GET OUT OF JAIL FREE TESTIMONY AND OTHER EXAMPLES OF INTEREST-BASED BARGAINING IN THE CRIMINAL JUSTICE SYSTEM

*Michael Rogers, Maria Garrett, and Aaron Dekel**

I. Introduction

If you do the crime, you must do the time. Well, upon reflection, maybe not always. In the O.J. Simpson Las Vegas robbery case, his accomplices (the "O.J.s"[1]) who cooperated with the prosecutor following their arrests were all sentenced to probation.[2] The crime of robbery, particularly aggravated robbery, usually results in a lengthy prison sentence.[3] So, why not here? That is because a criminal's most valuable, tradable currency is information.[4] And, in this case, the O.J.s furthered the prosecutor's interest of convicting the bigger fish, or the higher priority defendant, by providing information and testimony to materially assist in convicting O.J. Simpson.[5] The prosecutor is generally far less concerned about the sentencing bargain the informant received. Here, they received a highly favorable exchange rate on their information currency.[6]

In the criminal justice system, there exist interests and bargaining chips other than time served. These interests are discussed below in the context of real-life examples. Plea bargains are pervasive in today's system.[7] Recognizing that interest-based bargains are possible can help both parties, as demonstrated above.

---

* Michael Rogers is a Professor of Law at Baylor Law School; Maria Garrett and Aaron Dekel are Baylor Law School graduates now practicing in Dallas. We'd wish to express our gratitude for all the contributions made by the lawyers mentioned in the article.

1 Not the O'Jays, the fantastic R & B group.

2 Ashley Powers, *4 in Simpson Case are Given Probation*, L.A. Times (Dec. 10, 2008, 12:00 AM), http://articles.latimes.com/print/2008/dec/10/nation/na-oj-codefendants10.

3 Jasmine Brown et al., *O.J. Simpson Accomplices Reveal How 2007 Vegas Hotel Room Meeting Escalated into Botched Robbery*, ABC News (July 14, 2017, 1:35 PM), https://abcnews.go.com/US/oj-simpson-accomplices-reveal-2007-vegas-hotel-room/story?id=48627950.

4 E-mail from Brit Featherston, former U.S. Att'y, E. Dist. of Tex., to Michael Rogers, Professor of Law, Baylor College of Law (June 8, 2016, 3:08 PM) (on file with the author).

5 Brown et al., *supra* note 3.

6 *Id.*

7 Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, Outline (Aug. 7, 2017, 3:05 PM), https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials.

The goal of this article is to encourage the use of interest-based negotiations. Some of the stories included will be familiar, while others will be new. In *Getting to Yes*, Fisher and Ury identify four principles of negotiation ("principled negotiation") that can be employed effectively in almost any type of dispute resolution: (1) separate the people from the problem; (2) *focus on interests rather than positions*; (3) invent options for mutual gain; and (4) insist on using objective criteria.[8] Because focusing on interests is the second step identified in *Getting to Yes*, and inventing options for mutual gain is the next, some of the examples will include both sides of that interests/options coin. One of the lawyers we interviewed for this piece said that interest-based bargaining is a cornerstone of his practice (he did not know the label but liked it). In Professor Rogers' alternative dispute resolution ("ADR") class, many times a student has overlooked a creative solution tied to the underlying interests in a practice problem and then said during the ensuing class discussions, "I wish I had thought of that." Students also prefer examples and stories from practice to explanation by lecture. Thus, examples or stories supplemented by analytical narrative will be our primary methodology. We hope you find these examples and the related discussion helpful, educational, inspirational, and interesting.

II. Identifying Interests

A. *Building Blocks*

Cash, or its equivalent, is coin of the realm in both transactions and lawsuits. In criminal cases, the distributive bargaining usually concerns time served or to be served. The anticipated sentence is the critical concern in most plea bargains.

If time is money, then a distributive plea bargain resembles a civil lawsuit. The prosecution and the plaintiff's lawyer want more money-time; the defense, in both types of cases, wants less. Many civil lawsuits are settled with the introduction of interest-based currency; the same is and can be true for plea-bargaining.

---

[8] Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In 12–14 (3d ed. 2011).

Of course, lawyers in criminal cases have vastly different interests than those in civil litigation.[9] On a large scale, prosecutors are interested in justice, accountability, deterrence, and the protection of society.[10] But prosecutors, like other lawyers, can be selfish and egotistical.[11] They are also concerned with their win-loss records, reputation, job security, and career advancement.[12]

For defense attorneys, the obvious interest is getting their clients little or no jail time as a direct consequence of the criminal conviction.[13] To determine if justice will be served by a particular plea bargain offer, factors beyond jail time (the direct consequence) need to be taken into account. Collateral consequences can cause an otherwise fair deal to be unjust. For example, a bargain in state court that provides for minimal jail time can be unfair if it triggers a federal law mandating deportation or some other state authority that results in the loss of an occupational license/permit. Identifying any such underlying interests is a crucial step to obtaining the best possible outcome for all parties involved. In fact, it is dangerous to plea bargain without knowledge of all collateral consequences.[14] Many more examples of interest-based bargaining for justice are provided later.

B. *Win-Win or Tolerate-Tolerate*

"Win-win" became part of our word-stock between 1980 and 1985 and is closely tied to negotiation outcomes.[15] In fact, Dictionary.com defines win-win as "advantageous to both sides, as in a negotiation."[16] In a recent article, we encouraged the use of inter-

---

9 John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63, 79 (2014).

10 *Id.*

11 *Id.* at 88.

12 *Id.*

13 *Id.* at 79. Depending on the forum, however, time is not always a flexible currency. For example, in federal court, prosecutors are often bound by the United States Sentencing Guidelines and have limited bargaining chips in relation to jail time. Thus, they do not always have the freedom to offer as little time as the defendant would like.

14 *See* Randy T. Leavitt, *Dangers of Plea Bargaining Without Knowledge of Collateral Consequences*, 1 STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED CRIM. L. COURSE (July 2018) (ch. 7, at 1).

15 DICTIONARY.COM, *Win-Win*, https://www.dictionary.com/browse/win-win (last visited Sept. 13, 2020).

16 *Id.*

est-based negotiations in business transactions and civil litigation.[17] Because transactions are voluntary arrangements, it is sensible to seek a win-win outcome. Why transact if it is not advantageous to both sides?

However, because of the adversarial nature of litigation—particularly in the criminal context—win-win is often not realistic. Many students comment that the *Getting to Yes* approach of interest-based "win-win" negotiation does not seem to be "real world." While not detracting from the notion that the most durable agreements satisfy both parties' interests to some degree, "tolerate-tolerate" is often the more likely settlement scenario in the litigation context. What of plea bargaining? If it is kept distributive along a line of time to be served, then win/lose or tolerate-tolerate are the best outcomes that can be realized. If interests are identified and then satisfied, bargains as seen below become more tolerable and may even reach win-win status.

