. LEXIS 32602, at *4–5.
109. *See id.* at *2; *see generally* Andrea Roth, *"Spit and Acquit": Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. 405 (2019) (describing the OCDA's policy of offering misdemeanants and those accused of infractions leniency in exchange for the DNA in their spit).
110. CAL. CONST. art. I, § 1; Roth, *supra* note 109, at 443.
111. *Thompson*, 2021 Cal. Super. LEXIS 32602, at *4.
112. *Id.* at *4–5.
113. Thompson v. Spitzer, 307 Cal. Rptr. 3d 183, 203–04 (Cal. Ct. App. 2023).
114. *Id.* at 204 (emphasis added).
115. *Id.*

program was always constitutional,[116] which again suggests that an as-applied challenge is the proper vehicle for unconstitutional conditions doctrine claims.

These cases do not resolve whether standard plea bargains satisfy the doctrine. This is because *Alhusainy* and *Thompson* examine the conditional waivers of rights other than the privilege against self-incrimination, the right to a jury trial, and the right to confront witnesses.[117] However, the case-by-case analysis adopted in *Alhusainy* and espoused by *Thompson* supports the suitability of a case-by-case analysis for whether plea bargains violate this doctrine.

III. APPLYING THE *DANSKIN-BAGLEY* TEST TO PLEA BARGAINS

A. *Legal Test*

In assessing whether plea deals violate California's unconstitutional conditions doctrine, this Note argues that the appropriate legal test to employ is the one developed in *Danskin v. San Diego Unified School District*[118] and *Bagley v. Washington Township Hospital*.[119] In the absence of more explicit guidance from the California Supreme Court,[120] the *Danskin-Bagley* test should be used to resolve whether plea bargains violate the unconstitutional conditions doctrine. The *Danskin-Bagley* test resolves the question at hand because the test is like the heightened scrutiny analysis that would otherwise apply to unconstitutional conditions claims, as demonstrated by the analysis employed for takings cases, lower courts' approaches, and substantive due process principles.

Examining how the state high court has recently treated the unconstitutional conditions doctrine informs which legal test is best suited for the question at hand. The latest California Supreme Court cases that address the unconstitutional conditions doctrine concern government takings and employ a takings-specific legal test akin to heightened scrutiny.[121] This test has its roots in federal constitutional law.[122] The takings test is like heightened scrutiny because it

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116. *See id.* at 203–04 (directing the court on remand to allow the plaintiffs to argue that they should be given leave to amend their facial challenge).

117. *Thompson*, 2021 Cal. Super. LEXIS 32602, at *2; *Thompson,* 307 Cal. Rptr. 3d at 203; Alhusainy v. Superior Ct., 48 Cal. Rptr. 3d 914, 917 (Cal. Ct. App. 2006).

118. 171 P.2d 885 (Cal. 1946).

119. 421 P.2d 409 (Cal. 1966).

120. The last time that the California Supreme Court discussed the *Danskin-Bagley* test was in 2006, and the court did not abrogate the test. Instead, the court determined that *Danskin-Bagley* did not apply to the facts of the case. *See* Evans v. City of Berkeley, 129 P.3d 394, 403–04 (Cal. 2006).

121. *See, e.g.*, City of Perris v. Stamper, 376 P.3d 1221, 1224–25 (Cal. 2016) (employing an analysis that requires an "essential nexus" to a "valid public purpose" and a "rough proportionality" to the "impact of the proposed development" at issue to justify the taking).

122. *Id.* (describing how the test originated from two federal Supreme Court cases: Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994)).

requires the state to demonstrate a proportional relationship between a legitimate state interest and the state's restriction of land use.[123]

Examining what lower courts have done in the absence of explicit guidance from the state high court is informative in determining which legal test to apply. Although lower courts have taken divergent approaches, each approach has employed a form of heightened scrutiny. The approaches include using federal constitutional standards,[124] applying the *Danskin-Bagley* test,[125] and analogizing to other cases that do not explicitly address the doctrine.[126] Regardless of approach, every case has acknowledged the appropriateness of a requirement that the government's restrictions of constitutional rights be sufficiently related to a government purpose.[127] Some courts also have required the conditions be narrowly tailored.[128] Regardless of whether lower courts continue to explicitly apply the *Danskin-Bagley* test, they still apply heightened scrutiny to unconstitutional conditions claims.

In the absence of the *Danskin-Bagley* test, substantive due process principles would be used to resolve unconstitutional conditions problems. Substantive due process constrains government-imposed burdens on fundamental rights by requiring that government actions meet strict scrutiny, a

123. *See* Action Apartment Ass'n v. City of Santa Monica, 82 Cal. Rptr. 3d 722, 730 (Cal. Ct. App. 2008) (describing the takings test as a "heightened scrutiny nexus and rough proportionality test").

124. People v. Bankers Ins. Co., No. D073724, 2019 WL 3214158, at *4–6 (Cal. Ct. App. July 17, 2019) (citing federal case law to resolve whether the unconstitutional conditions doctrine applies to waiving Fourth Amendment rights to "maintain release on bail").

125. San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. Cal., 220 Cal. Rptr. 3d 346, 375 (Cal. Ct. App. 2017) (citing the three-pronged *Danskin-Bagley* test and employing it to resolve the case); Thompson v. Spitzer, 307 Cal. Rptr. 3d 183, 203 (Cal. Ct. App. 2023) (same).

126. Thompson v. Spitzer, 30-2021-01184633-CU-MC-CXC, 2021 Cal. Super. LEXIS 32602, at *3–4 (Orange Cnty. Super. Ct. Oct. 8, 2021) (resolving issues by analogizing to and distinguishing from case law); Alhusainy v. Superior Ct., 48 Cal. Rptr. 3d 914, 917–20 (Cal. Ct. App. 2006) (same).

127. *See Bankers Ins. Co.*, 2019 WL 3214158, at *5–6 (upholding bail conditions under the unconstitutional conditions doctrine because they had a sufficient relationship to protecting public safety); *Thompson*, 2021 Cal. Super. LEXIS 32602, at *4 (acknowledging that this doctrine can apply to plea bargains if they infringe upon constitutional rights without being narrowly drawn for government purposes); *Thompson*, 307 Cal. Rptr. 3d at 203–04 (concluding OCDA's policy of collecting DNA as part of its plea bargaining practice could be "sufficiently tailored" to meet the government's interest in public safety); *Alhusainy*, 48 Cal. Rptr. 3d at 918–19 (requiring a proportional nexus between the burden on constitutional rights and the government's purpose); *San Diego Cnty. Water Auth.*, 220 Cal. Rptr. 3d at 376 (requiring the government to prove that the "conditioning [of] water conservation program payments on member agencies' surrender of their petitioning rights is reasonably related to rate stability" to prevail on its claim).

128. *See Thompson*, 2021 Cal. Super. LEXIS 32602, at *4 (explaining how applying the unconstitutional conditions doctrine to plea deals would require a case-by-case analysis of whether conditions were narrowly drawn to serve government interests and tailored to individuals); *Thompson*, 307 Cal. Rptr. 3d at 203–04 (considering if collecting misdemeanants' DNA was sufficiently tailored to the government's interest in public safety); *Alhusainy*, 48 Cal. Rptr. 3d at 918 (rejecting a government condition for being overly broad); *San Diego Cnty. Water Auth.*, 220 Cal. Rptr. 3d at 375–76 (requiring the government to prove that there are no less restrictive alternatives to prevail on its claim).

form of heightened scrutiny.[129] Since plea deals burden fundamental constitutional rights,[130] substantive due process applies and would require a strict scrutiny analysis.[131] Thus, substantive due process would also require a heightened scrutiny analysis in answering whether plea deals violate the unconstitutional conditions doctrine.

Since the *Danskin-Bagley* test largely tracks the heightened scrutiny analysis that otherwise would apply, this Note will apply the *Danskin-Bagley* test to assess whether plea bargains satisfy the unconstitutional conditions doctrine. Heightened scrutiny would apply when analyzing cases under this doctrine. This is demonstrated by the state high court's use of heightened scrutiny in unconstitutional conditions takings cases, lower courts' analyses when applying this doctrine, and substantive due process principles. The components of the *Danskin-Bagley* test, as described below,[132] are akin to heightened scrutiny. Both approaches require that restrictions on constitutional rights have a strong relationship to the government's interests in those restrictions and that the conditions be narrowly drawn.[133] Thus, applying the *Danskin-Bagley* test here will help determine whether plea bargains violate the unconstitutional conditions doctrine as the test is like the heightened scrutiny analysis that would otherwise apply.

Additionally, the *Danskin-Bagley* test is more appropriate here than heightened scrutiny. This is because *Danskin-Bagley* demonstrates how state constitutions can provide broad protections to individual rights and because *Danskin-Bagley* assesses arguments for and against plea bargaining. As referenced above, the state high court applied *Danskin-Bagley* to protect individual rights in factual contexts like those of federal cases in which the federal doctrine did not apply.[134] Applying this state-developed test rather than

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129. Based on substantive due process principles, a strict scrutiny standard is typically applied in cases that impact a fundamental liberty interest. Under this standard, a state may not infringe on an individual's fundamental right unless the countervailing interest is sufficiently compelling to justify the interference and the law is narrowly tailored to serve the countervailing interest. H.S. v. N.S., 93 Cal. Rptr. 3d 470, 478 (Cal. Ct. App. 2009).

130. *See* People v. Collins, 27 P.3d 726, 733–35 (Cal. 2001) (right to jury trial); People v. Barnum, 64 P.3d 788, 796–97 (Cal. 2003) (privilege against self-incrimination and right to confront witnesses).

131. Substantive due process is relevant here, as it is applicable whenever one's life, liberty, or property is deprived. *See* Bottini v. City of San Diego, 238 Cal. Rptr. 3d 260, 287 (Cal. Ct. App. 2018). Scholars have argued that the unconstitutional conditions doctrine comes from substantive due process principles. *See, e.g.*, Zygmunt J.B. Plater & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions—Making Use of a Muddy Supreme Court Exactions Case*, 89 U. COLO. L. REV. 741, 745, 796 (2018).

132. *Infra* Part III.B.

133. *Compare* D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 22 (Cal. 1974) (discussing elements of strict scrutiny), *with* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 781 (Cal. 1981) (discussing elements of *Danskin-Bagley* test).

134. *Supra* Part II.B.

a heightened scrutiny analysis will demonstrate how state constitutions can provide a broader scope of protection to individual rights. Additionally, the *Danskin-Bagley* test is unique in how it balances individual rights and government interests. Neither rational basis nor strict scrutiny involves balancing rights against government justifications.[135] Thus, this test is particularly useful for examining courts' justifications for plea bargains, as the main benefit of plea bargains lies in their supposed ability to save state resources and their drawback is their burdening of constitutional rights.[136] The application of *Danskin-Bagley*'s analysis to plea bargains involves not only assessing the constitutionality of the practice, but also the practicalities of potential alternatives should plea bargains prove to be unconstitutionally restrictive.

B. Applying the Danskin-Bagley *Test*

The *Danskin-Bagley* test is a three-element balancing test that imposes the burden of proof on the government. When unconstitutional conditions problems arise, the *Danskin-Bagley* test requires the government to "demonstrate (1) that the [conditions] rationally relate to enhancement of public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available."[137] The value of the restrictions on individuals' rights "must manifestly outweigh any resulting impairment of constitutional rights."[138] Additionally, the government's conditions must be drawn "with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits."[139] This Note will apply the *Danskin-Bagley* test element by element to demonstrate that the government is unlikely to meet its burden with respect to plea bargains.

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135. *Supra* notes 93–94. The *Danskin-Bagley* test is also not like intermediate scrutiny, since intermediate scrutiny does not ask if there is a less restrictive alternative available to be satisfied, while *Danskin-Bagley* does. *See Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [https://perma.cc/X5ZB-9YYZ].

136. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/NV2A-NREV].

137. Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 411 (Cal. 1966).

138. *Id.* at 414–15.

139. *Id.* at 413–15; *see also* Robbins v. Superior Ct., 695 P.2d 695, 704 n.20 (Cal. 1985) ("Neither the party complaining of the unconstitutional condition, nor this court, bears the burden of establishing that effective and less restrictive alternatives exist. The burden of proof is borne by the governmental entity that seeks to impose the condition." (citations omitted)).

