Can California pleas resurrect its unconstitutional conditions doctrine?

Overview

The fact that most California criminal cases end in plea bargains presents an unconstitutional conditions problem.[1] Plea bargains involve prosecutors exchanging charging leniency for a waiver of constitutional rights.[2] Yet California's unconstitutional conditions doctrine limits the government's "authority to condition . . . a privilege or benefit" on waiving constitutional rights.[3] Whether plea bargains satisfy California's unconstitutional conditions doctrine depends on whether the doctrine itself remains viable. It also depends on a local jurisdiction's idiosyncrasies, complicating possible reforms. Because litigation around this issue is not feasible, legislative reforms are the best path toward solving this unconstitutional conditions problem.

Analysis

Applying the *Danskin-Bagley* test to plea bargains

It is unclear what legal test applies to an unconstitutional conditions challenge to California's plea bargaining system. The California Supreme Court's *Danskin-Bagley* test for unconstitutional conditions problems (from *Danskin v. San Diego School District* and *Bagley v. Washington Township Hospital District*) has been unused for many years.[4] This disuse makes it unclear whether the test is still valid.[5] In this void the Court of Appeal has employed divergent approaches to unconstitutional conditions cases, each applying a form of heightened scrutiny.[6]

Even so, the *Danskin-Bagley* test remains the correct test. The California Supreme Court has never expressly overruled, abandoned, or replaced it. And the *Danskin-Bagley* test best determines whether plea deals satisfy heightened scrutiny because

(unlike a general heightened scrutiny alternative) the *Danskin-Bagley* test best balances government interests and fundamental rights.[7] The *Danskin-Bagley* test is preferable as a specific application of a general heightened scrutiny analysis: both approaches require a strong relationship between rights restrictions and government interests, and that the state interests be narrowly drawn.[8] Thus, whether *Danskin-Bagley* or some other version of heightened scrutiny applies, the core test elements likely remain the same.

If the *Danskin*-Bagley test indeed is defunct, a court might default to substantive due process to resolve unconstitutional conditions problems. That analysis applies whenever the government burdens constitutional rights.[9] Substantive due process would still require heightened scrutiny here because plea bargains burden fundamental constitutional rights.[10]

But the more specific *Danskin-Bagley* test is superior because, unlike other forms of heightened scrutiny, it balances the extent of the burdened right with government interests. That balancing is relevant here because the justifications for plea bargaining relate to protecting government interests.[11] A generalized heightened scrutiny analysis is inferior to *Danskin-Bagley* because it cannot evaluate the contextual balance between individual rights and governent intersts, and thus would not adequately address the strongest justifications for plea bargaining.

Assuming it applies to plea bargains, the *Danskin-Bagley* test requires the government to demonstrate that the conditions rationally relate to enhancing public service, that the benefits the public gains by the restraints outweigh the resulting impairment of constitutional rights, and that no alternatives less subversive of constitutional rights are available.[12] The value of the restrictions on rights "must manifestly outweigh any resulting impairment of constitutional rights."[13] And any conditions must be drawn "with narrow specificity."[14] The next section shows how plea bargains fail that test.

Plea bargains rationally relate to enhancing public service

The first element is met because there is a relationship between plea bargaining and the criminal system's goal of rehabilitation. This first element requires analyzing whether the restraints placed on individuals' rights relate to enhancing public service. To meet this element, there must be a relationship between at least one of the purposes of the criminal system and plea bargains.[15] The legislature stated several purposes for the criminal justice system: "provid[ing] public safety by deterring and preventing crime, punishing individuals who commit crime, and reintegrating [individuals] back into the community."[16]

Plea bargains likely do not serve the goal of deterring crime.[17] Nor do they strongly relate to the goal of punishment.[18] And due to California's lax factual basis requirement for accepted pleas, there can be a disparity between a sentence and facts of an offense.[19] This disparity undermines the retributive value of pleas.[20] Yet plea deals can serve the goal of rehabilitation.[21] For example, pleas can move defendants into effective diversion programs.[22] This empirical support for a relationship between plea bargains and rehabilitation suggests that plea bargains relate to at least one criminal legal purpose.