How to start? A condition precedent to effectiveness is listening. Until you know what your counterpart wants and why, you will never be successful at getting what you want; active listening gives you an advantage. You will receive better information, learn more, and make fewer mistakes. We need to first ask why and then listen carefully. Jeff Jury, an attorney in Austin, Texas, lectures not to "lawyer-listen."[18] "Lawyer-listening" is a non-pejorative term for the tendency of lawyer-advocates to form a response before the speaker is finished, thereby diverting concentration from the speaker.[19] It seems to be a natural human defensive tendency when faced with conflicting information or argument.[20] A growing body of research tells us that the human brain is not equipped to "multi-task." Therefore, the most efficient advocacy begins with engaged listening.

---

[17] Michael Rogers, *Saving Mr. Banks and Other Interest-Based Negotiations*, 17 CARDOZO J. CONFLICT RESOL. 445 (2016). Maria Garrett was a Research Assistant for Professor Rogers during her time at Baylor Law School and assisted him with the research and writing of *Saving Mr. Banks*.

[18] *Id.* at 450. Jeff Jury is a nationally recognized mediator and arbitrator. He has taught alternative dispute resolution at Baylor Law School, the University of Texas Law School, and Southern Methodist University Law School.

[19] *See* LINDA KAPLAN THALER & ROBIN KOVAL, THE POWER OF NICE: HOW TO CONQUER THE BUSINESS WORLD WITH KINDNESS (2006).

[20] *Id.*

C. *Classroom Lessons from Professor Rogers*

I teach what I preach. My ADR class is a practice driven course that includes most types of negotiations. One of my two-hour classes is devoted solely to plea bargaining. I discuss an example from my practice from the 1980s that was a successful and efficient interest-based plea bargain. My client, whom I will call "A.J.," was a low-level bookkeeper. He had made bail but requested appointed counsel. The court appointed my supervising attorney and myself to represent him. His file revealed that he had been charged with felony theft of a car ("grand theft auto"). While reviewing his record, I also saw he had a prior arrest for the same offense that was pled down to a misdemeanor. When I asked him why he had "borrowed the car without consent" he gave a one-word answer—"tequila." When he drank tequila, he became a joy rider.

What interests could we pitch to the Assistant District Attorney ("ADA")? A.J. had an addiction to alcohol. Some prosecutors think it is in the interest of justice to attack root causes of a crime or to rehabilitate. Fortunately, this ADA fell into that camp. A.J. successfully completed rehab and received a very favorable plea agreement. So, this was as close to a win-win outcome as a criminal case gets: no jail time, and the root cause—the addiction—was under control, which was good for everyone.[21]

The practice problem for the plea-bargaining class also provides an opportunity to identify and apply underlying interests. In that exercise, an academic scholarship college student named Harold, walked up to a group of young men standing near a pole with a fire alarm (no fire is present). He points to the alarm lever and dares them to pull it as a joke. One of the men darts forward and pulls the lever causing everyone to scatter. A nearby police officer, Officer Bowles, had seen Harold pointing his hand near the lever. When Officer Bowles briefly looked away, the alarm was pulled. He didn't see who pulled, but because Harold was closest and had had his hand in the air, Officer Bowles followed Harold and arrested him. Harold tells the defense attorney he really didn't do it. A false fire alarm offense is a serious misdemeanor. Deferred adjudication is a possibility, or a lesser class C misdemeanor charge is available.

---

[21] This type of plea bargain is common today but was rare in the 1980s.

The student negotiators can engage in a distributive negotiation. They can attack each other's positions and move up or down the scale of crimes and punishments. For example, the defense might point out that the case is circumstantial (the policeman is inferring that Harold pulled the alarm, but he didn't actually see it). The ADA might point out that even if Harold didn't pull the lever, he solicited it. Thrust, parry, repeat. The defense lawyer should raise interest-based issues as well. Harold is a college student from a poor but proud family on a full scholarship with his eye on a professional career. Many prosecutors don't want to overpunish (due to collateral consequences) a youthful offender with no record and future promise, particularly in a circumstantial case. Some of my student prosecutors dismiss, but the most common outcome is deferred adjudication, which meets underlying interests on both sides: Harold wants it kept quiet and no permanent record, while the prosecutor does not like to dismiss cases because of the need to maintain a relationship with the police.

III. Real Stories of Interest-Based Bargaining in Criminal Litigation

A. *Prosecutor's Interests*

Prosecutors are charged to seek justice.[22] Nevertheless, prosecutors are driven by numerous other interests. To understand the balance of these interests, we will first attempt to understand what justice is. Second, we will then look at the personal philosophy of a long-time assistant criminal district attorney, Michael Jarrett ("Jarrett").[23] Third, we will look at a popular interest of prosecutors to catch the "big fish." Fourth, we will address the balance between upholding justice and doling out punishment. Finally, we will look at how sometimes a prosecutor's biggest win is gaining knowledge he or she can use in cases to come.

---

22 Tex. Code Crim. Proc. Ann. art. 2.01 (2005).

23 Interview by Sune Agbuke with Michael Jarrett, Assistant Crim. Dist. Att'y, McLennan Cnty., Tex., in Waco, Tex. (Summer 2017). This interview took place while Jarrett was in office; therefore, all narrative is expressed in present tense. After serving 17 years as an assistant district attorney, Jarrett is now in private practice.

1. The Duty to Seek Justice

Many people claim that they want justice. Can plea bargaining even achieve justice? The answer depends on what justice is.

Justice is ingrained in America. Our Pledge of Allegiance ends with the words, "liberty and justice for all."[24] In America, justice and liberty are equals. Both concepts rely on the other to stay afloat in the storm of values. Liberty becomes anarchy without justice, and justice becomes tyranny without liberty.[25]

When looking at plea bargaining in our criminal system, justice comes to the forefront in every deal. The defendant and the victim are in a classic conflict between justice and liberty. The defendant's liberty is about to be hindered by the workings of justice, and justice hinders the victim's liberty to seek revenge. But is this concept of justice an objective standard that can be applied equally to each person?

Justice is defined as giving each person their rightful due.[26] When looking at a criminal case, it may be easier to think that all criminals should get the highest form of punishment, "you do the crime; you do the time." However, that is a misconception. Justice is an organic structure that is dependent on the parties involved in each case. Justice is not only a form of punishment, but a way of reconciliation and healing. Justice deals with criminals, but it also deals with the community, the victim, the court, and the attorneys. Each player to a case has his or her own way to achieve justice, and plea bargaining is a way to achieve justice for as many players as possible.

Some believe that prosecutors do not really seek justice when they allow a criminal to plea bargain for a lighter sentence. However, prosecutors are under a strict duty to seek justice in every way. So, if plea bargaining is unjust, then prosecutors have been violating this duty for decades. The Supreme Court of the United States, in *Connick v. Thompson*, held that "the role of a [prosecutor] is to see that justice is done. 'It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"[27] This statement indicates that if a method exists that will help lead to a just result, the prosecutor is under a

---

[24] 4 U.S.C. § 4.

[25] *See generally* JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1689).

[26] *Justice*, FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/justice (last visited Sept. 13, 2020).

[27] 563 U.S. 51, 71 (2011) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

duty to use it. This idea falls perfectly in the parameters of plea bargaining as a tool to lead to a just result.