1. The Relationship Between the Limitations on Individual Rights and Government Purposes

The first element of the *Danskin-Bagley* test requires analyzing whether the restraints placed on individuals' rights relate to the enhancement of government service. In other words, the state "must establish that the imposed conditions relate to the purposes" of the government program that confers the benefits.[140] For example, *Committee to Defend Reproductive Rights v. Myers* involved the denial of Medi-Cal benefits to those who sought abortions.[141] In analyzing the first element, the state high court considered whether there was a relationship between Medi-Cal's purpose and the policy of discouraging abortions.[142]

Thus, meeting the first element requires a relationship between the purposes of the criminal legal system and plea bargains. The criminal system confers plea bargains' benefits: sentencing and charging leniency. The state legislature has articulated one purpose for the state's criminal system and three different methods for achieving that purpose: "provid[ing] public safety by deterring and preventing crime, punishing individuals who commit crime, and reintegrating criminals back into the community."[143] This Note will treat the three methods listed (deterrence, punishment, and rehabilitation) as systemic goals that lead to the systemic purpose of public safety.[144] This Note concludes that plea bargains do not necessarily deter and prevent crime or punish individuals well. Nevertheless, this Note concludes that a strong relationship between plea bargains and the systemic goal of rehabilitation exists. Thus, plea bargains meet the first *Danskin-Bagley* element: the practice advances the state's purpose of public safety by rehabilitating individuals.

However, plea bargains likely do not serve the criminal legal system's goal of preventing crime, as illustrated by academic and case studies. Roth's study of the OCDA's practice of exchanging DNA for plea deals suggests that the practice does not enhance public safety.[145] In addition, a case study involving the Riverside County District Attorney (RCDA) demonstrates that the county saw a dramatic decline in crime rates after the RCDA instituted a policy of refusing

140. *See Bagley*, 421 P.2d at 414.

141. 625 P.2d 779, 790 (Cal. 1981).

142. *Id.*

143. *California's Criminal Justice System Primer*, LEGIS. ANALYST'S OFF. (Jan. 17, 2013) https://lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.aspx [https://perma.cc/KDC4-YFNU].

144. This Note will also assume that meeting any of one of these goals would achieve the system's purpose of providing public safety, which is also the assumption that the State Legislature makes. *See id.*

145. Roth, *supra* note 109, at 434–35 (concluding that this OCDA policy did not improve public safety because it collected DNA from low-level offenders that did not pose a safety risk). *But see* Thompson v. Spitzer, 307 Cal. Rptr. 3d 183, 204 (Cal. Ct. App. 2023) (concluding that collecting misdemeanants' DNA could be "sufficiently tailored" to advance the government's interest in public safety).

plea deals for serious crimes.[146] Although the correlation seen in the RCDA case study could not establish causality, the study suggests that plea bargaining does not clearly serve the state's interest in effectively preventing crime.

Plea bargains also likely do not serve the criminal legal system's goal of deterring crime because scholars dispute whether plea bargains relate to deterrence. Advocates of plea bargains' deterrent value often argue that the practice can prevent crime because it facilitates the incarceration of "dangerous persons" that prosecutors would not be able to convict at a trial due to weak evidence.[147] However, this argument does not consider that plea bargaining can weaken crime deterrence by signaling to individuals that they can get off "easy" for crimes, and such "leniency" can encourage recidivism.[148] There is some empirical support for this argument. One study concluded that the leniency that accompanies plea bargains "reduces the deterrent impact of the law."[149] This demonstrates that even if there is a relationship between plea bargaining and crime prevention and deterrence, it is weak.

Plea bargains also do not have a strong relationship to the criminal legal system's goal of punishing crimes. Critics of plea bargains argue that the practice offers defendants less punishment than their crimes deserve.[150] This rationale animated the supporters of California's 1982 Proposition 8, which tried to impose a restriction on plea bargains for serious felonies.[151] Additionally, California has not implemented a strict requirement for a factual basis for accepted pleas.[152] Thus, pleas can result in discrepancies between the punishment pled to and the underlying facts of the offense.[153] This disconnect undermines the ability of pleas to sufficiently punish individuals for their conduct.[154] Thus, plea deals do not have a strong relationship to criminal punishment.

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146. Dave Downey, *REGION: Pacheco Seeks Re-election*, SAN DIEGO UNION TRIB. (May 15, 2010), https://www.sandiegouniontribune.com/sdut-region-pacheco-seeks-re-election-2010may15-story.html [https://perma.cc/U4TU-3GYX].

147. Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 618 (1987) (internal quotations omitted).

148. *Id.* at 618–20; *see, e.g.*, Robert James Bidinotto, *Subverting Justice*, *in* CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 65, 75 (Robert James Bidinotto ed., 1995).

149. Fine, *supra* note 147, at 619 (internal citations omitted).

150. *See id.* at 626.

151. Criminal Justice, Cal. Proposition 8 (1982).

152. *Infra* Part III.B.2.c.

153. David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 868–69 (1992); *see* David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 258–61 (1965) (analyzing behaviors of California public defenders and district attorneys and concluding that public defenders focus on "the social characteristics of the persons who regularly commit [offenses], the features of the settings in which they occur, [and] the types of victims involved" rather than whether the facts of the event fit the requisite statutory elements of charges when deciding how to negotiate plea bargains).

154. *See* Starkweather, *supra* note 153, at 868–69.

Plea deals, however, may serve the criminal legal system's goal of rehabilitating those who have committed crimes because it involves an acceptance of responsibility. Plea bargains involve a defendant acknowledging their guilt, which some see as the first step toward rehabilitation as it involves an acknowledgement of personal responsibility.[155] However, some would dispute this premise. Some argue that defendants take plea deals for reasons other than taking personal responsibility. For example, Grossman argues that defendants plead guilty to avoid more severe punishment rather than to accept personal responsibility for wrongs.[156]

Additionally, plea deals can be rehabilitative because they can function to help prosecutors get defendants into rehabilitative diversion programs. Diversion programs address the root causes of crimes and provide needed resources to defendants.[157] Some prosecutors, such as the Alameda County District Attorney, even require criminal defendants to plead guilty before they can access diversion programs.[158] Some researchers have concluded that diversion programs can be effective at rehabilitating individuals.[159] However, critics argue that prosecutors can also place individuals in effective diversion programs without first seeking a plea deal.[160] Therefore, it is not clear if the plea bargain is what induces individuals to accept diversion programming.

Regardless of one's conclusions about defendants accepting personal responsibility or diversion programming, plea bargains still likely serve a rehabilitative purpose. Slobogin has concluded that plea bargains make rational sense in a system oriented toward rehabilitation rather than retribution. This is partly because the sentencing discount that accompanies plea bargains does not serve a retributive purpose.[161] Slobogin is consistent with the federal Supreme Court's conclusion that plea bargaining, "by shortening the time between charge and disposition, . . . enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."[162] These sources do not allude to a clear cause-and-effect relationship. However, the support referenced in the

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155. *See* Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 121 (2005).

156. *Id.* at 120–24.

157. Akhi Johnson & Mustafa Ali-Smith, *Diversion Programs, Explained*, VERA INST. OF JUST. (Apr. 28, 2022), https://www.vera.org/diversion-programs-explained [https://perma.cc/6MG8-FVND].

158. AM. C.L. UNION N. CAL. & URB. PEACE MOVEMENT, IN(JUSTICE) IN ALAMEDA COUNTY: A CASE FOR REFORM AND ACCOUNTABILITY 25 (2021) [hereinafter IN(JUSTICE) IN ALAMEDA COUNTY].

159. Elsa Augustine, Johanna Lacoe, Steve Raphael & Alissa Skog, *The Impact of Felony Diversion in San Francisco* 30–33 (Cal. Pol'y Lab, Working Paper No. 2021-1, 2021).

160. IN(JUSTICE) IN ALAMEDA COUNTY, *supra* note 158, at 25.

161. *See* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1525, 1546–47 (2016).

162. Santobello v. New York, 404 U.S. 257, 261 (1971).

preceding paragraphs indicates that there is a notable relationship between plea bargains and the goal of rehabilitating individuals.

Plea bargains satisfy the first element of *Danskin-Bagley* as there is a relationship between one of the goals of the criminal legal system and plea bargains. Although there may be attenuated relationships between plea bargaining and the punitive and deterrent purposes of the criminal legal system, plea bargaining likely advances the system's rehabilitative purpose. Plea bargaining meets one of the goals that is essential to achieving the legal system's purpose of providing public safety. Thus, this Note will examine the next element of the *Danskin-Bagley* test.

2. *Balancing Public Gains with the Resulting Impairment of Constitutional Rights*

The second element of the *Danskin-Bagley* test requires the government to demonstrate that "the utility of imposing . . . conditions" on waivers of constitutional rights "manifestly outweigh[s] any resulting impairment of constitutional rights."[163] This element requires balancing the importance of the state interests served by burdening constitutional rights and the importance of the implicated constitutional rights.[164] This also requires considering "the extent to which the . . . ability to exercise that right is . . . impaired."[165] This Note will follow the analysis employed in *Committee to Defend Reproductive Rights v. Myers*. First, the Note will examine the importance of the constitutional rights burdened, the extent of these burdens, and how well these burdens serve state interests.[166] Then, this Note will balance the importance of the constitutional rights at stake and of the state interests in restricting those rights.[167] Lastly, because plea bargains implicate fundamental rights, burdens on those rights must be justified by a compelling state interest. There is not enough evidence that plea bargains serve compelling state interests to satisfy this element of the test.

a. *Importance of the Constitutional Rights that Are Burdened*

First, this Note will assess the importance of the constitutional rights that plea bargains burden. The constitutional rights that a defendant waives via a standard guilty plea—the right to jury trial, the right to confront witnesses, and the privilege against self-incrimination—are fundamental under the state

163. Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 415 (Cal. 1966).
164. Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 791–92 (Cal. 1981).
165. *Id.*
166. *See id.*
167. *See id.* at 796–97.

constitution.[168] Additionally, each of these rights has deep historical roots. The right to a trial by jury is embedded in common law.[169] The privilege against self-incrimination also originated in English common law.[170] Some academics assert that the right to confront witnesses presented against the accused came from English common law.[171] Others argue that this right came from the American colonies' development of criminal procedure.[172] Regardless, the constitutional rights that plea bargains burden have deep historical roots, and courts classify these rights as some of the most important constitutional rights.[173]

b. Extent of the Burden Imposed on the Constitutional Rights

Next, this Note will assess the extent of the burden on the implicated constitutional rights.[174] Plea bargains require a person to completely forgo their right to a jury trial; indeed, one of the main purposes of plea bargains is to avoid jury trials.[175] Plea bargaining also requires a defendant to completely give up their right to confront witnesses against them, as this right is a trial right.[176] Plea bargains do not require a defendant to completely forgo their privilege against self-incrimination. A defendant can plead no contest, in which the defendant neither contests the criminal allegation nor admits factual guilt.[177] Defendants can also make an *Alford* plea, which allows them to maintain their innocence while taking a plea bargain.[178] However, all pleas still significantly burden the privilege against self-incrimination because they result in criminal punishment.[179] The privilege against self-incrimination functions to help

168. *See* People v. Collins, 27 P.3d 726, 733–35 (Cal. 2001) (concluding that the right to jury trial is a fundamental right); People v. Barnum, 64 P.3d 788, 796–97 (Cal. 2003) (concluding that the privilege against self-incrimination and right to confront witnesses are fundamental rights).

169. Robert von Moschzisker, *The Historic Origin of Trial by Jury*, 70 U. PA. L. REV. 1, 2 (1921).

170. Richard H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 964–65 (1990).

171. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 80–81 (1995).

172. *Id.*

173. *See, e.g.*, *Collins*, 27 P.3d at 733–35 (concluding that the right to jury trial is a fundamental right); *Barnum*, 64 P.3d at 796–97 (concluding that the privilege against self-incrimination and right to confront witnesses are fundamental rights).

174. *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 793 (Cal. 1981).

175. Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074 [https://perma.cc/MB8T-H6PF].

176. *See* People v. Francis, 245 Cal. Rptr. 923, 926–27 (Cal. Ct. App. 1988) (assessing the federal constitutional right to confront witnesses against the accused). The federal constitutional right to confront witnesses and its state counterpart are coextensive. *See generally* People v. Sanchez, 374 P.3d 320 (Cal. 2016) (relying on interpretation of the federal confrontation right to resolve the case).

177. *Nolo Contendere*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nolo_contendere [https://perma.cc/W7AR-4T4L].