Balancing the benefits of plea bargains with resulting impairment of constitutional rights

The second element requires balancing the importance of the burdened rights, the extent of the burdens, and the importance of state interests. This is where plea bargains fail the *Danskin-Bagley* test, because their utility does not clearly outweigh the resulting deprivation of constitutional rights.[23] Because plea bargains implicate fundamental rights, the burdens on those rights must serve compelling state interests, and there is insufficient evidence that plea bargains serve compelling state interests to satisfy this element.[24]

The importance of the constitutional rights that are waived in a standard guilty plea (the right to jury trial, the right to confront witnesses, and privilege against self-incrimination) is great — each is a fundamental right.[25] And the burdens on those

fundamental rights are significant, because defendants must either forfeit them entirely or substantially.[26]

The question, then, is how well plea bargains advance state interests. The California Supreme Court first approved plea bargaining in *People v. West*.[27] The court identified several rationales for the practice: procedural flexibility, necessity due to limited judicial resources, fairness, and judicial discretion.[28] Plea bargains do foster procedural flexibility, but the rest is in question.

Whether plea bargains serve the state's interest in preserving needed judicial resources is disputed. The *West* opinion reasoned that plea deals are needed because additional jury trials would require more resources than the courts can muster.[29] Yet empirical studies and statewide data have found no significant relationship between caseloads and plea bargaining rates.[30] Nor does resource scarcity directly relate to plea bargaining.[31]

Studies in California similarly do not support the claim that plea bargains are needed to preserve judicial resources. The number of criminal jury trials in California and the number of criminal dispositions have both decreased over the past decade.[32] The gap between the state's assessed judicial need and total judicial position equivalents has also decreased over the past decade, indicating that the need for additional judicial resources has declined.[33]

Even so, criminal caseload clearance rates are lower than the rates from ten years ago.[34] If plea bargains preserve needed judicial resources, less need for judges and fewer jury trials should correlate with greater docket clearance. Instead, these trends suggest that the opposite is true. Similarly, greater demand for judicial resources does not always impair judicial efficiency. From 2014–2015, California's felony caseload clearance rate was greater than 100%.[35] But in the same period there was a higher rate of jury trials for felonies than in 2020–2021, during which the felony caseload clearance rate was just over 50%.[36]

Thus, there is no association between greater need for judges and fewer jury trials, or between higher caseload clearance rates and fewer jury trials. Those factors would correlate if more jury trials created docket backlogs. These data refute the idea that plea bargains serve judicial efficiency.

Plea bargains also likely do not create the fair results that *West* envisioned because pleas can mask false guilty pleas.[37] Innocent people often plead to false charges to avoid more severe punishment.[38] Coercive aspects of plea bargaining, such as pretrial detention, also convince innocent individuals to plead guilty.[39] A significant percentage of exonerated convictions have resulted from guilty pleas.[40] Convicting the innocent through plea bargaining does not serve the state's interest in fairness.

Plea bargains do not enhance judicial discretion over sentencing — they instead transfer sentencing power to prosecutors.[41] Prosecutors control the negotiating parameters by deciding what to charge.[42] Those charging decisions are largely unreviewable.[43] Trial courts do approve plea deals, but that does not involve the discretion that *West* envisioned.[44] For example, even when a court disapproves of a deal, the court cannot alter it unless both parties consent.[45] Negotiations often takes just a few minutes, suggesting that the practice does not allow for judicially-supervised, case-specific sentencing.[46] This obstructs rather than enhances judicial discretion over sentencing.

Because plea bargains do not serve state interests well, the significantly burdened rights must prevail in the balancing analysis. Plea bargains greatly burden fundamental constitutional rights, so the burdens can only be justified if plea bargains serve compelling government interests well.[47] Preserving judicial resources is not a compelling government interest.[48] Nor is procedural flexibility.[49] The independence and impartiality of the judicial system are compelling state interests,[50] but as discussed above plea bargains impair these interests. Because the state's interests do not "manifestly outweigh [the] resulting impairment of constitutional rights," the second element has not been met. The next section shows

that a less restrictive alternative is available.