2. Prosecutor's Perspective

Jarrett was a Criminal District Attorney in McLennan County, Texas for over 17 years.[28] Through plea negotiations, Jarrett seeks justice. According to Jarrett, every case deserves an offer from the State.[29] For him, a plea deal is not a tool for a defendant "to avoid responsibility" or a "get-outta-jail-free" card, but an opportunity for the defendant to take responsibility for his or her actions and bear the consequences stemming from those actions.[30] With that in mind, Jarrett rewards cooperation and credits defendants for taking responsibility.[31] He strongly believes that everyone deserves the opportunity to accept responsibility.

i. Community Standard

Jarrett's philosophy on plea deals is based on the community standard. As opposed to a criminal defense attorney whose driving focus is the best interest of the defendant, a prosecutor, like Jarrett, is concerned with what is best for the community.[32] While victims have the right to be notified of plea agreements—and victims' wishes definitely play a role in plea negotiations—prosecutors have to keep in mind that they represent the State and their primary duty is to the community, not just the victim.[33] The community's standard provides the parameters and structure on plea deals for Jarrett. In simple terms, Jarret asks himself: "what does this crime mean to the community? What is this offense worth to the citizens in the community? How is a particular case's worth different in Dallas from what it is worth in Waco?"[34] Different communities have different concerns and views on certain offenses. For example, possession of a small amount of drugs in Austin is not as serious as it is thirty minutes up the road in Georgetown. Moreover, in McLennan County, there is a strong focus on violent crimes.[35]

While standard plea offers are generally close to the minimum punishment, much more goes into crafting a plea deal than the pos-

---

28 Agbuke, *supra* note 23.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 Agbuke, *supra* note 23.
35 *Id.*

sible range of punishment for the offense. Plea negotiations take place on a case-by-case basis. Jarrett considers the unique facts and circumstances of the case, the defendant's criminal history, and the victim's wishes when crafting a plea offer.[36] He also determines the purpose of the punishment in the particular case. Different cases have different purposes for punishment, be that deterrence (for the individual and/or community), rehabilitation, or retribution.[37]

In Jarrett's experience with plea deals, sometimes nobody "wins."[38] The defendant may feel like the punishment is too severe, while the victim or the community may feel the punishment was not severe enough. [39] However, the goal is to do the right thing—to do justice.

Keeping the community standard in mind allows Jarrett to prioritize where time and resources go.[40] It is a waste of time and resources to try every case solely based on confidence that the State can carry its burden of proof and obtain a conviction. In Jarrett's view, there is no need for a trial in 99% of cases because the facts are largely undisputed.[41] Further, Jarrett sincerely believes that 99% of the time there is common ground between what is best for the defendant and what is best for the victim and community.[42] It is the role of the attorneys as advocates to find that common ground and to be open-minded to creative solutions during plea negotiations.

When plea negotiations are an exercise in gamesmanship, and everything is a fight between the prosecutor and defense counsel constantly trying to one-up each other, this common ground of everyone's best interest becomes impossible to find.[43] Jarrett has learned that sitting down and talking is better than taking sides in a courtroom. Both prosecutors and defense attorneys can be more effective in their roles when they view plea negotiations in this way. Jarrett has provided several of the following examples to show the prosecutor's interest as it goes against the defendant's and victim's interests.

---

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 Agbuke, *supra* note 23.

41 *Id.*

42 *Id.*

43 *Id.*

ii. The Best Interest of the Wrongdoer

Jarrett worked on a case where a woman signed her father's name on a lease and then broke the lease.[44] Her father refused to pay and now the woman faced the criminal consequences for her actions.[45] As Jarrett and the woman's defense attorney developed the facts of the case, they learned that the woman was pregnant and had a severe drug problem.[46] The top priority for both Jarrett and the defense counsel was the baby.[47] The health and well-being of the child was more important than imposing a punishment on this woman.[48] They made the decision to keep the woman in jail for her to get clean and made arrangements for her to be released on bond to a drug treatment facility.[49]

iii. Balancing the Punishment with the Future of a Minor

One night, two teens, Jacob and TJ, decided to rob a local drug dealer at the drug dealer's apartment.[50] The drug dealer was the ex-boyfriend of TJ's new girlfriend.[51] Wearing a hoodie and armed with a fake gun, Jacob boasted on social media about how hardcore and "real" he was.[52] The truth was that he came from a functional, loving home and was only a "wannabe" drug dealer and gangbanger.[53]

Jacob and TJ held up the drug dealer, his roommates, and guests at gunpoint while searching for valuable items like gaming consoles and drugs.[54] Unbeknownst to the teens, they were not the only gunslingers in the apartment.[55] The drug dealer had a shotgun hidden away.[56] However, unlike the teens' "toy" guns, the drug dealer's gun was real.[57] The drug dealer retrieved the shotgun and frantically fired over and over again.[58] TJ was hit in the abdomen,

---

44 *Id.*
45 *Id.*
46 Agbuke, *supra* note 23.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 Agbuke, *supra* note 23.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 Agbuke, *supra* note 23.

Jacob in the leg.[59] No one knew at the time, but the drug dealer had also shot his roommate who died inside the apartment.[60] Jacob and TJ ran out of the apartment and into the street where TJ collapsed dead.[61] Jacob was soon apprehended by law enforcement and charged with capital murder.[62] Despite the fact that Jacob did not shoot anyone, under the laws of Texas, the facts and circumstances of the case made it a capital offense.[63] However, because Jacob was a minor at the time of the burglary, he could not receive the death penalty.[64] The maximum punishment Jacob could receive under the law was a life sentence with the opportunity for parole after forty years.[65]

Jarrett communicated to defense counsel a plea offer of forty years.[66] Defense counsel expressed that Jacob and his family would not accept that high of a sentence, so Jarrett did something he had never done before a case resolved—he met with the defendant's family.[67] Jarrett had a two-hour conversation with Jacob's family, listening to their pleas, answering their questions, and explaining the rationale behind the plea offer.[68] To a teenager, forty years is the end of the world. However, Jarrett pointed out that Jacob would be eligible for parole in his mid-thirties and he could still have the opportunity to live a meaningful life.[69]

Jarrett learned a lot from his visit with Jacob's family.[70] He was able to put himself in their shoes and see that they did not ask for any of this to happen.[71] He was able to see what the other side deals with—an experience he believes is valuable and important for both prosecutors and defendants.[72]

---

59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 Agbuke, *supra* note 23.
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 Agbuke, *supra* note 23.
71 *Id.*
72 *Id.*

iv. Avoiding a Trial to Protect the Victims

Jarrett had a case where a man decapitated his wife.[73] The man then showed his four-year-old daughter the severed head of her mother stored in the freezer.[74] Jarrett offered the man fifty years.[75] Considering the man's age, the plea offer was essentially a life sentence—the man would never be released from prison.[76] Jarrett expected to receive backlash and criticism from the community for what seemed to be a mild punishment for the man's actions.[77] However, in this case, Jarrett had to consider that little girl.[78] His main concern in this plea negotiation was to avoid revictimizing the child by making her testify to the trauma she had been through.[79] Justice in this case meant a lower sentence not because the defendant deserved it, but because that little girl did.[80]