178. People v. Rauen, 133 Cal. Rptr. 3d 732, 734 (Cal. Ct. App. 2011) (acknowledging that an *Alford* plea gets its name from the federal case *North Carolina v. Alford*, 400 U.S. 25 (1970)).

179. *See id.*

individuals avoid criminal sanctions.[180] Plea deals completely deprive defendants of their rights to a jury trial and to confront witnesses and significantly burden defendants' privilege against self-incrimination.

c. How Well the Burdens on Constitutional Rights Serve State Interests

Subsequently, this Note will identify state interests in plea bargains and assess how well plea bargains advance those interests to determine if plea bargains meet the second element of *Danskin-Bagley*.[181] The California Supreme Court first justified plea bargaining in *People v. West*.[182] The court asserted that the benefits of plea bargains for the government "lie[] in the savings in costs of trial, the increased efficiency of the procedure, and the further flexibility of the criminal process."[183] The state high court also reasoned that plea bargains preserve needed judicial resources,[184] and the court characterized the practice as fair.[185] Lastly, the court concluded that plea bargaining increases judicial discretion over sentencing as it "permits the courts to treat the defendant as an individual . . . and to adapt the punishment to the facts of the particular offense."[186] In applying the second element of the *Danskin-Bagley* test, this Note will consider how well plea bargains serve the *West* court's justifications for the practice: procedural flexibility, necessity due to limited judicial resources, fairness, and judicial discretion over sentencing. Plea bargains serve the state's interest in procedural flexibility well, but they do not necessarily serve any of the other state interests advanced by the *West* court.

i. Procedural Flexibility

As the *West* court reasoned, plea bargaining allows for procedural flexibility. Plea bargaining removes procedural protections that defendants who exercise their right to a trial otherwise enjoy.[187] Voir dire procedures and the rules of evidence that would apply during a jury trial can be dispensed with during plea negotiations.[188]

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180. For example, the privilege against self-incrimination does not apply when one is offered immunity that is coextensive with the privilege. *See* Spielbauer v. Cnty. of Santa Clara, 199 P.3d 1125, 1131 (Cal. 2009).

181. *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 793–94 (Cal. 1981) (concluding that the conditioning of Medi-Cal benefits on forgone abortions does not serve the state's interest in conserving fiscal resources or its interest in protecting the potential life of a fetus).

182. 477 P.2d 409 (Cal. 1970).

183. *Id.* at 413.

184. *Id.* at 414.

185. *Id.* at 413.

186. *Id.* at 414.

187. *See* Slobogin, *supra* note 161, at 1516.

188. *See* Wan, *supra* note 22, at 36.

Additionally, jury trials' fact-finding requirements are stricter than those for plea negotiations.[189] For instance, juries must be unanimous when finding facts,[190] and findings of fact must be based on substantial evidence.[191] Some procedural protections for the fact-finding process for guilty pleas exist, but the protections are weak. For example, trial courts must find whether the defendant has pled voluntarily and whether a factual basis for the plea exists.[192] However, the state high court has interpreted the requirement for a factual basis narrowly. The court concluded that this either requires the defendant to "describe the conduct that gave rise to the charge" or requires the court to "question the defendant regarding the detailed factual basis" of the plea.[193] A trial court does not need to explore whether a defendant knew of potential defenses.[194] Also, the trial judge does not have to be convinced of the defendant's guilt.[195]

The lower standard for fact-finding and lack of procedural protections that accompany jury trials mean that plea bargains allow for greater procedural flexibility than jury trials.

ii. Judicial Necessity

Whether plea bargains serve the state's interest in preserving needed judicial resources remains disputed. The *West* court advanced an often-cited justification for plea bargains: the state needs plea deals since using jury trials to dispose of all criminal cases would require more resources than the criminal system has. Thus, abolishing plea bargains would grind the system to a halt.[196] However, empirical studies, statewide data, and anecdotal reports do not establish that California needs plea bargains to preserve judicial resources.

Empirical studies have not demonstrated a strong correlation between the rate of plea bargains and judicial resource constraints. One would expect higher caseloads to be correlated with higher rates of plea bargains if the premise that plea bargains are needed to preserve judicial resources is true. However, studies of the association between caseloads and the frequency of plea bargaining have not found a significant relationship between the two.[197] One study concluded that

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189. Slobogin, *supra* note 161, at 1517–18.

190. People v. Melendez, 274 Cal. Rptr. 599, 608 (Cal. Ct. App. 1990) (quoting United States v. Gipson, 553 F.2d 453, 457–58 (5th Cir. 1977)).

191. People v. Echevarria, 13 Cal. Rptr. 2d 840, 845 (Cal. Ct. App. 1992).

192. CAL. PENAL CODE § 1192.5(c).

193. People v. Holmes, 84 P.3d 366, 372 (Cal. 2004).

194. *Id.* at 441.

195. *Id.*

196. *See* People v. West, 477 P.2d 309, 413–14 (1970) ("Numerous courts, commissioners, and writers have recognized that the plea bargain has become indispensable to the efficient administration of criminal justice."); SUBRAMANIAN ET AL., *supra* note 43, at 35.

197. SUBRAMANIAN ET AL., *supra* note 43, at 35, 37–39. For example, the Vera Institute noted:

> [One] study of 318,750 felony and misdemeanor cases filed in Wisconsin from 2009 to 2013

prosecutors that charge a higher proportion of arrests tend to also secure higher rates of guilty pleas, regardless of office size and crime rate in the jurisdiction.[198] This suggests that resource scarcity does not have a direct relationship with plea bargaining. Feeley even argues that plea bargaining resulted from other factors, such as a growth in the public defense apparatus and an increase in the criminal system's professional resources, rather than a need for judicial economy.[199] Feeley also maintains that system actors always work quickly to process cases, regardless of their caseloads, because of their "strong interest in being some place other than in court."[200] Thus, no academic consensus supports the premise that the state needs plea bargains to preserve judicial resources so that the criminal legal system can function.

Limited state-collected data also do not support the *West* court's assertion that the state needs plea bargains to preserve judicial resources.[201] However, there are limits to extrapolating from these data as the data are incomplete,[202] the data do not differentiate between criminal and civil judges, and there is no perfectly inverse relationship between jury trials and plea bargains.[203] Other unmeasured factors could be at play, and this Note does not attempt to undertake an empirical analysis of these data.

> similarly analyzed the relationship between prosecutor characteristics—including the size and make-up of their caseloads—and case outcomes, while controlling for numerous defendant and case variables. The researchers found a large range in the number of cases the prosecutors worked on—from fewer than 100 in a five-year period to several thousand. However, there was no relationship between the size of prosecutors' caseloads and either their case dismissal rate or the plea bargain outcomes of their cases (in other words, the likelihood of guilty pleas to lesser charges or of pleas resulting in noncustodial sentences).

Id. at 38. The report then goes on to note that there are studies that suggest that there may be a relationship between the composition of caseloads and plea bargaining rates. *Id.* at 38–39.

198. Brian Forst, *Wrongful Convictions in a World of Miscarriages of Justice*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTHERN AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 15, 31 (Ronald C. Huff & Martin Killias eds., 2013).

199. Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 342, 349–52 (1982). Feeley also noted:

> The standard argument is that plea negotiations are a necessary evil reluctantly accepted by an overworked court, and by implication a reduction of caseload will result in less or perhaps no plea bargaining. This argument is extremely difficult either to support or to refute because it is usually not stated with much precision, and the logic of decision making in response to the press of a heavy caseload is not clear.

FEELEY, *supra* note 43, at 252.

200. *See* FEELEY, *supra* note 43, at 271–72 (arguing that most actors in the criminal legal system *always* want to get through cases quickly, regardless of the size of their caseloads, because they all have a strong interest in being somewhere other than court).

201. *West*, 477 P.2d at 413–14.

202. *See* 2022 COURT STATISTICS REPORT, *supra* note 14, at 90–91 (revealing that multiple counties reported incomplete data related to judicial filings and dispositions); 2023 COURT STATISTICS REPORT, *supra* note 14, at 104.

203. The report provides data on the frequency of guilty pleas but does not report the frequency of plea deals. *See generally* 2022 COURT STATISTICS REPORT, *supra* note 14; 2023 COURT STATISTICS REPORT, *supra* note 14.

This Note instead asserts that these data do not support the conclusion that plea bargains preserve judicial resources. Statewide data show that in California, the number of criminal jury trials has decreased over the past ten years,[204] as has the number of criminal dispositions.[205] The gap between the state's Assessed Judicial Need (this "[r]epresents the estimated number of judicial officers needed to handle the workload in the trial courts based on" the state's "judicial workload and the need for new judgeships") and the total Judicial Position Equivalents (this "[r]eflects authorized judicial positions adjusted for vacancies, assistance rendered by the court, and assistance received by the court from assigned judges, temporary judges, commissioners, and referees") has also decreased over the past ten years.[206] This indicates that California's judicial resources are now better able to meet the needs of the system. Despite these trends, the caseload clearance rates—the proportion of resolved cases to filed cases—for criminal cases are lower than the rates from ten years ago.[207]

These data do not support the idea that plea bargains are needed for the preservation of judicial resources. If that premise were true, one would expect that a decrease in the need for judicial resources and less jury trials would be associated with a greater ability to clear dockets. However, these trends suggest that as the need for judicial resources and the number of jury trials have decreased, the state has been less able to clear dockets. This is not an indication of causality, but it is a data trend that is inconsistent with the *West* court's conclusion.[208]

Data also suggest that a greater need for judicial resources does not negatively impact judicial efficiency in clearing cases. During the fiscal year 2014–2015, California reached a caseload clearance rate of more than 100 percent for felony cases.[209] However, in 2014–2015, California had a much higher rate of jury trials for felonies than in 2020–2021, during which the state had a felony caseload clearance rate of just over 50 percent.[210] Thus, according to these limited data, no association between a higher need for judges and a decreased rate of jury trials exists. Also, no association between higher caseload clearance rates and lower rates of jury trials exists. One would expect these associations to exist if it is true that more jury trials create a judicial backlog. As mentioned before, these data are incomplete and there are limits to extrapolating

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204. 2022 COURT STATISTICS REPORT, *supra* note 14, at 60.

205. *Id.* at 52.

206. *Id.* at 61.

207. *Id.* at 53 (defining the clearance rate as "the number of outgoing cases as a percentage of the number of incoming cases"); 2023 COURT STATISTICS REPORT, *supra* note 14, at 63 (same).

208. People v. West, 477 P.2d 409, 413–14 (Cal. 1970).

209. 2022 COURT STATISTICS REPORT, *supra* note 14, at 53.

210. *Compare id.* at 54 (indicating that 1.3 percent of felony cases were resolved via a jury trial), *with* JUD. COUNCIL OF CAL., 2016 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 47 (2016) (indicating that 2 percent of felony cases were resolved via a jury trial).

conclusions from these data. However, statewide data still do not support the *West* court's assertion that plea bargains serve the state's interest in judicial efficiency.[211]

One could also look to anecdotal reports to see if those confirm that a higher rate of jury trials results in less judicial efficacy. From the late 2000s to early 2010s, the RCDA stopped accepting plea deals for serious crimes.[212] Some argued that this policy caused a court backlog.[213] Several factors complicate this association. For one, many considered Rod Pacheco, the elected district attorney, an extremist.[214] Pacheco did not allow his line prosecutors to exercise much discretion, which increased senior prosecutors' workloads and contributed to backlogs.[215] Allegations of RCDA prosecutors going to extreme lengths to secure convictions abounded.[216] Pacheco also pursued the death penalty aggressively,[217] and capital cases demand more resources than noncapital cases.[218] Riverside County also needed judicial resources before this practice occurred.[219] Thus, whether the RCDA policy caused judicial congestion is difficult to establish.

iii. Fairness

Plea bargains likely do not serve the fairness interest identified by the *West* court since the trial penalty often induces innocent people to plead guilty.[220]

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211. *West*, 477 P.2d at 413–14.

212. Bill Blum, *No Deal*, DAILY J. (July 2, 2008), https://www.dailyjournal.com/articles/263991-no-deal [https://perma.cc/L2FA-LJUZ].

213. *See, e.g.*, *id.*

214. *See, e.g.*, DAVID V. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY 27 (2015) (quoting District Attorney Pacheco as saying "[a]ny prosecutor can convict the guilty, but it takes a great prosecutor to convict the innocent." (internal emphases omitted)).