Less-burdensome alternatives to plea deals are available

Bench trials are a less-burdensome alternative that serve the state's interests in fairness, efficiency, judicial discretion, and procedural flexibility better than plea bargains.[51] Bench trials are less restrictive of constitutional rights because they preserve one's right to confront witnesses and privilege against self-incrimination. Although bench trials also completely burden the right to a jury trial, bench trials are still a better alternative to plea bargains. Unlike plea bargains, bench trials allow criminal defendants to present evidence concerning their innocence and challenge the prosecution's case before a neutral fact-finder, which can reduce the opportunities for prosecutorial coercion. And defendants gain leverage by retaining their adversarial and evidentiary rights in bench trials. One scholar concluded that preserving those adversarial rights in bench trials can prevent them from becoming slower guilty pleas.[52]

Bench trials also benefit the state's interests in fairness, efficiency, judicial discretion, and procedural flexibility. Judicial discretion is enhanced relative to pleas because judges determine the sentences, and bench trials have relaxed procedures.[53] Bench trials serve the state's interest in fairness and efficiency. For example, Philadelphia used bench trials for many of its felony cases despite a high caseload.[54] Those defendants retained their adversarial rights, preserving adversarial protections without consequently increasing resource demands.[55] Another study concluded that a similar system produced equivalent benefits in Pittsburgh.[56] Those experiences suggest that California arguably underuses bench trials.[57]

The least restrictive alternative for the constitutional rights burdened by plea deals would be to abolish plea bargains. Naturally, many argue that eliminating the practice likely would severely impact court calendars.[58] But this falsely assumes that a greater need for judicial resources correlates with a greater rate of plea

bargains.[59] There are examples of successful plea bargaining bans.[60] For example, when Alaska banned plea bargains in 1975 its court processes quickened, defendants continued to plead guilty at similar rates, and trials remained rare.[61] In El Paso, jury trials remained rare after its ban.[62] These examples suggest that exploding calendars are not inevitable and that a criminal court system can function effectively without plea bargains.

Other potential solutions to this unconstitutional conditions problem

Whether the least restrictive alternative of abolishing plea bargains is feasible depends on the local conditions. Questions about whether plea bargains violate the unconstitutional conditions doctrine also invoke a jurisdiction-by-jurisdiction analysis.[63] This makes impact litigation around the constitutionality of plea bargains impractical.

Legislative reforms can best address the unconstitutional conditions problem and mitigate judicial concerns. The legislature can regulate the right to jury trial.[64] That includes the power to regulate how parties waive the right to a trial jury — the legislature has for example barred prosecutors from asking defendants to give up future rights in plea deals.[65] Reforming the statutes that regulate plea bargains could make the process of plea bargaining fairer. For example, the legislature could strengthen California's lax fact-finding requirements for plea bargains, as by "requiring third-party scrutiny of factual stipulations."[66] Appropriate third parties could be victims or probation officers.[67] Such reforms would help ensure that the admitted charges are consistent with the underlying facts and give judges greater discretion over sentencing.

The legislature can also grant judges leeway from mandatory minimums to reduce the trial penalty, which often factors into a defendant's decision to plead.[68] Critics may argue that the political will for these reforms is lacking. But given the ongoing litigation and reform over prison overcrowding, and the relationship between high incarceration costs and a looming budget deficit, sentencing policy reforms may

have appeal. California voters have made their penal laws less punitive before, and the legislature recently passed progressive legislation with criminal justice system reforms.[69] *Danskin-Bagley* is a balancing test, and reforms here can both clarify the relationship between plea bargaining and state interests — and strike a proper constitutional balance between them.

Conclusion

A process that requires defendants to exchange their constitutional rights for sentencing leniency creates an unconstitutional conditions problem.[70] *Danskin-Bagley* is the correct test to weigh the resulting burdens on constitutional rights against countervailing state interests. Whether plea bargains satisfy this test depends on local conditions. Because individual counties are unlikely to implement needed reforms here, legislative reforms can best address this unconstitutional conditions problem.

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1. Judicial Council of California, 2022 Court Statistics Report, Statewide Caseload Trends (2022) pp. 55, 83 (hereafter 2022 Court Statistics Report). ↑

2. Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative* (1982) 17 So.Cal. Rev.L. & Social J. 33, 36–37 (hereafter *The Unnecessary Evil*). ↑

3. *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 457. ↑

4. *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499. ↑

5. Levine et al., *Protecting State Rights from Unconstitutional Conditions* (2022) 56 U.C. Davis L. Rev. 247, 253. ↑

6. *People v. Banker Ins. Co.* (July 17, 2019, D073724) __ Cal.App.4th. __ 2019, 10–14 (federal standards); *Thompson v. Spitzer* (Super. Ct. Orange County, 2021, No. 21-1184633) [2021 Cal. Super. LEXIS 32602], 3–4 (analogizing to other cases); *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 390–393 (analogizing to other cases); *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1158–1159 (*Danskin-Bagley* test). ↑