3. Catching the "Big Fish"

Multi-defendant cases bring an interesting dilemma for a prosecutor. Does the prosecutor go after all defendants equally, or does he focus most of his attention and resources on just one of them? After all, not all criminal defendants are created equal. There is usually a guy at the top, the power-player, the "big fish." Then, there are the smaller guys, those that follow his directions and do his bidding. When faced with this scenario, the answer is usually easy—go after the big fish and use the small fish as bait to help catch him. Doing so helps the prosecutor with two of his main interests: justice and cleaning up the streets. If he focused on the smaller fish, he may catch more criminals, but small fish are replaceable and big fish are not. By putting the big fish in jail, he cuts off criminal activity at the top and punishes the criminal mastermind.

i. O.J. Simpson

As noted in the introduction, one notable example of this is the O.J. Simpson robbery case. In 2007, six men were arrested after they confronted sports memorabilia dealers in a Las Vegas ho-

---

73 *Id.*
74 *Id.*
75 *Id.*
76 Agbuke, *supra* note 23.
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*

tel room.[81] All six men were charged with several felonies, including armed robbery.[82] One of these men was O.J. Simpson, Heisman Trophy winner and NFL Hall of Famer, who became notorious after he was found not-guilty in his ex-wife's murder trial.[83] The other five were his not-famous friends. It is clear to see who the big fish was here: O.J.

Although all six men were arrested and charged, four of the other men soon made a deal that was equally beneficial to them and the prosecution.[84] The four co-defendants testified in the State's case against O.J.[85] Two of the co-defendants, Michael McClinton and Walter Alexander, testified that Simpson summoned them and asked them to bring guns with them to a meeting Simpson had arranged with the memorabilia dealers.[86] At the meeting, they said Simpson told them to point the .45-caliber Ruger at the dealers and take Simpson memorabilia.[87] At trial, the prosecution presented a tape recording in which Simpson asked McClinton about the gun and laughed about it.[88] This turned out to be one of the prosecution's strongest pieces of evidence.[89] With this, the prosecution was able to secure a guilty verdict against the big fish—Simpson was found guilty of kidnapping, armed robbery, among other charges, and was sentenced to spend at least nine years in prison.[90] The testifying co-defendants, on the other hand, walked away with mere sentences of probation.[91]

Had they not helped the prosecution gather evidence against Simpson, they could have received about seven and a half years in prison like Clarence Stewart, the only one of Simpson's cohorts who did not negotiate a plea deal.[92] This is a good win-win outcome (for everyone, except Simpson). Even though not all co-defendants were sent to prison, the prosecution obtained valuable

---

81 *Timeline: OJ Simpson Legal History*, NBC L.A. (May 13, 2013, 2:03 PM), http://www.nbclosangeles.com/news/local/OJ-Simpson-Legal-Timeline-History-207202111.html.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 Powers, *supra* note 2.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* On October 1, 2017, Simpson was released after serving nine years in state prison. Amy Harmon & Christina Caron, *O.J. Simpson is Freed on Parole in Nevada After 9 Years*, N.Y. TIMES (Oct. 1, 2017), https://www.nytimes.com/2017/10/01/us/oj-simpson-parole-nevada.html.

91 Powers, *supra* note 2.

92 *Id.*

information that helped them build a case and put the ringleader behind bars. Without McClinton's tape and assistance, this may not have been possible. Moreover, even if the testifying co-defendants were each convicted of a felony, they would have escaped prison time. Without the plea deal, they would have gone to prison with the non-testifying co-defendant.

ii. Bernie Madoff

A similar situation arose in the Bernie Madoff case. Two years prior to pleading guilty, Paul Konigsberg, an accountant for Madoff, began talking to the government about his crimes.[93] These conversations provided the government with investigative leads and corroboration of evidence, which helped them build cases against Madoff and some of his high-level associates.[94]

Konigsberg pleaded guilty to one count of conspiracy to falsify the books and records of Madoff Securities and to obstructing the administration of the tax laws.[95] Under these charges, he faced at least eight years in prison, with a maximum sentence of thirty years.[96] However, he served none of this time.[97] As part of his plea deal, Konigsberg agreed to cooperate with the government in its ongoing investigation against Madoff himself.[98] The prosecutors soon recognized that Konigsberg was unaware of Madoff's Ponzi scheme, even if he unwittingly helped it along.[99] Thus, he was a small fish. The big fish were Madoff and his cohorts who knowingly engaged in the Ponzi scheme. So, the prosecution used the information Konigsberg provided, along with his testimony, to es-

---

93 *Accounting Exec Earned Leniency in Madoff Case, Prosecutors Say*, BOSTON GLOBE (July 3, 2015, 6:00 PM), https://www.bostonglobe.com/business/2015/07/03/accounting-exec-earned-leniency-madoff-case-prosecutors-say/DbH9zD8UP7SWOHJjxsZl4O/story.html.

94 *Id.*

95 *Manhattan U.S. Attorney Announces Guilty Plea of New York Accountant in Connection with the Massive Fraud at Bernard L. Madoff Investment Securities*, U.S. DEP'T OF JUST. (June 24, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-guilty-plea-new-york-accountant-connection-massive.

96 *Id.*; *see also* Larry Neumeister, *No Prison for Accounting Executive in Madoff Fraud Case*, SAN DIEGO UNION-TRIB. (July 8, 2015, 10:22 PM), http://www.sandiegouniontribune.com/news/2015/jul/08/accounting-executive-set-for-sentencing-in-madoff/.

97 Neumeister, *supra* note 96.

98 U.S. DEP'T OF JUST., *supra* note 95.

99 BOSTON GLOBE, *supra* note 93.

tablish cases against these big fish.[100] In return, Konigsberg escaped prison time.[101]

iii. Sammy "the Bull" Gravano

Another prime example of catching the big fish is the story of Sammy "the Bull" Gravano. Gravano was a part of the Gambino Crime Family in New York.[102] After several months of investigation, the FBI arrested Gravano and John Gotti, the head of the family, on multiple charges including murder.[103]

After sitting in jail for ten months with Gotti trying to pin three murders on him, Gravano contacted the FBI to request a plea deal.[104] Gravano agreed to admit to nineteen murders, including that of his brother-in-law, to testify against John Gotti, and to testify for the government on any other cases for the next two years.[105] In return, the prosecutor would let the judge know that Gravano had cooperated and acted in good faith.[106] Furthermore, Gravano would enter the witness protection program upon release.[107] The max sentence that Gravano would receive was twenty years in prison instead of life.[108]

Gravano's testimony not only led to many arrests and convictions but also allowed the FBI and police to understand how the Mafia worked.[109] His testimony proved invaluable in dismantling crime families throughout New York, leading to thirty-six arrests and convictions.[110] So, not only did the prosecutor get his big fish

---

100 The prosecution also got to fulfill another important interest through Konigsberg: restitution. Part of the plea deal required Konigsberg to forfeit $4.4 million, which was used to compensate victims of the fraud. U.S. DEP'T OF JUST., *supra* note 95. Additionally, Konigsberg's information aided the government in striking a deal with JPMorgan Chase & Co., in which the bank agreed to pay $1.7 billion to settle criminal charges related to its relationship with Madoff. Larry Neumeister, *Accounting Exec Receives Light Sentence in Madoff Case*, ABC7NY (July 3, 2015), https://abc7ny.com/bernard-madoff-ponzi-scheme-paul-konigsberg-manhattan-federal-court/827086/.