215. Elizabeth Banicki*, DA's Office Scorched in Grand Jury Report,* COURTHOUSE NEWS SERV. (June 8, 2009), https://www.courthousenews.com/das-office-scorched-in-grand-jury-report/ [https://perma.cc/7J9Y-QZCW].

216. *See, e.g.*, Baca v. Adams, No. CV 08-683-MMM (PJW), 2011 U.S. Dist. LEXIS 157443, at *44 (C.D. Cal. June 22, 2011) (observing that the RCDA "turned a blind eye to fundamental principles of justice to obtain a conviction"); *Southern California Tops Deep South in New Death Sentences Amid Mounting Evidence of Misconduct*, DEATH PENALTY INFO. CTR. (Sept. 10, 2015), https://deathpenaltyinfo.org/news/southern-california-tops-deep-south-in-new-death-sentences-amid-mounting-evidence-of-misconduct [https://perma.cc/D6HV-7H88] ("In Riverside County, federal courts overturned a murder conviction earlier this year because a prosecutor lied about whether an informant received incentives for testifying.").

217. *See* FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART I—AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES 32 (2016).

218. Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 LOY. L.A. L. REV. S1, S21 (2012).

219. JUD. COUNCIL OF CAL., UPDATE OF JUDICIAL NEEDS STUDY (ACTION REQUIRED) 4, 8 (2004) (referencing JUD. COUNCIL OF CAL., RESULTS OF STATEWIDE ASSESSMENT OF JUDICIAL NEEDS INCLUDING LIST OF RECOMMENDED NEW JUDGESHIPS (ACTION REQUIRED) (2001)).

220. *See* People v. West, 477 P.2d 409, 413 (Cal. 1970).

Studies have concluded that innocent individuals, to avoid the possibility of a more severe punishment, often falsely plead guilty instead of taking their chances at trial.[221] Case studies confirm this phenomenon.[222] For example, in 2015, the National Registry of Exonerations concluded that 15 percent of known exonerations resulted from false guilty pleas.[223] Additionally, codefendants' plea bargains often depend on how the other codefendants plead. Thus, whether a codefendant is facing a trial penalty or the death penalty can persuade innocent defendants to plead guilty.[224] Since a significant percentage of exonerated convictions result from false guilty pleas,[225] it cannot be argued that current plea bargaining practices serve the state's interest in the fairness of the criminal legal system.[226]

These innocent individuals' decisions to accept a plea deal to avoid the trial penalty or the death penalty are rational. Psychological studies about risk aversion conclude that people often choose a more certain chance of a lesser reward over a less certain chance of a greater reward.[227] The calculus involved in plea bargains induces innocent people to plead guilty.

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221. *See* Megan Rose & ProPublica, *The Deal Prosecutors Offer when They Have No Cards Left to Play*, ATLANTIC (Sept. 7, 2017), https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/ [https://perma.cc/GL45-6N7X] (describing how ProPublica found ten cases in a nineteen-year period "in which defendants with viable innocence claims ended up signing Alford pleas or time served deals," even though in all of those cases "exculpatory evidence was uncovered, persuasive enough to garner new trials, evidentiary hearings, or writs of actual innocence"); *see also* JOHNSON, *supra* note 16, at 15 (classifying the use of a large trial penalty as coercive).

222. *See* Serial, *A Bar Fight Walks into a Justice Center*, N.Y. TIMES, at 32:25–33:23 (Sept. 20, 2018), https://serialpodcast.org/season-three/1/a-bar-fight-walks-into-the-justice-center [https://perma.cc/Y96U-3HFG] (describing how a judge equated a misdemeanor plea with innocence because it was common for innocent people to plead guilty to reduced charges).

223. *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 1 (Nov. 24, 2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/P9FS-V33F] (finding that 15 percent of known exonerations that were examined were convicted via guilty pleas).

224. Suzi Parker, *After 18 Years, "West Memphis 3" Go Free on Plea Deal*, REUTERS (Aug. 19, 2011), https://www.reuters.com/article/us-crime-westmemphis3-arkansas/after-18-years-west-memphis-3-go-free-on-plea-deal-idUSTRE77I54A20110819 [https://perma.cc/DBG8-YDMR] (describing how a defendant pled guilty to a crime that he maintained he did not commit and where there was not strong evidence against him to save his codefendant from being executed by the state).

225. Of course, even data about exonerations are limited and cannot fully depict how often innocent people plead guilty. *See* Rose & ProPublica, *supra* note 221 ("No one tracks how often the wrongly convicted are pressured to accept plea deals in lieu of exonerations.").

226. *See* JOHNSON, *supra* note 16, at 20 (concluding that the phenomenon of innocent people pleading guilty is "antithetical to a fair criminal justice system").

227. *See, e.g.*, Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 160, 160 (1982).

Pretrial detention, as a coercive aspect of plea bargaining, can also convince individuals who may be innocent to plead guilty.[228] Those in pretrial detention plead guilty at a far higher rate than those who are not in detention while awaiting the adjudication of their cases.[229] Innocent individuals tend to plead guilty when doing so allows them to leave pretrial detention and consequently avoid losing their job or home.[230] Additionally, prosecutors use time in detention as leverage to try and convince individuals to take deals.[231] In California, many people wait in pretrial detention because they cannot afford to bail out.[232] This indicates that those who accept plea deals to leave detention are often indigent.[233] The impact of pretrial detention as a coercive factor in plea bargaining falls heavily on low-income communities, who already make up the majority of criminal defendants.[234] Avoiding time in custody or detention became an even more pressing consideration for the innocent during the height of the COVID-19 pandemic when prisons and jails became hotspots for the disease.[235]

When it comes to false guilty pleas, prosecutors suffer from confirmation bias. They tend to offer plea deals to already-convicted defendants suspected of being factually innocent that allow them to get out of prison quickly.[236] It is

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228. *See* SUBRAMANIAN ET AL., *supra* note 43, at 11–15 (describing a small body of research that found a strong relationship between pretrial detention and pleading guilty and concluded that this association likely exists because the detained want to leave detention as soon as possible); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention,* 69 STAN. L. REV. 711, 717 (2017).

229. Morning Edition, *Inmates Who Can't Make Bail Face Stark Options*, NPR, at 2:56–3:13 (Jan. 22, 2010), https://www.npr.org/templates/story/story.php?storyId=122725819 [https://perma.cc/JX4L-TMFX].

230. Heaton, Mayson & Stevenson, *supra* note 228, at 715–16.

231. *See* Rose & ProPublica, *supra* note 221 (describing how an individual refused a plea deal in favor of taking his chances at trial, how he waited sixteen months in custody for the trial, and how it was not until the day that trial was supposed to begin that the prosecutors informed the court that they declined to prosecute).

232. Robert Lewis, *Waiting for Justice*, CALMATTERS (Mar. 31, 2021), https://calmatters.org/justice/2021/03/waiting-for-justice [https://perma.cc/9CFF-KWL9].

233. Emily Stauffer, *Plea Bargains: Justice for the Wealthy and Fear for the Innocent*, 35 BYU PRELAW REV. 167, 179–81 (2021).

234. *See* ALEXI JONES & WENDY SAWYER, ARREST, RELEASE, REPEAT: HOW POLICE AND JAILS ARE MISUSED TO RESPOND TO SOCIAL PROBLEMS (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/35ST-6SLQ].

235. Shi Yan, David M. Zimmerman, Kelly T. Sutherland & Miko M. Wilford, *Pandemic Pushed Defendants to Plead Guilty More Often, Including Innocent People Pleading to Crimes They Didn't Commit*, CONVERSATION (Aug. 2, 2021), https://theconversation.com/pandemic-pushed-defendants-to-plead-guilty-more-often-including-innocent-people-pleading-to-crimes-they-didnt-commit-165056 [https://perma.cc/5TQ2-XT6J]; JOHNSON, *supra* note 16, at 23 (describing how defendants in custody typically have a harder time building up their defense and how pretrial detention became even more undesirable when jails became COVID hotspots).

236. Rose and ProPublica explain:

> If [the prosecutors] admit they got it wrong, prosecutors have to accept that a person was robbed of years of his life, the real perpetrator was never found, the victim's family was let

important to note that these prosecutors could have moved to dismiss those cases. Thus, plea deals allow those who have been wrongfully incarcerated to leave custody.[237] However, the bargains still saddle them with convictions for crimes they did not commit.[238]

Also, the emotional burden of constantly going to court to prove one's innocence can coerce the accused to plead guilty.[239] For example, a court-watch team in Alameda County talked to a truck driver who maintained his innocence.[240] Unfortunately, he had to go to court many times because the prosecutor who oversaw his case maintained a hardline position.[241] This truck driver grew tired of driving from his home in San Joaquin to court in Alameda County and of missing several days of work, so he decided to plead no contest to the charges he faced.[242] This resulted in a conviction.[243]

Pleading guilty can also implicate deportation, which can coerce defendants into accepting plea bargains. Deportation is a particularly salient concern in California, the state with the largest number and share of immigrants in the country.[244] Prosecutors can use this to their advantage. For example, until 2020, the Alameda County District Attorney's office had an internal policy of using the threat of deportation or other immigration consequences to seek longer probation or jail time during plea negotiations.[245] In response to such practices,

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> down, and, to top it off, they now have a cold case that's unlikely to be solved. With the Alford plea, not only is the real perpetrator not caught but the case is officially closed on the books. It also dings their won-loss record on typically high-profile cases. The idea of a wrongful conviction . . . assaults a prosecutor's sense of identity that "we're the good guys."

See Rose & ProPublica, *supra* note 221; Megan Rose, *Innocent but Still Guilty*, PROPUBLICA (Jan. 17, 2018), https://www.propublica.org/article/innocent-but-still-guilty [https://perma.cc/PFH7-UD9J]; Megan Rose, *Baltimore Prosecutor Admits He Was Wrong to Block Request to Alter Alford Plea*, PROPUBLICA (Jan. 3, 2018), https://www.propublica.org/article/baltimore-prosecutor-admits-he-was-wrong-to-block-request-to-alter-alford-plea [https://perma.cc/9GSW-3FNA]; Megan Rose, *The Freedom Plea: How Prosecutors Deny Exonerations by Dangling the Prison Keys*, PROPUBLICA (Sept. 7, 2017), https://www.propublica.org/article/freedom-plea-prosecutors-deny-exonerations-dangling-prison-keys [https://perma.cc/797T-S7FV]; Megan Rose, *A Dubious Arrest, a Compromised Prosecutor, a Tainted Plea: How One Murder Case Exposes a Broken System*, PROPUBLICA (Dec. 4, 2017), https://www.propublica.org/article/a-dubious-arrest-compromised-prosecutor-tainted-plea-how-one-murder-case-exposes-a-broken-system [https://perma.cc/S3HA-WAKP].

237. *See* Rose & ProPublica, *supra* note 221.

238. *See id.*

239. *See, e.g.*, IN(JUSTICE) IN ALAMEDA COUNTY, *supra* note 158, at 20.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *States with the Most Immigrants 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/states-with-the-most-immigrants [https://perma.cc/X8PE-LVV8].

245. IN(JUSTICE) IN ALAMEDA COUNTY, *supra* note 158, at 22.

several California public defender offices in the Bay Area and Los Angeles have incorporated an immigration practice into their offices.[246]

Lastly, the secretiveness of plea bargaining processes contributes to the phenomenon of the innocent pleading guilty.[247] The secretiveness, speed, and prevalence of plea deals can also incentivize prosecutors and defense attorneys to engage in unprofessional behavior.[248] There is no way to know how frequently prosecutors engage in misconduct during plea bargains because negotiations often take place behind closed doors.[249] Unlike judges' sentencing decisions, prosecutors' charging decisions are typically not reviewable by appellate courts.[250] Also, there is often no appellate judicial check on negotiation tactics since many plea bargains involve defendants waiving their right to an appeal.[251] Prosecutorial misconduct can be hard to prove even when trials occur and the court creates a trial record.[252] Thus, the lack of a formal record and formalized fact-finding procedures in plea negotiations can allow more misconduct to fly under the radar. The secretiveness of plea negotiations also allows public defenders' ineffective assistance of counsel to go unnoticed.[253] Plea bargaining

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246. The offices of the Los Angeles County Public Defender, the Alameda County Public Defender, the Contra Costa Public Defender, the San Francisco County Public Defender, and the Santa Clara County Public Defender all have immigration units. *Immigration,* LAW OFFS. OF L.A. CNTY. PUB. DEF., https://pubdef.lacounty.gov/immigration [https://perma.cc/9TUX-YJRX]; *Immigration Representation Unit,* ALAMEDA CNTY. PUB. DEF., https://publicdefender.acgov.org/Immigration.page [https://perma.cc/UWD9-TRFB]; *Crimmigration,* CONTRA COSTA PUB. DEFS., https://www.cocopublicdefenders.org/immigration [https://perma.cc/2KW2-E7RJ]; *Immigration Unit*, S.F. PUB. DEF.'S OFF., https://sfpublicdefender.org/services/immigration-unit [https://perma.cc/DK9W-25G7]; Tracey Kaplan, *Santa Clara County Public Defender Hires Immigration-Law Specialist*, MERCURY NEWS (Oct. 25, 2014), https://www.mercurynews.com/2014/10/25/santa-clara-county-public-defender-hires-immigration-law-specialist [https://perma.cc/5QG3-WJZQ].