7. *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499. ↑

8. *Compare D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17–18 (heightened scrutiny) with *Committee to Defend Reproductive Rights*, 29 Cal.3d at 258 (*Danskin-Bagley* test); Levine et al., *Protecting State Constitutional Rights from Unconstitutional Conditions* (2022) 56 U.C. Davis L.Rev. 347, 353. ↑

9. *See H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1142. ↑

10. *See People v. Collins* (2001) 26 Cal.4th 297, 307–310 (right to jury trial); *People v. Barnum* (2003) 29 Cal.4th 1210, 509 1222–1223 (privilege against self-incrimination and right to confront witnesses). ↑

11. *Compare* Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice* (2002) 4 U. Pa. J. Const. L. 225, 227–229 (describing traditional heightened scrutiny) with *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 258 (describing the *Danskin-Bagley* test); *The Unnecessary Evil*, *supra*, 17 So.Cal. Rev.L. & Social J. at 35 (detailing typical justifications for plea bargains). ↑

12. *Danskin*, 28 Cal.2d at 501–502. ↑

13. *Id.* at 506. ↑

14. *Id.* at 505, 507. ↑

15. *See Committee to Defend Reproductive Rights*, 29 Cal.3d at 271–272. ↑

16. Legislative Analyst's Office, *California's Criminal Justice System: A Primer* (Jan. 17, 2013). ↑

17. Fine, *Plea Bargaining: An Unnecessary Evil*, 70 Marq. L.Rev. 615, 619 (the leniency that accompanies plea bargains instead "reduces the deterrent impact of the law," indicating the lack of a strong relationship between plea bargaining and deterrence). ↑

18. Bidinotto, *Subverting Justice* in Criminal Justice? The Legal System Versus Individual Responsibility. (Bidinotto edit., 1995) p. 626; CRIMINAL JUSTICE, California Proposition 8 (1982) UC Hastings Scholarship Repository. ↑

19. *See People v. Holmes* (2004) 32 Cal.4th 432, 442686; Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining* (1992) 67 Ind. L.J. 853, 868–869. ↑

20. Starkweather, 67 Ind. L.J at 868–869. ↑

21. Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism* (2016) 57 Wm. & Mary L.Rev. 1505, 1546–1547 (plea bargains correspond more with a system oriented towards rehabilitation rather than retribution). ↑

22. Johnson & Ali-Smith, *Diversion Programs, Explained*, Vera Institute (Apr. 28, 2022). ↑

23. *Committee to Defend Reproductive Rights*, 29 Cal.3d at 273–274. ↑

24. *Id.* ↑

25. *See Collins*, *supra*, 26 Cal.4th at 307–310; *Barnum*, *supra*, 29 Cal.4th at 1222-–1223. Moschzisker, *The Historic Origin of Trial by Jury* (1921) 70 U. of Penn. L. Rev. 1, 2 (jury trial); Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune* (1990) 65 N.Y.U. L.

Rev. 962, 964–965 (privilege against self-incrimination); Jonakait, *The Origins of the Confrontation Clause: An Alternative History* (1995) 27 Rutgers L.J. 77, 80–81 (confrontation right). ↑

26. *Committee to Defend Reproductive Rights*, 29 Cal.3d at 275–276; Hessick, *The Constitutional Right We Have Bargained Away*, The Atlantic (Dec. 24, 2021); *see People v. Francis* (1988) 200 Cal.App.3d 579, 586. The availability of nolo and Alford pleas means that the privilege against self incrimination is not always given up entirely. ↑

27. *People v. West* (1970) 3 Cal.3d 595, 599. ↑

28. *Id.* at 604–605. ↑

29. *See West*, 3 Cal.3d at 604–605. ↑

30. *See* Vera Institute of Justice, In the Shadows, A Review of the Research on Plea Bargaining (2020) pp. 35, 37–39. ↑

31. 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 (edit. Huff & Killias 2013) p. 31. ↑

32. 2022 Court Statistics Report at 52–53, 60. ↑

33. *Id.* at 61. ↑

34. *Id.* at 53. ↑

35. *Id.* ↑

36. *Compare id.* at 54 *with* Judicial Council of California, 2016 Court Statistics Report, Statewide Caseload Trends (2016) p. 47. ↑