101 Neumeister, *supra* note 96.

102 *See* GangLife Documentary, *National Geographic Documentary 2016 HD1080p–Sammy Gravano Interview Gambino Mafia Family*, YOUTUBE (Jan. 29, 2016), https://www.youtube.com/watch?v=8T29etcOp70 [hereinafter *Sammy Gravano Interview*].

103 Steven M. Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1142–46 (2004).

104 *See Sammy Gravano Interview*, *supra* note 102.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *See Sammy Gravano Interview*, *supra* note 102.

in Gotti, he also got more fish, and Gravano was able to receive a lighter sentence.[111] In fact, Gravano was only sentenced to five years in prison and three years of supervised release.[112] He only spent five more months in jail after securing the plea deal.[113]

4. Justice and Doling Out Punishment

i. Bus Driver Case[114]

This was a typical driving while intoxicated ("DWI") with the defendant failing the breathalyzer. The result of the breathalyzer was not exceptionally high and none of the facts were out of the ordinary. No one was injured. The defendant, Goble's client, was a bus driver. He had a family in Waco and was well respected. On the day in question, he had attended a birthday party and was subsequently arrested for DWI. If he were convicted of driving while intoxicated, the laws, regulations, and terms of employment would require that he be terminated. Therefore, the prosecutor agreed that the standard punishment for the client would be disproportionate because of the sanctions that would result outside of the criminal law system.

The prosecuting attorney, however, did not want him to escape without any punishment at all. Goble and the prosecutor then agreed to a plan where the driver would commit to many hours of community service, speaking to schools, and volunteering with Mothers Against Drunk Driving. He also attended an Alcoholics Anonymous class through the probation department and contributed to a non-profit organization. He underwent an extensive alcohol screening process in which it was determined that he did not have any issue with any type of drugs or alcohol and that the arrest was an unusual event. Thereafter, the prosecuting attorney agreed that he had "paid a price" and dismissed the case.

ii. A Life Sentence of a Different Kind[115]

Defendant, R.S., was a 15-year-old juvenile with no prior criminal history and had twin 10-year-old brothers. By numerous ac-

---

111 *Id.*

112 *Id.*

113 Gravano was sentenced in 2002 to twenty years in prison for drug trafficking in Arizona. *Id.*

114 This case is referring to notes from Rod Goble. Rod Goble is a criminal defense attorney in Waco, Texas. Certain facts of this case have been changed to protect client information.

115 Interview with Judge Deivanayagam, McLennan County Court, in Waco, Tex. (May 2016). This section is referring to an interview of Judge Vikram "Vik" Deivanayagam. Judge

counts he was a great older brother. For example, in the summers, he would take his younger brothers fishing, hiking, and camping. They lived in the country in Elm Mott, Texas, in a trailer home. Both parents worked and were good people. One day during the summer, R.S. had a friend come over while the parents were at work. That friend brought a six-pack of beer. They each had one beer and started a second (the twins were not given any alcohol). One of the twins wanted to go out and shoot cans off the fence posts but R.S. kept telling him they would do so later. Eventually, the twin grabbed the shotgun by the barrel to take it outside. As R.S. grabbed the other end of the shotgun to pull it away, the shotgun went off shooting the twin in the chest. The EMS was called immediately, but they did not arrive in time and the 10-year-old died in the trailer.

R.S. was charged with criminally negligent homicide, largely because of the use of alcohol. Deivanayagam spent weeks talking to the prosecutor about the differences between an accident and criminal negligence. Despite these discussions, the prosecutor was of the opinion that tragic as the circumstances were, she was going to prosecute. So, Deivanayagam tried a different approach. He asked her about her ultimate goals—she wanted to send a message to the community's youth about drinking and, because there was a death, a price had to be paid. Knowing these things, the attorneys agreed to an interview with some local media (both TV and newspaper). The interviews were gut-wrenching, but the message was spread. With regard to making sure that R.S. paid a price, Deivanayagam explained to her that R.S. still had a surviving twin. As that child grew up, went to prom, graduated high school, got married, and had kids, there would be a living, breathing reminder of the twin that didn't survive. At every family gathering and every holiday meal, R.S. would see the face of the twin that survived and be reminded of the one that didn't. It was a life sentence of a different kind. The arguments seemed to work, her stance softened, and even though she did present it to the grand jury for consideration, she assured Deivanayagam that her recommendation would be not to prosecute. The grand jury's decision was to no-bill the matter.

Deivanayagam is a judge in the McLennan County Court at Law, and previously was a criminal defense attorney with Rod Goble.

5. Trading for Information and Training

Often, prosecutors need background and insider knowledge to pursue cases, and if a defendant is lucky, he can trade on such knowledge to receive a lower sentence. For example, consider this story from defense attorney Michelle Tuegel.[116]

Tuegel represented a defendant charged with possession of GHB with the intent to manufacture the controlled substance. GHB is also known as the "date rape drug." The defendant had a serious drug problem but was unique compared to Tuegel's other clients in the federal system—he was a former nurse, so he had a lot of knowledge and information about the chemicals used to make GHB. With this knowledge, he was able to manufacture the drug with his friends.[117]

The defendant was getting the chemicals to manufacture the GHB through the Alibaba e-commerce company in China. Eventually, Homeland Security noticed the shipments and its agents were able to gather enough information to begin a formal investigation. By tracking money orders, Homeland Security agents were able to find the defendant's computer information, and the materials and packages used to make the drugs which led to his arrest.

Tuegel quickly met with the prosecutor to see if this was a case where the government was looking for more information. At that time, the government had some information on GHB manufacturers and distributors in the state, but not enough to obtain arrest warrants or indictments. Tuegel knew that the defendant could provide enough information to make all of that happen. She was able to play to the prosecutor's interest of getting bigger and more numerous arrests while still satisfying the defendant's interest in getting a lighter sentence.

Tuegel used the defendant's qualities as selling points in the negotiation: the defendant had the information the government needed, the defendant was well-spoken and educated in medicine. They agreed to have the defendant sit down and provide information to federal agents in a debriefing. If the information the defendant provided resulted in arrests and convictions, the prosecutor would recommend a lighter sentence. Debriefings occurred with DEA, ICE, and even local state authorities.

---

116 Michelle Tuegel is a criminal defense attorney based in Waco, Texas.

117 At that time, the defendant and his friends were also using methamphetamine, an upper. They used the GHB, a downer, on themselves to come down from their methamphetamine highs.

The federal agents wanted the defendant to teach them about the drug and the process by which it was manufactured. In the initial debriefing, the defendant was teaching the prosecutor and the agents about the chemistry in connection to GHB and its manufacturing process. It seemed like something straight out of an episode of Breaking Bad.

The defendant also informed the agents about people who were moving GHB out of a restaurant. This was a huge red flag considering how unique the substance was and what it was used for. This drug is very dangerous when near food that people are consuming. The defendant's information ultimately enabled the agents to fight crime better.