247. *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 165–66 (2014) (suggesting that a lack of judicial regulation of plea bargains contributes to innocent defendants pleading guilty).

248. *See* Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And Yes, It's Totally Legal*, CATO INST. (Aug. 8, 2019), https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal [https://perma.cc/V3S2-SRHF].

249. *Id.* ("Defenders of the status quo claim that examples like these are unusual and that prosecutors rarely commit misconduct. But how can we possibly know that? When only two percent of federal prosecutions go to trial. . . .").

250. David Alan Sklansky, *The Problem with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 459 (2018).

251. *See, e.g.*, People v. Panizzon, 913 P.2d 1061, 1070 (Cal. 1996) (enforcing a defendant's waiver of appellate rights as part of a guilty plea).

252. *See* Rose & ProPublica, *supra* note 221.

253. Hadar Aviram, Deanna Dyer & S.C. Thomas, *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 HASTINGS CONST. L.Q. 775, 789 (2014). The federal Supreme Court allows criminal defendants to raise ineffective assistance of counsel claims if their defense attorneys unreasonably advised them to plead guilty. Hill v. Lockhart, 474 U.S. 52, 57–59 (1985); *see also* McMann v. Richardson, 397 U.S. 759, 763, 774 (1970) (denying relief to a defendant even though defendant relied on problematic advice from his counsel when deciding to plead guilty).

often occurs quickly—parties can determine the fate of a criminal case in a matter of seconds and without much judicial oversight.[254] This suggests that plea deals may encourage quantity over quality for both prosecutors and defense attorneys.[255]

Systemic pressures can encourage defense attorneys to accept plea bargains, even when they should not. Public defenders also have a perverse incentive to persuade their clients to accept plea bargains because, relative to prosecutors, they have less control over their caseload. They may be incentivized to encourage plea bargaining because they believe doing so will decrease their high caseloads.[256] Defense attorneys also express the concern that accepting their clients' decisions to go to trial can give them a reputation as obstructionists and ruin their relationships with judges.[257] This is especially true when judges assign cases to private defense attorneys. Judges may be less likely to assign cases to defense attorneys who are perceived as clogging dockets with unnecessary trials.[258] This may be an issue that exists in the numerous California jurisdictions that assign indigent defense cases to private attorneys.[259] Given that plea bargains often hide prosecutors' and defense attorneys' misconduct, plea bargains are likely not advancing the state's interest in fairness.

Plea bargains also do not serve the state's interest in fairness because their secretive nature makes it harder for the public to hold system actors accountable. In California, most judges are appointed by the Governor and then must survive periodic elections by county voters.[260] The public can attend hearings in which judges impose sentences.[261] Thus, voters can communicate to judges whether they agree with their sentencing decisions by voting them out. For example, Judge Aaron Persky handed down what many viewed to be a lenient sentence on

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254. *See, e.g.*, Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/AEN5-PYBS] ("I felt I was watching justice dispensed at the pace of speed dating.").

255. *See id.*

256. *See* Reed Cantrell, *Plea Deals: An Unconstitutional Bandaid for Our Overburdened Justice System*, COLUM. UNDERGRADUATE L. REV. (June 20, 2022), https://www.culawreview.org/current-events-2/plea-deals-an-unconstitutional-bandaid-for-our-overburdened-justice-system.

257. Serial, *supra* note 222.

258. *Id.*

259. *See* GABRIEL PETEK, LEGIS. ANALYST'S OFF., ASSESSING THE PROVISION OF CRIMINAL INDIGENT DEFENSE 3–5 (2022).

260. *Judicial Selection: How California Chooses Its Judges and Justices*, CAL. CTS. NEWSROOM, https://newsroom.courts.ca.gov/branch-facts/judicial-selection-how-california-chooses-its-judges-and-justices [https://perma.cc/H7CU-8NFR].

261. The federal and California constitutions both provide criminal defendants with the right to a public trial. U.S. CONST. amends. VI, XIV; CAL. CONST. art. 1, § 15. The right to a public trial extends to sentencing hearings. *See* People v. Poe, No. A160102, 2021 WL 5578080, at *1–2 (Cal. Ct. App. Nov. 30, 2021).

a Stanford student convicted of sexually assaulting an unconscious woman.[262] In 2016, Santa Clara County voters ousted him.[263] By contrast, when prosecutors make their sentencing decisions during plea negotiations, there is typically no public record of their negotiations.[264] In turn, the lack of transparency hinders voters' ability to hold prosecutors accountable for their sentencing decisions. Plea bargains make it harder for voters to exercise their electoral check on system actors, which does not serve the state's interest in fairness.

Plea deals also do not serve the state's interest in fairness because they often result in racialized sentencing disparities. Racism impacts plea bargaining just as it impacts every other part of the criminal system.[265] The speed at which plea bargaining occurs and the amount of discretion that attorneys have when bargaining enable attorneys' racial biases to infiltrate the process.[266] When prosecutors and defense attorneys negotiate over which charges a defendant should face, which largely determines sentences, attorneys' implicit racial biases come into play.[267] Studies confirm that these racial biases result in Black and Latine criminal defendants facing harsher charges and longer sentences than White defendants.[268] California is not immune from this reality. In May 2023, a Contra Costa County judge found that the Contra Costa County District Attorney's office charged crimes in a racially biased manner.[269] Defense attorneys in that case argued that their Black clients were up to 44 percent more likely to be charged with special enhancements.[270] One attorney noted that these enhancements can result in mandatory life sentences without the possibility of

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262. Robbie Short, *Judge in Stanford Rape Case Removed from Bench by Santa Clara County Voters*, CALMATTERS (June 5, 2018), https://calmatters.org/politics/elections/2018/06/judge-in-stanford-rape-case-removed-from-bench-by-santa-clara-county-voters [https://perma.cc/X5HY-BWAN].

263. *Id.*

264. *See* JOHNSON, *supra* note 16, at 16 (calling for more transparency surrounding sentencing offers and plea negotiations).

265. *See Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals [https://perma.cc/E678-DM8A] [hereinafter *Racial Bias in Plea Deals*].

266. Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 127–30 (2021).

267. *Id.* at 120–24.

268. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018); Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR: CODE SWITCH (July 17, 2014), https://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants [https://perma.cc/RG4K-4YTB].

269. Anser Hassan, *Judge Issues Landmark Ruling Against Contra Costa County D.A.'s Office Over Racial Bias*, ABC7 NEWS (May 21, 2023), https://abc7news.com/contra-costa-county-district-attorney-office-superior-court-judge-ruling-racial-bias-racism-charging-decisions-das-antioch-police-investigation/13277527 [https://perma.cc/6RPR-ZFSS].

270. *Id.*

parole.[271] Because plea bargains contribute to racialized sentencing disparities, plea bargains do not serve the state's interest in fairness.

iv. Judicial Discretion

The *West* court saw plea bargains as a way for judges to exercise more discretion over sentencing decisions after mandatory minimums limited this discretion.[272] However, plea bargains have actually put the most sentencing power in the hands of prosecutors.[273] Prosecutors can control the parameters of plea bargaining by selecting which charges to bring and what punishments to seek.[274] Prosecutors' decisions to charge and sentence are also largely unreviewable by judges.[275] Thus, contrary to the *West* court's conclusion, plea bargains have enabled prosecutorial discretion rather than judicial discretion over sentencing decisions.

Trial courts play a role in approving plea deals, but the court's role does not involve the judicial discretion that the *West* court envisioned.[276] A trial court has broad discretion in accepting plea bargains.[277] However, limitations prevent judges from exercising control over sentencing decisions. For example, judges cannot engage in direct bargaining.[278] Even when a court disapproves of a plea deal, it cannot alter the deal unless both parties consent to the court's changes.[279] Therefore, judges do not decide defendants' sentences when those defendants have accepted a plea deal. Some counties, such as Santa Clara County, incorporate judicial input about sentencing during negotiations.[280] However, each county develops its own plea-bargaining process,[281] so parties do not necessarily have to seek sentencing guidance from judges when negotiating. Also, plea negotiations can often occur in a matter of minutes.[282] This reality suggests that the practice does not allow for the judge-controlled, case-specific

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271. *Id.*

272. People v. West, 477 P.2d 409, 413 (Cal. 1970).

273. *See* Slobogin, *supra* note 161, at 1516.

274. *See* Megan Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2137–39 (2022).

275. *See id.* at 2140.

276. *West*, 477 P.2d at 414 ("Plea bargaining also permits the courts to treat the defendant as an individual . . . to adapt the punishment to the facts of the particular offense. . . . In some cases, only the bargained reduction in the charge can enable the judge to exercise his discretion as to meaningful sentencing alternatives.")

277. *See* People v. Hester, 992 P.2d 569, 572 (Cal. 2000).

278. People v. Smith, 126 Cal. Rptr. 195, 197 (Cal. Ct. App. 1975).

279. People v. Segura, 188 P.3d 649, 656 (Cal. 2008).

280. *See* 2018–2019 SAN MATEO CNTY. CIV. GRAND JURY, DEMYSTIFYING THE PLEA BARGAINING PROCESS 1–3 (2018), https://www.sanmateo.courts.ca.gov/system/files/plea_bargaining.pdf [https://perma.cc/5LCW-2K6F].

281. *See id.*

282. *See* Yoffe, *supra* note 254 ("I felt I was watching justice dispensed at the pace of speed dating.").

sentencing treatment that the *West* court thought would occur.[283] Thus, the assertion that plea bargaining grants judges more discretion over sentencing and allows for case-specific treatment is incorrect. While judges decide whether to accept plea bargains, a judge can do little on their own to alter the deal.

In sum, this Note considered four justifications for plea bargaining: creating more flexible criminal procedure, preserving needed judicial resources, producing fair results, and promoting judicial discretion in sentencing decisions.[284] Data, empirical studies, and case studies dispute whether plea bargaining preserves needed judicial resources, produces fairness, or promotes judicial discretion. On the other hand, plea bargaining does provide for more flexible criminal procedures as plea bargains implicate fewer procedural protections than jury trials do. Thus, plea bargains' burdens on constitutional rights advance one state interest.

d. Balancing the Burdened Constitutional Rights and State Interests

Lastly, to determine if the second element of the *Danskin-Bagley* test is met, this Note will balance the importance of the burdened constitutional rights, the extent to which those rights are impaired, the importance of state interests in the impairments, and how well the burdens serve those state interests.[285] Plea bargains involve the waiver of fundamental constitutional rights, the heaviest possible burden on those rights. Thus, these burdens can only be justified by compelling government interests that are well served by plea bargains.[286]

Two of the *West* court's justifications for plea bargaining, judicial resource economy and procedural flexibility, do not constitute compelling government interests. The preservation of judicial resources is likely not a compelling government interest. The California Supreme Court held in *In re Allen* that preserving financial resources is an insufficient reason for chilling the exercise of constitutional rights.[287] Also, procedural flexibility likely does not constitute a compelling state interest because administrative efficiency, another cost-saving rationale, is not a compelling state interest.[288]

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283. *See* People v. West, 477 P.2d 409, 414 (Cal. 1970).

284. *Id.* at 413–14.

285. *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 791–92 (Cal. 1981).

286. *See id.* at 800 ("It is the state's obligation to protect and safeguard these rights. If any action by the state burdens the exercise of any fundamental liberty, the state must justify such an act by a showing of compelling necessity.").

287. 455 P.2d 143, 144 (Cal. 1969) (holding that preservation of judicial resources did not justify chilling defendants' exercise of their right to counsel).

288. *See* Gould v. Grubb, 536 P.2d 1337, 1346 (Cal. 1975) ("[N]umerous cases have refused to permit the state to justify discriminatory legislation on the basis of similar 'administrative efficiency' interests." (citations omitted)).