37. *See West*, 3 Cal.3d at 604. ↑

38. *See, e.g.*, National Registry of Exonerations, Innocents Who Plead Guilty

(2015) p. 1. ↑

39. *See* Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (2017) 69 Stan. L.Rev. 711, 717. ↑

40. National Registry of Exonerations, Innocents Who Plead Guilty (2015) p. 1. ↑

41. *See West*, 3 Cal.3d at 605; Slobogin, 57 Wm. & Mary L.Rev. at 1516. ↑

42. **Wright et al., *Inside the Black Box of Prosecutor Discretion* (2022) 55 U.C. Davis L.Rev. 2133, 2137–2139.** ↑

43. *Id*. at 2140. ↑

44. *West*, 3 Cal.3d at 605. ↑

45. *People v. Segura* (2008) 44 Cal.4th 921, 931. ↑

46. *See* Yoffe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017); *West*, 3 Cal.3d at 605. ↑

47. *See id*. at 287. ↑

48. *See In re Allen* (1969) 71 Cal.2d 388, 391. ↑

49. *Gould v. Grubb* (1975) 14 Cal.3d 661, 675. ↑

50. *Inquiry Concerning Bailey* (2019) 6 Cal.5th CJP Supp. 24, 57; *see West*, 3 Cal.3d at 604–605. ↑

51. *Committee to Defend Reproductive Rights*, 29 Cal.3d at 282. ↑

52. Schulhofer, *Is Plea Bargaining Inevitable?* (1984) 97 Harv. L.Rev. 1037, 1050. ↑

53. 1 Wigmore, Evidence (Tillers rev. ed. 1983) § 4d.1, 213–214. ↑

54. Schulhofer, *Is Plea Bargaining Inevitable?* (1984) 97 Harv. L.Rev. 1037, 1053. ↑

55. *Id*. at 1063, 1084–1086. ↑

56. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System* (1983) 50 U. of Chi. L.Rev. 931, 1042–1043. ↑

57. In 2020–2021, bench trials made up less than 1% of felony and non-traffic misdemeanor dispositions. 2022 Court Statistics Report at 83–84. ↑

58. 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). ↑

59. *Id.* ↑

60. Fine, 70 Marq. L. Rev. at 629 (Ventura County); Bidinotto, at 76 (New Orleans and Pontiac); Holmes et al., *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis* (1992) 26 Law & Society Rev. 139, 141 (El Paso) (hereafter Holmes et al.). There are some contrary examples. See, e.g., Canon, Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class (2022) p. 225. ↑

61. Alaska Judicial Council, The Effect of the Official Prohibition of Plea Bargaining on the Disposition of Felony Cases in Alaska Criminal Cases – Final Report (1980) at ii–iii. ↑

62. Holmes et al. at 151. ↑

63. *See Thompson v. Spitzer*, *supra* [2021 Cal. Super. LEXIS 32602] at 4–5 (concluding a facial challenge is inappropriate). ↑

64. *People v. Wardlow* (1981) 118 Cal.App.3d 375, 384. ↑

65. *See, e.g.* Cal. Pen. Code § 1192.5; Greg Moran, *Newsom Signs Bill Blocking*

Prosecutors from Demanding Defendants Give Up Future Rights, The San Diego Union Trib. (Oct. 9, 2019, 2:05 PM). ↑

66. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation* (1999) 47 UCLA L.Rev. 113, 171. ↑

67. *Id.* ↑

68. *See* Johnson, Am. Bar Ass'n Crim. Just. Section (2023) 2023 Plea Bargain Task Force Report 16. ↑

69. Duara, A Top Prison Expert on the California 'Disaster' and How to Salvage It, CalMatters (Dec. 2, 2022) (prison overcrowding); Kaplan, Proposition 36: Voters Overwhelmingly Ease Three Strikes Law, The Mercury News (Aug. 13, 2016) (proposition); Egelko, 'A Lot of Cases Will Get Another Look': More Convictions Can Be Challenged Over Racial Bias Under New California Law, SF Chronicle (Oct. 20, 2022) (legislative reform). ↑

70. TCR Staff, *'Outrageous Outcomes': Plea Bargaining and the Justice System*, The Crime Report (Apr. 8, 2022). ↑