While the defendant was instrumental in teaching the government about GHB, he could potentially be a great witness that could also teach a jury about GHB. Before sentencing, the prosecutor filed what is called a 5k motion in the federal system, which states that the defendant provided substantial assistance to the government. This type of motion is often sealed to protect the defendant. At sentencing, the judge was made aware that the defendant had cooperated with the federal agents on how to manufacture this type of drug, where distributors were, and other information which could lead to big busts.

B. *Defendant's Interests*

1. The Crime Charged[118]

One day, two young men had been drinking when they determined it would be fun to imitate a group of teenagers who had used slingshots to break windows in the Waco area. They went on a rampage down Valley Mills Drive and broke twenty-seven windows, causing several thousand dollars' worth of damage. They were caught in the act and charged with felony criminal mischief.

One of the defendants was to enter dental school in the fall, while the other was taking his exams to be a Certified Public Accountant and would soon afterwards begin working at a major accounting firm. Needless to say, a felony conviction would have prevented both of them from pursuing their occupations.

---

[118] Interview with Rod Goble, private criminal defense attorney, Law Office of Rod Goble, in Waco, Tex. (May 2016).

Rod Goble met with the elected District Attorney and the First Assistant and discussed the case with them. The D.A. advised that he would not consider reducing the charges because of the publicity and the fact that he had twenty-seven business owners "out for blood." Goble asked the D.A. if he would consider reducing the charges if Goble could get the twenty-seven business owners to request that charges be reduced to a misdemeanor. The D.A. literally laughed and said that it would be an impossible task, and that the detective working the case would be upset and disagreeable. Goble then asked if he could get the detective to agree to a misdemeanor charge. The D.A. again laughed and said it would never happen. But, if Goble could do it, the D.A. would agree to a misdemeanor.

What the D.A. did not know at that time is that Goble had already talked with the detective and the detective had verified that these two desperados had not been involved in any way in the previous damage. He actually liked the two young men and did not want to see their careers go down the drain. He was very cooperative behind the scenes giving the defense information about the victims. Goble then contacted all the business owners and arranged a meeting between them and the clients to answer any and all questions about the incident, as well as the payment of restitution. The business owners' primary questions were "why did those kids do such a stupid thing?" Goble determined that the clients would do a much better job answering the question than he would. Therefore, he sent the clients door-to-door to meet with every single owner. After their meetings, everyone signed a statement stating that they did not oppose the charges being reduced, and especially wanted the charges to either be reduced from a felony to a misdemeanor or be completely dismissed. Interestingly, the owners did share several stories about some of the stupid things they had done in their younger years.

After further discussion, the D.A. followed the agreement and the charges were reduced. The victims in the case became allies for the defendants. The victims and the detective investigating the case were glad the students were able to begin their careers. Both of the students accomplished their goals, had families, and clearly learned a lesson. Of significance in this case is that both students immediately accepted responsibility and made restitution.

2. Telling His or Her Story

Criminal defendants—like the rest of us—are human beings, and human beings are emotional. According to a former FBI hostage negotiator, taking emotion out of negotiations causes them to fail.[119] When parties begin to consider the best alternative to a negotiated agreement ("BATNA") or engage in positional bargaining, this is what they are doing—they are pretending the other side is a rational, unemotional person.[120] But that is far from reality. Instead, one must consider the other side's emotions, which are interest-based, and use them to push negotiations along.[121] Sometimes, this emotional interest is the defendant's need to have his or her story heard. One great example is that of David Koresh and the Branch Davidians.

The Branch Davidians made national news when federal agents sieged the organization's compound near Waco in 1993. But few know of the negotiations that transpired between David Koresh and government officials. After the Bureau of Alcohol, Tobacco and Firearms ("ATF") failed to serve an arrest and search warrant on the Compound, the FBI enlisted its "best and most experienced negotiators."[122] The goal was to "assess the behavior of Koresh and his followers."[123] In other words, the team was probably looking to determine what the Branch Davidians really wanted, or their underlying interests. The FBI soon found out what this was: getting their message out to the world.[124] Koresh promised that he would start releasing hostages if his recorded message was played over the radio.[125]

The positions here were obvious: Koresh and the Branch Davidians wanted the government to leave them alone and to end the shootout started by ATF days prior; whereas, the government wanted to arrest Koresh for the weapons violations, which began the ordeal, and to secure the release of all hostages. However, by

---

119 Eric Barker, *6 Hostage Negotiation Techniques That Will Get You What You Want*, TIME (Mar. 26, 2014, 12:46 PM), http://time.com/38796/6-hostage-negotiation-techniques-that-will-get-you-what-you-want/.

120 *Id.*

121 *Id.*

122 Edward S.G. Dennis, Jr., *Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas February 28 to April 19, 1993*, U.S. DEP'T OF JUST. ARCHIVES (Oct. 8, 1993), https://www.justice.gov/publications/waco/evaluation-handling-branch-davidian-stand-waco-texas-february-28-april-19-1993#SUM.

123 *Id.*

124 *Id.*

125 *Id.*

listening to Koresh, the FBI was able to determine his true interests and to coordinate a detailed arrangement that would, in theory, result in a win-win for all parties. Koresh would get to spread his organization's message through a much larger platform than any he had had before, and the FBI would get the hostages home safely. This tactic was largely successful at the beginning. Koresh's message was broadcasted, and twenty-one children along with fourteen adults were released.[126] Sadly, the negotiations ultimately failed, and Koresh and many followers perished in the compound even after his message was broadcasted.

3. The Alford Plea: Survival Interest

In the realm of criminal law, many interests poke and prod at the parties to move them toward a certain result. At times, a defendant's interest will be just to survive—the most basic human need. What if a defendant is faced with the choice of going to trial and risk getting the death penalty or pleading guilty and spending life in prison? Is that even a choice? On top of that, what if the defendant believed he was innocent and still pleaded guilty?

The above scenario involves an interesting dynamic between a justice system that wants guilty parties to admit their guilt and defendants who want to survive. The Supreme Court of the United States, in *North Carolina v. Alford*, addressed these interests with an interesting result that gave us the "*Alford* plea."[127] In *Alford*, a defendant was faced with the possibility of getting the death penalty if he was convicted of first-degree murder.[128] In North Carolina, at that time, the only way to avoid the death penalty if convicted at trial was for the jury to recommend life imprisonment.[129]

But, defendants in North Carolina had a second option. If a defendant pleaded guilty to first-degree murder before trial, the penalty would be life imprisonment.[130] In other words, no trial, no death penalty. In this case, however, the defendant pleaded guilty to second-degree murder, and still testified that he had not committed the murder.[131] This posed an interesting question: Can

---

126 *Id.*

127 400 U.S. 25, 25 (1970).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

someone plead guilty to something that they do not believe they did just to avoid the death penalty?