Nevertheless, fairness and judicial discretion are compelling government interests.[289] Courts have classified the independence and impartiality of the judicial system as compelling state interests.[290] Fairness and judicial discretion are essential to an independent and impartial judicial system. Therefore, the state's interests in plea bargains producing fair results and increasing judicial discretion can be classified as compelling interests. These interests relate to the independence and impartiality of the judicial system.[291]

Although judicial fairness and judicial independence constitute compelling state interests that could justify burdening fundamental rights, it is not clearly established that plea bargains serve these interests well. The state's interests in plea bargains' burdening of criminal defendants' jury trial right, confrontation right, and the privilege against self-incrimination do not "manifestly outweigh [the] resulting impairment of [those] constitutional rights."[292] So, the second element of the *Danskin-Bagley* test has not been met.

Additionally, whether the state pursues a compelling interest in a discriminatory manner is relevant to the unconstitutional conditions analysis.[293] In *Committee to Defend Reproductive Rights*, the California Supreme Court recognized that the "limitations upon governmental benefits which apply to rich and poor alike are obviously less invidious than conditions . . . in which the state effectively tells [low-income individuals]" that because of their poverty, they "must restrict [their exercise of constitutional rights] in ways that the government does not ask self-sufficient people to do."[294] As explored earlier, many criminal defendants are too poor to post bail and many plead guilty to leave pretrial detention.[295] Thus, low-income individuals are more limited in how they can exercise their constitutional right to a jury trial. Even if one were convinced that plea bargains serve compelling government interests well, the discriminatory manner in which plea bargains serve those interests cannot withstand constitutional scrutiny.

Next, this Note will consider whether a less restrictive alternative is available.

3. No Alternatives Less Subversive of Constitutional Rights Are Available

To meet the last element of the *Danskin-Bagley* test, the state must demonstrate that its actions constitute the "'least offensive alternative' adequate

289. *See* People v. West, 477 P.2d 409, 413–14 (Cal. 1970).

290. Inquiry Concerning Bailey, No. 202, 2019 WL 1770417, at *13 (Cal. Comm'n on Jud. Performance Feb. 27, 2019); Broadman v. Comm'n on Jud. Performance, 959 P.2d 715, 729 (Cal. 1998).

291. *See West*, 477 P.2d at 413–14.

292. Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 415 (Cal. 1966).

293. Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 796 (Cal. 1981).

294. *Id.* at 797 (quoting Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443, 472 (internal quotations omitted)).

295. *See supra* notes 228–235.

to achieve any legitimate state interest."[296] The state must "establish the unavailability of . . . alternatives" that are less burdensome on individuals' constitutional rights.[297] The feasibility of the least restrictive alternative, namely the abolition of plea bargains, depends on the idiosyncrasies of jurisdictions. Bench trials constitute another less restrictive alternative that serves the state's interests in fairness, efficiency, judicial discretion, and procedural flexibility.

The least restrictive alternative to the constitutional rights burdened by plea deals would be an abolition of plea bargains. Defenders of plea bargains often assert that eliminating the practice would be impossible because it would create too much judicial congestion.[298] This argument has two flawed premises. First, this argument assumes that a greater need for judicial resources is associated with a decreased rate of plea bargains. As covered above, data and empirical studies dispute this assumption.[299] Second, this argument often assumes that every criminal defendant would take their case to a jury trial in the absence of a trial penalty. This cannot be true in California because the state constitutional right to a jury trial does not apply to all criminal cases.[300] The majority of California's criminal caseload is made up of infractions.[301] So, even amidst a hypothetical abolition of plea bargaining, California would not provide jury trials to most of its criminal caseload. Also, not everyone with the right to a jury trial will choose to exercise it, even in the absence of a sentence discount.[302] Thus, the argument that eliminating plea bargains would paralyze the judicial system has flawed premises.

Additionally, case studies dispute the assertion that abolition is impossible. Case studies demonstrate that whether an abolition of plea bargains would be feasible depends on the jurisdiction. A handful of jurisdictions have banned plea bargaining. Ventura County, California; New Orleans, Louisiana; Pontiac,

296. *Comm. to Def. Reprod. Rts.*, 625 P.2d at 797.

297. *Bagley*, 421 P.2d at 415.

298. Josh Getlin, *Plea Bargain Issue: The Jury's Still Out: County D.A.'s Crackdown on Practice Reassessed as Controversy Rages On*, L.A. TIMES (Aug. 30, 1987), https://www.latimes.com/archives/la-xpm-1987-08-30-me-4836-story.html [https://perma.cc/3DNZ-45PX].

299. *Supra* Part III.B.2.c.

300. *See Ex parte* Wong You Ting, 39 P. 627, 628 (Cal. 1895); *supra* Part II.A.

301. TAFOYA & NGUYEN, *supra* note 20; 2022 COURT STATISTICS REPORT, *supra* note 14, at 82 (documenting that approximately 75 percent of California's criminal filings in fiscal year 2021 were infractions); 2023 COURT STATISTICS REPORT, *supra* note 14, at 94 (documenting that approximately 80.5 percent of California's criminal filings in fiscal year 2022 were infractions).

302. Those facing misdemeanor charges may find the costs of pretrial processes significantly more daunting than the costs of misdemeanor convictions such that they choose to not exercise adversarial rights, including their right to a jury trial. *See* FEELEY, *supra* note 43, at 241.

Michigan; and El Paso, Texas have all limited or banned plea bargaining before.[303] Whether such bans succeeded varied.[304]

In 1975, Alaska's attorney general instituted an almost-complete ban on plea bargains without "the benefit of additional funding or added resources of any kind, and without delay."[305] Also, this was implemented after plea bargaining had been used to resolve the majority of the state's criminal caseload for years.[306] This ban served the state's interest in preserving judicial resources, fairness, and judicial discretion over sentencing. A state study found that after the ban, court processes became quicker, defendants pled guilty at similar rates as before the ban, and the trial rate increased while the overall difference in number of trials was negligible.[307] Even though the trial rates increased, the time it took to achieve a disposition actually lessened temporarily.[308] Bidinotto argued that Alaska's policy worked because actors in the criminal legal system were incentivized to be more efficient: "police did better investigating; prosecutors . . . began preparing their cases better; . . . [and] judges were compelled to spend more time in court and control their calendars more efficiently."[309]

El Paso and New Orleans were similarly successful. A study of El Paso found that after a plea bargaining ban, the jury trial rate almost tripled.[310] Yet, jury trials were still the exception.[311] The El Paso court system rearranged its organization to accommodate the ban.[312] The ban in New Orleans also resulted in an increase in jury trials. However, increased case screening by prosecutors and less tolerance for overcharging kept the system operable.[313] These case studies demonstrate that it is not universally impossible for criminal legal systems to effectively function without plea bargains.

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303. Fine, *supra* note 147, at 629 (describing Ventura County's ban); Bidinotto, *supra* note 148, at 76 (describing New Orleans's and Pontiac's bans); Malcolm D. Holmes, Howard C. Daudistel & William A. Taggart, *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, 26 LAW & SOC'Y REV. 139, 141 (1992) (describing El Paso's ban).

304. CANON, *supra* note 21, at 217–34 (describing the successes and failures of various jurisdictions that banned plea bargaining).

305. ALASKA JUD. COUNCIL, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN ALASKA CRIMINAL CASES—FINAL REPORT ii (1980).

306. *Id.* at 1–4.

307. *Id.* at ii–iii.

308. *See* CANON, *supra* note 21, at 217.

309. *See* Bidinotto, *supra* note 148, at 76; *see also* CANON, *supra* note 21, at 217–21 (arguing that the Alaska policy resulted in higher quality prosecution, policing, and judging). *But see* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1045–46 (1984) (describing how the Alaska attorney general's ban on plea bargaining did not stop judges from engaging in plea bargaining in some cases).

310. Holmes, Daudistel & Taggart, *supra* note 303, at 146.

311. *Id.*

312. CANON, *supra* note 21, at 225.

313. *Id.* at 222–24.

A counterpoint to this Note's arguments for abolition is the concern that an increase in jury trials would interfere with defendants' speedy trial rights. Californian defendants have a federal and a state constitutional right and a statutory right to a speedy trial.[314] This concern is legitimate, but system actors can respect this right even with an increase in jury trial rates. First, courts can rearrange their scheduling to accommodate a crowded trial calendar, just as the El Paso court system did.[315] Second, district attorneys can manage their caseloads—they can charge fewer cases and not overcharge, as the New Orleans District Attorney Office did.[316] District attorneys can also move to dismiss cases they do not believe are triable.[317] Should the rate of jury trials increase, courts and prosecutors can adjust their behavior to accommodate more jury trials while respecting defendants' speedy trial rights.

Bench trials constitute another less restrictive option that serves state interests. Bench trials impose fewer burdens on constitutional rights than plea bargains. Bench trials still impair the right to a jury trial, but bench trials preserve a defendant's right to confront witnesses and privilege against self-incrimination.[318] Bench trials serve the state's interests in judicial discretion, as judges impose the sentences, and procedural ease, as procedural rules are more relaxed in bench trials.[319]

Empirical studies also demonstrate that bench trials serve the state's interests in fairness and efficiency. Schulhofer studied how Philadelphia, a jurisdiction with a high caseload, utilized bench trials for a significant proportion of felony cases in place of plea bargains, despite the jurisdiction's high caseload.[320] Philadelphia did not impose an official ban on plea bargaining.[321] However, defendants only pled guilty when it was futile to take a case to trial since the prosecutors did not offer defendants much of a sentencing discount when negotiating.[322] Defendants who utilized bench trials did not waive other

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314. U.S. CONST. amend. VI; CAL. CONST. art. I, § 15; CAL. PEN. CODE § 1382.

315. CANON, *supra* note 21, at 225. This author has also been told by Contra Costa County Deputy Public Defenders that the Contra Costa County Superior Court changed its calendaring practices in response to an increase in jury trials.

316. *Id.* at 222–24.

317. *See* Lewis, *supra* note 232; Jose Martinez, *San Francisco Public Defender Office Protests Court Case Backlog*, CBS NEWS (June 9, 2023), https://www.cbsnews.com/sanfrancisco/news/san-francisco-public-defender-office-protests-court-case-backlog/ [https://perma.cc/SWL6-NSJN].

318. *See* Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, 100 N.C. L. REV. 1621, 1637 (2022) (explaining that the only difference between a jury trial and a bench trial is that during a bench trial, the judge is the factfinder).

319. *See* People v. Pierson, 77 Cal. Rptr. 888, 888–90 (1969) (describing how an evidentiary statute that applies to jury trials does not apply to bench trials because trial judges are presumed to be less swayed by prejudicial evidence).

320. Schulhofer, *supra* note 309, at 1053.

321. *Id.*

322. *Id.* at 1061.

adversarial rights.[323] Schulhofer concluded that Philadelphia could preserve adversarial trials with most constitutional rights intact because a bench trial typically did not consume more resources than a guilty plea did.[324] Philadelphia's bench trials and plea deals consumed a similar amount of resources because the government had already conducted the bulk of investigative work before pursuing a plea deal.[325] When a defendant chose a bench trial, the government did not expend a significant amount of additional resources.[326] Alschuler's study concluded that a similar "jury waiver" system in Pittsburgh was effective.[327] If such a system is possible in one of the largest cities in the United States,[328] it is worth questioning if California underutilizes bench trials.[329]

Due to the feasibility of alternatives that are less burdensome on individuals' constitutional rights, the government is unlikely to meet the last element of the *Danskin-Bagley* test with respect to plea bargaining practices. Thus, the government would be required to consider these alternatives.

IV.
HOW CAN CALIFORNIA'S CRIMINAL LEGAL SYSTEM SATISFY THE *DANSKIN-BAGLEY* TEST?

This Note's analysis of the *Danskin-Bagley* elements suggests that plea bargaining practices likely run afoul of California's unconstitutional conditions doctrine. However, the data that this Note explored are limited. Also, the data that this Note reviewed indicate that how a plea bargain relates to different aspects of a criminal legal system can depend on the context of the specific jurisdiction and district attorney's idiosyncratic policies.[330] Thus, definitively determining whether plea bargains violate the unconstitutional conditions doctrine requires a case-by-case analysis.

Individualized analysis is likely required to assess if plea deals satisfy the *Danskin-Bagley* test since jurisdictions differ in judicial resources and

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323. *Id.* at 1063.

324. *Id.* at 1084–86.