This case came before the Supreme Court, which delivered an opinion containing several important holdings.[132] First, a plea of guilty to avoid a possible penalty did not demonstrate by itself that the defendant lacked free and rational choice.[133] Rather, a defendant may have made a rational choice in pleading guilty after receiving counsel on the possible penalties.[134] Second, a court that accepts this type of plea does not commit constitutional error when a defendant makes an intelligent decision in his best interest and the record before the court contains strong evidence of actual guilt.[135] Essentially, this plea is allowed when "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt."[136]

The *Alford* plea, therefore, serves as another tool in interest-based plea bargaining. These pleas are driven by a fear of a harsher penalty while still maintaining one's innocence. Even though this may seem to favor the government in prosecuting individuals who believe they are innocent, there is a high burden to get these pleas accepted by a trial court. The government must have enough evidence that the defendant will likely be charged with the higher crime before the judge will likely accept the plea.[137] Moreover, a trial court is not obligated to accept these pleas.[138]

Alford pleas are also different from other types of pleas such as the *nolo contendere* plea. In a *nolo contendere* plea, the defendant is refusing to admit guilt, and in subsequent litigation he can re-litigate his guilt.[139] With *Alford* pleas, however, the defendant is estopped from contesting his guilt in subsequent civil and criminal litigation.[140] Also, with an *Alford* plea, the defendant is claiming his innocence instead of refusing to admit to the guilt.[141]

---

132 *Id.*

133 North Carolina v. Alford, 400 U.S. 25, 25 (1970).

134 *Id.*

135 *Id.*

136 *Id.* at 37.

137 *Id.*

138 *Id.*

139 North Carolina v. Alford, 400 U.S. 25, 25 (1970).

140 *Id.*

141 Brandi L. Joffrion, *Sacrificing Fundamental Principles of Justice for Efficiency: The Case Against Alford Pleas*, 2 U. DENV. CRIM. L. REV. 39, 45 (2012).

Notably, *Alford* pleas are not nationally recognized. The state courts of New Jersey, Michigan, and Indiana all refuse to accept these pleas,[142] whereas, the state courts of Louisiana, Mississippi, Missouri, Pennsylvania, and Ohio, have frequently accepted these pleas.[143] Furthermore, federal courts discourage defendants from entering these pleas.[144] Of those criminal cases that end in plea bargaining, only 6.3–6.7% of state cases end in an *Alford* plea and only 2.8–3% of federal cases end in this plea.[145]

One of the benefits that this plea could serve comes from the *Willingham v. State* case in Texas.[146] This case became famous because scientific evidence indicating that Cameron Todd Willingham had been convicted on faulty opinions and "junk science" was discovered years after Willingham was executed.[147] In the original case, Willingham was accused of burning down his house and killing his three infant daughters.[148] Experts testified to the conclusion that the fire was caused by arson and that the only logical person to have started the fire was Willingham.[149] The State brought forth other evidence, including a "jailhouse snitch" who stated that Willingham told him in prison that he had burnt down the house.[150] The evidence at the time seemed to clearly implicate Willingham, but Willingham continued to maintain his innocence.[151] The prosecutor offered him a plea deal whereby Willingham could plead guilty and get life in prison.[152] Willingham refused the plea, and the jury convicted him and sentenced him to the death penalty.[153]

Many appeals and reviews later, Willingham was on death row only months from execution.[154] His pen pal sent his case to a re-

---

142 *Alford Plea – What is it and Which States Use it?*, HG.ORG, https://www.hg.org/legal-articles/alford-plea-what-is-it-and-which-states-use-it-49755 (last visited Nov. 3, 2019).

143 Jenny Elayne Ronis, Comment, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1399–1400 (2010).

144 U.S. Dep't of Just. Manual § 9-16.000.

145 Joffrion, *supra* note 141, at 56.

146 897 S.W.2d 351 (Tex. Ct. Crim. App. 1995).

147 *Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT (Sept. 13, 2019), https://www.innocenceproject.org/cameron-todd-willingham-wrongfully-convicted-and-executed-in-texas/.

148 *Willingham*, 897 S.W.2d at 354.

149 INNOCENCE PROJECT, *supra* 147.

150 *Willingham*, 897 S.W.2d at 356.

151 INNOCENCE PROJECT, *supra* note 147.

152 *Id.*

153 *Id.*

154 *Id.*

nowned chemist who specialized in fire investigation.[155] The chemist concluded that the evidence for arson was based on "junk science" that had been disproved and that all the evidence pointed to an accidental fire.[156] The chemist wrote a report showing his findings and the evidence was sent to another well-known fire investigator.[157] The second investigator also concluded that the incident had been an accident.[158] The two investigators sent their reports to the parole board and the parole board sent it to the governor.[159] The governor refused to grant the stay, maintaining that the case was good and that there was no error in it.[160] Willingham was subsequently executed.[161]

The *Alford* plea was already twenty years old by the time the trial occurred. Why was Willingham not given that option? It may be because it is not used very often, but perhaps not. An *Alford* plea could have given Willingham the option to plead to a lesser sentence while still claiming his innocence. In this case, the circumstances would have likely passed the high standard required to have this plea accepted because, at the time it would have been entered into, the evidence pointed heavily to his guilt. He would not have been executed and would likely have been released once the science and evidence had been more thoroughly developed.

As shown in *Willingham*, the *Alford* plea meets the defendant's interests of survival and getting a lighter sentence. It will allow defendants who believe that they are innocent a chance that the evidence of their innocence will come to light while avoiding the death penalty. This plea also meets the state's interest to achieve justice because this would give the state and the defendant time to prove who the truly guilty person is.

C. *Cultural Differences*

Attorney Michelle Tuegel had a client from Vietnam who owned a nail salon.[162] The client was accused of kissing his five-

---

155 *Id.*

156 *Id.*

157 INNOCENCE PROJECT, *supra* note 147.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 Interview by Sune Agbuke with Michelle Tuegel, formerly private attorney, Hunt & Tuegel in Waco, Tex. (Summer 2017).

year-old son's genitals. One day, the child communicated to someone at his daycare what his father was doing. Child Protective Services and local law enforcement called and questioned the defendant, who admitted to the behavior but was confused about why he was in trouble.

In the course of preparing for trial, she discussed the facts of this case with a cultural specialist. Through the cultural specialist's help, she learned that the defendant's behavior was a cultural act and not for sexual gratification. She learned that in Vietnamese culture, the oldest boy is so important and so highly regarded that the family essentially worships—in a purely spiritual sense—the male genitalia. This was common behavior by both parents.

Understanding that this type of behavior was not acceptable here in the United States, Tuegel sought to have her client take cultural classes and avoid registering as a sex offender. She understood how "unbelievable" this cultural practice would be to a prosecutor and that she lacked the background to explain it to the prosecutor. Tuegel found a cultural mitigation specialist who did her own research and provided the prosecutor with a report stating that the defendant lacked the intent to commit the offense of which he was accused.

As Michelle developed the case further, she learned that the mother of the child, and wife of the defendant, was very low functioning and really not equipped to care for the child. She believed that removing the defendant from his family would actually harm the child and that a dismissal of the charges was in the best interest of the child. Because the defendant was not hurting his son or another child, Tuegel was able to get the case dismissed. Her client took cultural classes to learn that his behavior was not acceptable in America and he did not have to register as a sex offender and, most importantly, their family unit was not disturbed.