325. *See id.*

326. *See id.*

327. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1042–43 (1983).

328. *The 300 Largest Cities in the United States by Population 2023,* WORLD POPULATION REV., https://worldpopulationreview.com/us-cities [https://perma.cc/U93R-AZ7R].

329. Bench trials are rarely utilized in California. In fiscal year 2020–2021, bench trials made up less than 1 percent of felony case dispositions and non-traffic misdemeanor dispositions. 2022 COURT STATISTICS REPORT, *supra* note 14, at 83. The same was true in fiscal year 2021–2022. 2023 COURT STATISTICS REPORT, *supra* note 14, at 96.

330. *See* JOHNSON, *supra* note 16, at 6 ("[P]lea bargaining is not one monolithic practice. It looks different depending on whether one is in state or federal court, a rural jurisdiction with few lawyers or an urban center with large prosecution and public defender offices. Even within the same courthouse, informal practices may differ between courtrooms and attorneys.").

prosecutorial policies. The government may be able to prove that the *Danskin-Bagley* balancing test is satisfied in a jurisdiction like San Bernardino County, which has the greatest need for additional judges.[331] However, the test may not be satisfied in the Sierra and Alpine Counties, where judicial resources greatly exceed the judicial system's need.[332] Whether cases in a particular jurisdiction satisfy the test can fluctuate as well. This is because the weighing of the elements of the test can depend on a district attorney's policies and how those policies impact resource allocation.[333] Other factors that vary across counties can also impact the *Danskin-Bagley* analysis, such as the variance of the use of strike enhancements, which can be a powerful bartering chip during plea negotiations.[334] A case-by-case inquiry could be appropriate to definitively conclude whether different counties' plea bargaining practices violate the unconstitutional conditions doctrine. However, courts are unlikely to take on this examination sua sponte.[335] In lieu of effective impact litigation, there are four different groups of actors that can take other actions to remedy this constitutional issue: courts, defense attorneys, prosecutors, and state legislators.

A. Courts

As mentioned before, this Note anticipates that courts would not be receptive to attempts at using the unconstitutional conditions doctrine as a means for impact litigation to change the criminal legal system. However, courts could take steps that would reduce the coercive aspects of plea bargaining that affect the practice's constitutionality. For example, an entire local trial court system could reconfigure how it approaches cash bail. In fact, the Los Angeles Superior

331. JUD. COUNCIL OF CAL., THE NEED FOR NEW JUDGESHIPS IN THE SUPERIOR COURTS: 2022 UPDATE OF THE JUDICIAL NEEDS ASSESSMENT 8–9 (2022).

332. *Id.*

333. *See supra* Part III.B.2.c.

334. MIA BIRD, OMAIR GILL, JOHANNA LACOE, MOLLY PICKARD, STEVEN RAPHAEL & ALISSA SKOG, THREE STRIKES IN CALIFORNIA 5 (2022), https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf [https://perma.cc/8GPU-GWTW].

335. Courts tend to reject facial challenges under the unconstitutional conditions doctrine and favor as-applied challenges, and individual challenges may be more palatable for courts. *Compare* Thompson v. Spitzer, No. 30-2021-01184633-CU-MC-CXC, 2021 Cal. Super. LEXIS 32602, at *4–5 (Orange Cnty. Super. Ct. Oct. 8, 2021) (rejecting a facial challenge while noting that as-applied challenges may "be appropriate"), Thompson v. Spitzer, 307 Cal. Rptr. 3d 183, 203 (Cal. Ct. App. 2023) (rejecting the facial challenge to the OCDA policy), *and* Action Apartment Ass'n v. City of Santa Monica, 82 Cal. Rptr. 3d 722, 726–27 (Cal. Ct. App. 2008) (rejecting facial challenges under the unconstitutional conditions doctrine in the takings context), *with* Alhusainy v. Superior Ct., 48 Cal. Rptr. 3d 914, 919–20 (Cal. Ct. App. 2006) (deciding an as-applied challenge). Empirical evidence suggests that there are likely California jurisdictions that violate the unconstitutional conditions doctrine with their plea bargaining practices. *See* 2022 COURT STATISTICS REPORT, *supra* note 14, at 60–61, 82–84, 87–88, 90–95; 2023 COURT STATISTICS REPORT, *supra* note 14, at 62–66, 71–72, 90, 94–97, 100–101, 103–07, 135–51. However, empirical evidence is often not sufficient to carry the burden of proof in courts. *See* David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 421 (2014).

Court is taking this approach and eliminating cash bail for most defendants.[336] Additionally, if prosecutors and defense attorneys make more complete records of plea bargaining practices, judges can scrutinize such records when determining whether to accept a guilty plea.[337] Trial judges retain a lot of discretion, and this discretion can be used to help ensure greater protections of the rights of the accused.

B. Defense Attorneys

Courts are not likely to raise the issue of whether their jurisdiction's plea-bargaining practices violate the unconstitutional conditions doctrine sua sponte. Thus, whether this argument will be raised in courts will depend on criminal defense attorneys' discretion. Defendants may want to use the unconstitutional conditions doctrine to challenge their plea deals. For example, the trial court in *Thompson v. Spitzer* indicated that individuals who received plea bargains from OCDA's practice of collecting misdemeanants' DNA during plea deals could have viable unconstitutional conditions claims.[338] Of course, as plea deals often are advantageous to defendants,[339] defense attorneys would rarely be incentivized to raise such an argument. Nevertheless, this doctrine could be a viable argument that could be used to challenge a plea deal. Thus, defense attorneys at the trial level may want to consider writing plea deals to reserve the resolution of an unconstitutional conditions issue for appeal.[340] If an appellate court finds that the unconstitutional conditions issue has merit, then the plea bargain could be reversed.

C. Prosecutors

Alternatively, prosecutors can implement policies that allow plea bargains to better serve state interests and satisfy the *Danskin-Bagley* test. District attorneys can adopt policies to curb abuses of prosecutorial discretion during plea

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336. Editorial, *50 Cent and Prosecutors Are Wrong About Cash Bail. L.A. Courts Get It Right*, L.A. TIMES (July 21, 2023), https://www.latimes.com/opinion/story/2023-07-21/court-bail-reform-plan [https://perma.cc/52E4-EDBE].

337. *See* JOHNSON, *supra* note 16, at 16 ("[P]lea negotiations [should] be transparent and recorded, which would allow judges to compare posttrial sentencing recommendations from the government to pre-trial offers in the same case.").

338. 2021 Cal. Super. LEXIS 32602, at *4–5 (noting that unconstitutional conditions challenges may apply to some plea bargains).

339. Paul Bergman, *The Benefits of a Plea Bargain*, NOLO, https://www.nolo.com/legal-encyclopedia/the-benefits-plea-bargain.html [https://perma.cc/G5BY-HC42].

340. A defendant can plead guilty while maintaining their right to appeal. Lefkowitz v. Newsomme, 420 U.S. 283, 288–89 (1975) (affirming that a state can give a defendant the ability to appeal their conviction based on a constitutional issue even if the defendant entered a guilty plea).

negotiations to ensure that plea bargains produce fair results.[341] They can also work with defense attorneys to pursue more bench trials as a less restrictive alternative to plea bargains.[342] Such policies would improve the relationship between plea bargaining and the state's interests in fairness and flexible criminal procedure. This could impact whether plea bargains satisfy the *Danskin-Bagley* test.

Prosecutors can implement different policies to ensure that plea bargaining processes better serve the state's interest in fairness. Since prosecutors decide what charges to bring, which controls the parameters of plea negotiations, their charges can often determine how a plea bargain will proceed.[343] Some district attorney offices, recognizing that unchecked prosecutorial discretion can lead to the abuse of power,[344] have written policies to control prosecutorial discretion and to reduce overcharging practices.[345] Prosecutors can also use their discretion to ask the court to dismiss convictions that would otherwise count as a "strike" under California's Three Strikes Law.[346] Strikes carry severe sentencing consequences and can induce innocent defendants to plead guilty.[347] Prosecutors can also refrain from using coercive aspects of the criminal legal system, such as pretrial detention, threats of deportation, and bail, to induce pleas.[348]

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341. *See, e.g.*, Mikayla Smith, Casey Morrison, & Lauren Laino, *Investigating Prosecutorial Discretion in the Plea-Bargaining Process: A Partnership with the Urban Institute,* PHILA. DIST. ATT'Y'S OFF. & URB. INST. (June 14, 2022), https://phillyda.org/investigating-prosecutorial-discretion-in-the-plea-bargaining-process-a-partnership-with-the-urban-institute/ [https://perma.cc/8P5C-UYKW] (explaining how the Philadelphia district attorney implemented policies limiting discretion in plea bargains to reduce disparities in sentencing).

342. The California Constitution requires the consent of both parties to waive a jury trial for a bench trial. CAL. CONST. art. I, § 16; People v. Ernst, 881 P.2d 298, 301 (Cal. 1994).

343. *Power of Prosecutors*, IN DEF. OF, https://indefenseof.us/issues/prosecuted [https://perma.cc/UV34-9PFAA].

344. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 71 (1968) (discussing how plea bargains are flexible but also noting that "[f]lexibility is . . . an advantage that all lawless systems exhibit").

345. FAIR & JUST PROSECUTION & FAIR TRIALS, ISSUES AT A GLANCE: PLEA BARGAINING 7 (2022), https://fairandjustprosecution.org/wp-content/uploads/2022/02/Plea-Bargaining-Issue-Brief.pdf [https://perma.cc/X8EE-WYHV] (discussing how prosecutors in King County, New Jersey, Philadelphia, and Dallas have adopted some objective terms for line prosecutors to use while negotiating plea bargains); *see also* JOHNSON, *supra* at note 16, at 17.

346. BIRD ET AL., *supra* note 334, at 9 (describing a change in prosecutorial policies to prevent the coerciveness of overcharging under the Three Strikes Law).

347. *See id.* at 7–8.

348. JOHNSON, *supra* note 16, at 23.

Many progressive district attorney offices have increased their efforts at data collection[349] or have based their policy decisions on data.[350] These district attorney offices should also commit to publication of their guidelines for plea bargain decisions. They can also start collecting data around plea bargaining practices. These practices would help the public to better understand prosecutors' work and to hold district attorneys accountable.[351]

Additionally, prosecutors can take steps to ensure there are more court records of negotiations. Prosecutors should write down all plea offers and file them with the court so that records of pleas can be created and subject to judicial review.[352] This transparency can help the public understand the trial penalty. This can also reveal the disparity between sentences and underlying offenses. Additionally, these data can help inform criminal legal reform efforts[353] and expose attorneys' deficiencies during plea bargain processes.[354] These records can also help inform judicial decisions about whether to approve plea bargains.

Lastly, prosecutors can stop overcharging. Prosecutors control their caseloads. If prosecutors do not think that they can guarantee every accused their constitutional rights and maintain their current caseloads, then they should reduce their caseloads.[355]

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349. *See, e.g.*, *Data Dashboards*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/data-dashboards/ [https:/perma.cc/N29S-DV7D]; Nate Gartrell, *Contra Costa DA to Release Data that Local Activists Have Sought for Years: A Breakdown of Charges, Case Results, and Race/Gender*, MERCURY NEWS (Oct. 22, 2020), https://www.mercurynews.com/2020/10/22/contra-costa-da-to-release-data-that-local-activists-have-sought-for-years-a-breakdown-of-charges-case-results-and-race-gender/ [https://perma.cc/S7L8-DZ8K].

350. David Greenwald, *What Does the Future of Prosecution Look Like—These Five Prosecutors Offer Different Viewpoints*, DAVIS VANGUARD (Jan. 30, 2023), https://www.davisvanguard.org/2023/01/what-does-the-future-of-prosecution-look-like-these-five-prosecutors-offer-different-viewpoints/ [https://perma.cc/XK9C-PJT3].

351. Stephanie Kelemen, *Dealing in Justice: System-Level Solutions for Plea Bargaining Inefficiencies in Massachusetts Municipal and District Courts*, HARV. NEGOT. & MEDIATION CLINICAL PROGRAM, https://hnmcp.law.harvard.edu/hnmcp/blog/dealing-in-justice-system-level-solutions-for-plea-bargaining-inefficiencies-in-massachusetts-municipal-and-district-courts/ [https://perma.cc/H766-CQ5VV] (suggesting that data collection on pleas can help the public hold inefficient district attorney offices accountable); IN(JUSTICE) IN ALAMEDA COUNTY, *supra* note 158, at 22 (discussing how once activists learned that the Alameda County district attorney was "leveraging collateral immigration consequences in plea negotiations to get longer sentences," they pressured the elected district attorney to create different guidelines); JOHNSON, *supra* note 16, at 19, 28 (proposing the creation of a searchable, digital database that tracks "plea offers, charging decisions, and sentencing outcomes").