D. *Additional Stories Involving Unjust Collateral Consequences*[163]

The following stories were provided by Judge Deivanayagam, while he was still in private practice. Before he assumed the bench of the McLennan County Court at Law, his practice consisted pri-

---

[163] Deivanayagam, *supra* note 115.

marily of criminal defense. His stories below all discuss unjust collateral consequences faced by his clients.

1. Boy Trouble

This is a case about two fourteen-year-old girls. Both were initially friends, going to church together, and spending time at each other's houses after school. But, as often happens, a boy entered the picture and the girls became rivals for his attention. Both girls began spreading rumors about the other. Although it is unclear who actually started the campaign of slander/libel, it is clear that both participated. Things came to a head one day when Deivanayagam's client, D.W., got off the bus and followed the other girl to her house. She then went up to the door and rang the bell. When the other girl answered, they exchanged words and D.W. pulled the other girl out of the house by her hair and proceeded to assault her in the front yard. Fortunately, a neighbor was nearby and broke up the incident before it got much worse.

The police arrived and Deivanayagam's client was charged with Assault and Burglary of Habitation (entering the victim's house to commit an assault, although there was some debate about whether there was actual entry). Both are serious charges and Deivanayagam's client's parents—unaware of the events leading up to the incident—were upset. The victim's parents were shocked and scared that their daughter was not safe in their house and worried about her mental health because of the bullying at school. D.W.'s parents were also worried that the other girl may retaliate and potentially cause D.W.—who was gifted both intellectually and athletically—to have a juvenile criminal record.

Deivanayagam spoke to the prosecutor and they both agreed that, while there was a basis for prosecution, they should find an alternative. They both realized that teenagers live in a world full of drama (both real and imagined). The attorneys feared that since both girls would continue to go to school together for the next four years (and both played sports together), there would be recurring incidents of retaliation no matter what happened on the case. In fact, for a couple of months after the incident, both parties' parents were reporting various incidents of exchanging ugly looks, spreading rumors, and egging the other's house. So, the attorneys agreed to have all the parties (parents, the girls, the prosecutor, and Deivanayagam) meet with a third-party mediator, which is something almost unheard of in the criminal context. Prior to the meet-

ing, the prosecutor and Deivanayagam agreed that nothing that arose from the meeting would be used in any further prosecution.

The meeting lasted almost four hours. The parties started off in different rooms, while the mediator talked separately with each side to get a feel for the positions. Then everyone moved into one room together. The atmosphere was initially cold, but eventually there was a thawing. The mediator did a great job of keeping the parents' input at a minimum and allowing the girls to talk it out in a controlled environment. Both girls got to express how they felt about the situation and each other. After some discussion and tears, both girls ended up making amends and leaving the room as friends again. The parents' fears were also laid to rest. The parents of the victim did not desire to press charges after seeing that D.W.'s parents were good people (that were also in the dark about the situation at school) who took the incident seriously. They had already imposed numerous sanctions at home because of the arrest/incident.

2. Losing Dreamer Status

In this case, the client, A.A., was twenty-two years old. He was stopped by officers on a routine traffic stop. Officers observed what they believed to be a small amount of marijuana in the car, so they decided to search the vehicle. While they searched, they also found a small amount of cocaine (less than one gram).

Here's the problem: A.A. was brought to this country when he was four years old. He attended school and graduated. When he was applying for jobs during high school, he made the discovery that he was not a legal resident of the United States. He then began the process of applying for legal status through the "Dream Act" (also known as D.A.C.A. or Deferred Action for Early Childhood Arrivals).[164] He did eventually receive legal status, which requires renewal every five years. But, a conviction, jail sentence, or deferred probated sentence results in the denial of renewal and possibly deportation and denial of reentry. As a result, A.A. faced not only the consequences in the criminal system but also serious collateral issues. A.A. had not been back to his home country since he was four. He didn't know anyone in that country, and he had not seen his relatives in the last twenty years.

Deivanayagam spoke with the prosecutor and agreed that, under the facts, the normal course of conduct would be to agree to

---

[164] DREAM Act of 2011, S. 952, 122th Cong. (2011).

place A.A. on a deferred adjudication probation. But, because of his residency status, such action would ultimately result in either A.A. being deported (so he would not finish his probation) or living here illegally with the possibility of being caught and deported at any time. This seemed to be a very harsh result. So, Deivanayagam had A.A. submit to regular drug testing for six months, perform community service, and maintain employment. At that point, Deivanayagam asked the prosecutor to refuse the felony possession of a controlled substance case and instead prosecute the misdemeanor marijuana case by offering deferred adjudication probation, which would not affect his status in this country under D.A.C.A. Deivanayagam argued that the prosecutor had evidence to show his client had quit using drugs and was rehabilitated (one of the goals of the criminal justice system), and that they could still monitor him for the next two years on a misdemeanor probation so that he stayed on the straight and narrow. Further, and of most importance to A.A., he would be able to stay in the country legally and contribute to society. The prosecutor agreed and they were able to resolve the matter.

3. Losing Employment on a Trivial Matter

A detective with the Waco Police Department failed to properly register his security business, which is a requirement for operating a security business in the State of Texas. The detective had filled out all the paperwork but forgot to mail the letter to the Department of Public Safety. He was later caught for failing to properly register his business. While this failure was only a status offense, a conviction could have dire consequences on the detective's job. If he were arrested, he would not be able to carry a gun, and if he could not carry a gun, then he could not be a police officer. He would lose his job and the benefits earned over the twenty years of working on the police force. Though a jury could sentence the detective to merely probation, that would still constitute a conviction on his record.

The defense attorney began negotiations with the prosecutor by helping the prosecutor understand the unique and severe consequences a conviction would have on the detective's life and how this was not someone deserving of punishment. The negotiation was successful. The prosecutor believed the detective was a good man and did not want to hurt him. The defense attorney and the prosecutor came to an agreement that deferred adjudication would be appropriate. However, there were two issues: determining the

appropriate length of time the detective would be on deferred adjudication, and how to allow the detective to carry a gun while on deferred adjudication, despite there being a prohibition by law. The agreed-upon solution was to send the detective on vacation. He could serve out his deferred adjudication without having to risk losing his job or break the law by carrying a gun. Fortunately, he had two weeks of vacation time. Therefore, the final plea deal was for ten days of deferred adjudication. This plea deal makes sense since the violation was regulatory in nature and not an evil action.

IV. Conclusion

The examples listed above show that, while we all understand justice is blind, not all defendants are created equal. To that end, it is important for both sides in a criminal proceeding to think outside the box. Indeed, as demonstrated, interest-based negotiation is prominent in the highest profiled cases and the lowest profiled cases, even when we do not realize it. For a criminal defense attorney, it is imperative to analyze the collateral consequences of a plea bargain because collateral consequence can cause an otherwise fair deal to be unjust.

Prosecutors, defendants, and victims can all have different interests. To be the best attorney—either as a prosecutor or defense attorney—you must learn how to best achieve the interests of not only your client but also of your opponent. Knowing the interests of your opponent will give you an advantage during negotiations to achieve the best result for your client. Adding a dose of interest-based negotiation to plea bargaining will help achieve justice while allowing defendants and victims to avoid harsh consequences or situations.