352. JOHNSON, *supra* note 16, at 16.

353. Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 994–96, 999 (2021).

354. *Id.* at 993–94.

355. *See* CANON, *supra* note 21, at 278 ("Resources are finite—always have been, always will be. In most metropolitan areas, and even in rural America, the capacity to competently prosecute every single case simply does not exist. So why do we try?").

Prosecutorial actions can improve the relationship between plea bargains and fairness. Their actions can reduce prosecutorial abuse of discretion, improve the relationship between convictions and the underlying facts of the offense, and enable judges and the public to hold district attorneys accountable.

Additionally, prosecutors and defense attorneys can work together to utilize bench trials more often as a less restrictive alternative, which would serve the state's interest in more flexible criminal procedures.[356] The California Constitution requires the consent of both parties before a bench trial can be pursued.[357] Empirical studies of jury-waiver systems demonstrate that this model can preserve defendants' constitutional rights without excessively burdening judicial resources.[358] Opting for bench trials when defendants waive their right to a jury would also be faithful to the intent of the architects of the California Constitution.[359] Additionally, the scope of the jury trial right in the California Constitution depends on the historical use of that right. Thus, this right should typically be waived in accordance with the historical understanding of how the right would be waived: via bench trials.[360]

D. Legislative Reforms

It is also worth exploring whether there are policy solutions to the unconstitutional conditions problem. The *Danskin-Bagley* test is a balancing test. Thus, instituting policy reforms to improve how well plea bargaining serves important state interests can help tip the scale such that plea bargains strike a constitutional balance between state interests and individual rights. Additionally, the California legislature and the California governor have taken steps recently to reform the criminal legal system.[361] This indicates that state actors may now have the political capital necessary to make systemic changes.

The legislature can improve judicial discretion over the plea-bargaining process. The legislature can regulate the enjoyment of the right to a jury trial if

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356. *Supra* Part III.B.3.

357. CAL. CONST. art. I, § 16; People v. Ernst, 881 P.2d 298, 301 (Cal. 1994).

358. *Supra* Part III.B.3.

359. *Supra* Part II.A.

360. *Id.*

361. In 2022, the California legislature passed sweeping legislation aimed at reforming the criminal system. The California Racial Justice Act for All has the goal of rooting out racism in the criminal legal system. *See* Press Release, Assemblymember Ash Kalra, California Racial Justice Act for All Signed into Law (Sept. 30, 2022), https://a25.asmdc.org/press-releases/20220930-california-racial-justice-act-all-signed-law [https://perma.cc/G7PM-CK59]. Governor Newsom has also announced plans for making drastic changes to the criminal system, such as transforming San Quentin Prison into a rehabilitative center as modeled after the Norwegian criminal system. Sam Levin, *"Ending San Quentin": Plan Would Turn Prison into "Norwegian Style" Rehab Center*, GUARDIAN (Mar. 17, 2023), https://www.theguardian.com/us-news/2023/mar/16/california-san-quentin-prison-rehabilitation-center-reform-gavin-newsom [https://perma.cc/88Z8-N47M].

it does not diminish the scope of the right.[362] Thus, the legislature has the power to regulate how parties waive the right to a jury trial. It has used this power to create statutory regulations for plea bargains.[363] Reforms to the statutes regulating plea bargains can make plea bargaining fairer. For example, the legislature can strengthen California's laissez-faire fact-finding requirements for plea bargains. Reforms such as "requiring third-party scrutiny of factual stipulations" can help strengthen procedural protections around plea bargains.[364] Appropriate third parties can be victims or probation officers.[365] This reform would help ensure that the charge pled to is consistent with the underlying facts of the offense. This would also grant judges more judicial discretion over a defendant's sentence. The state legislature can also write legislation that would allow judges to impose sentences that are inconsistent with mandatory minimums. This would increase judicial power over sentencing and help reduce the trial penalty, which often factors into a defendant's decision to plea.[366] These reforms would increase judges' control over plea bargains and would impact the balance of *Danskin-Bagley* elements.[367]

The legislature can also take steps to ensure that plea bargaining practices better serve the state's interest in fairness. For example, the legislature can reduce the trial penalty by eliminating mandatory minimums. Scholars and the ABA have suggested that lessening the trial penalty could make plea bargaining practices fairer.[368] Also, California's Three Strikes Law has offered prosecutors a lot of power in plea negotiations;[369] repealing this law could reduce the opportunities for abuse of prosecutorial discretion. The legislature can also reform California's bail laws to ensure that fewer defendants end up in pretrial detention. This could lessen a coercive factor in plea bargaining practices.[370]

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362. People v. Wardlow, 173 Cal. Rptr. 500, 503 (Cal. Ct. App. 1981).

363. *See, e.g.*, CAL. PENAL CODE § 1192.5; Greg Moran, *Newsom Signs Bill Blocking Prosecutors from Demanding Defendants Give Up Future Rights*, SAN DIEGO UNION TRIB. (Oct. 9, 2019), https://www.sandiegouniontribune.com/news/courts/story/2019-10-09/newsom-signs-bill-blocking-prosecutors-from-demanding-defendants-give-up-future-rights [https://perma.cc/K4HY-N74N].

364. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 171 (1999).

365. *Id.*

366. *See* JOHNSON, *supra* note 16, at 16.

367. *Supra* Part III.B.2.c.

368. *See* McCoy & Mirra, *supra* note 42, at 926–27; *see also* JOHNSON, *supra* note 16, at 15.

369. BIRD ET AL., *supra* note 334, at 10 (proposing a change in prosecutorial policies to prevent the coerciveness of overcharging under the Three Strikes Law).

370. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 188–89 (2022) (describing how reducing bail can constitute an effective reform that would reduce the coerciveness of plea deals); JOHNSON, *supra* note 16, at 23 (recommending that bail and pretrial detention should not be used to persuade defendants to take guilty pleas). The California Supreme Court has already taken steps to try and make the cash bail system fairer to indigent defendants. The court has required trial courts to undertake individualized inquiries before bail determinations. *In re*

Additionally, the legislature can create statutes that would provide relief for factually innocent defendants who plead guilty.[371] Offering a statutory form of relief will serve the state's interest in fairness because it can reduce wrongful imprisonments and because it is difficult to constitutionally vacate a plea.[372] This reform can improve how well plea bargains serve the state's interest in fairness.

The legislature can also strengthen the relationship between plea bargains and judicial economy. The legislature has control of the state's purse strings.[373] The legislature can use its purse power to ensure that public defender and prosecutor offices are equitably funded. This would provide the judicial system with capacity to conduct more trials or to ensure plea bargains are fair.[374] Additionally, the legislature can use its purse power to increase judgeships in California's lower courts.[375] Adding judgeships to counties with a need for more judges can help those jurisdictions reduce their reliance on plea bargains as a shortcut for clearing caseloads.[376] The legislature can act to improve plea bargains' relationship to judicial resources.

Lastly, the legislature can propose a constitutional amendment that allows defendants to waive their right to a jury trial and receive a bench trial unilaterally. As of now, the California Constitution requires both the prosecution and the defense to agree to a bench trial.[377] Since the jury trial right is meant to protect criminal defendants, defendants should be able to decide whether to waive that right unilaterally.[378] Also, allowing a defendant to waive this right would give a defendant greater ability to preserve their constitutional rights. Bench trials allow defendants to choose to waive just one right, the jury trial right. Because the legislature has the power to propose state constitutional amendments,[379] the state legislature can use this power to provide defendants with more access to a less restrictive alternative to plea bargaining.

Humphrey, 482 P.3d 1008, 1019 (Cal. 2021). The First District Appellate Court, which heard the case before the California Supreme Court did, suggested that the legislature was the actor that needed to undertake the work that is necessary to make the bail system fairer. *See In re* Humphrey, 228 Cal. Rptr. 3d 513, 516 (Cal. Ct. App. 2018), *aff'd*, 482 P.3d 1008 (Cal. 2021). The First District also acknowledged that courts are limited in what they can do to remedy the issue. *See id.*

371. King, *supra* note 364, at 170; *see also* JOHNSON, *supra* note 16, at 20 (recommending that "defendants . . . have access to all available mechanisms for post-conviction review of innocence claims, regardless of the method of conviction").

372. *See In re* Crumpton, 507 P.2d 74, 77 (Cal. 1973).

373. *See California's Power of the Purse: State Budget*, COURAGE CAL. INST. (June 25, 2021), https://couragecaliforniainstitute.org/californias-power-of-the-purse/ [https://perma.cc/7CB7-BRC5].

374. Yoffe, *supra* note 254.

375. JUD. COUNCIL OF CAL., FACT SHEET: CALIFORNIA JUDICIAL BRANCH 2–3 (2022), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf [https://perma.cc/QS3N-6KFL].

376. *See* JUD. COUNCIL OF CAL., *supra* note 331 (documenting the counties with the highest need for additional judgeships).

377. CAL. CONST. art. I, § 16; People v. Ernst, 881 P.2d 298, 301 (Cal. 1994).

378. Krishnamurthi, *supra* note 318, at 1673–74.

379. *Constitutional Amendments (ACA/SCA)—6920*, CAL. DEP'T OF GEN. SERVS., https://www.dgs.ca.gov/Resources/SAM/TOC/6000/6920 [https://perma.cc/E9GM-GN38].

In sum, the legislature can institute reforms that would improve how well plea bargaining serves the state's interests in judicial discretion, fairness, and judicial economy. Such reforms can tip the balance of the *Danskin-Bagley* elements such that plea bargains are less likely to violate California's unconstitutional conditions doctrine.

CONCLUSION

Most defendants exchange their constitutional rights for sentencing and charging leniency, which is an unconstitutional conditions problem.[380] How well plea bargains serve state interests by burdening fundamental constitutional rights implicated through plea deals is disputed. This suggests that plea bargains likely violate California's unconstitutional conditions doctrine. Additionally, definitively establishing whether plea bargains satisfy the *Danskin-Bagley* test depends on a jurisdiction's and case's idiosyncrasies. Encouraging system actors to improve the plea-bargaining system with a view toward satisfying the *Danskin-Bagley* test is a potential solution to this unconstitutional conditions problem.

Danskin-Bagley's application to plea bargains reveals two conclusions: (1) it is not necessarily true that plea bargains preserve needed judicial resources, and (2) there are less restrictive alternatives available. The test's balancing of practical realities and individual rights proves to be a good vehicle to assess arguments about the practice of plea bargaining. This application also demonstrates that California's constitution provides broad protections for individual rights. The *Danskin-Bagley* test is a creature of California constitutional law. Its use demonstrates that state constitutions can and should operate to provide broader protections of individuals' constitutional rights than the Federal Constitution.

There is no way for Brian Banks to turn back the clock to 2002 and understand what his future could have been had he been able to play football at USC. There is no way to give Brian back what he lost. Although Banks eventually did play for the NFL for a short period, had he not been incarcerated, he could have had an even more notable football career, as he displayed promising talent.[381]

Brian Banks has shared his story and raised awareness about wrongful convictions through different media projects.[382] Banks's personal speaking engagements focus on "the power of choice," and he frames his philosophy in a simple statement: "It is not what we go through, but how we allow it to affect

380. *See* Rodriguez, *supra* note 14.
381. SPEAK, *Brian Banks Discusses His Story & the "What Ifs" on NFL Career*, YOUTUBE (Aug. 13, 2019), https://www.youtube.com/watch?v=t7c0PgE9aw4 [https://perma.cc/TQL8-QZMS].
382. *Id.*

us."[383] Banks often discusses how he could not control a lot of what happened during his experience with California's criminal legal system,[384] and this is true for every criminal defendant.

Defendants have no control over mandatory minimums, the resources their attorneys have, the crowded judicial calendars, and the largely unchecked discretion of prosecutors. While Brian chose to remain positive, California state actors must choose to change the calculus for those in Brian's position. State actors must allow the rights enshrined in the state constitution to be properly balanced with the daily practicalities of the criminal legal system.

383. *About*, BRIAN BANKS FREE, https://www.brianbanksfree.com/pages/about [https://perma.cc/466W-7W6W].

384. *Id.*