Georgia State University Law Review

Volume 27
Issue 2 *Winter 2011*

Article 11

1-1-2011

The Surprising Lessons from Plea Bargaining in the Shadow of Terror

Lucien E. Dervan

Follow this and additional works at: http://scholarworks.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Dervan, Lucien E. (2010) "The Surprising Lessons from Plea Bargaining in the Shadow of Terror," *Georgia State University Law Review*: Vol. 27: Iss. 2, Article 11.
Available at: http://scholarworks.gsu.edu/gsulr/vol27/iss2/11

This Article is brought to you for free and open access by the College of Law Publications at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia State University Law Review by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

THE SURPRISING LESSONS FROM PLEA BARGAINING IN THE SHADOW OF TERROR

Lucian E. Dervan[*∇]

ABSTRACT

Since September 11, 2001, several hundred individuals have been convicted of terrorism related charges. Of these convictions, over 80% resulted from a plea of guilty. It is surprising and counterintuitive that such a large percentage of these cases are resolved in this manner, yet, even when prosecuting suspected terrorists caught attempting suicide attacks, the power of the plea bargaining machine exerts a striking influence. As a result, a close examination of these extraordinary cases offers important insights into the forces that drive the plea bargaining system. Utilizing these insights, this article critiques two divergent and dominant theories of plea bargaining present in the current literature—the administrative theory and the shadow-of-trial theory. The article then offers a new theory of plea bargaining that both expands on these existing theories and combines relevant aspects of each into one overarching model. In doing so, this article provides for a greater understanding of the function of the plea bargaining machine in the criminal justice process, the roles played by its actors, and the factors influencing its operation.

INTRODUCTION

An hour and a half from Paris, American Airlines Flight 63 cruised 39,000 feet above the Atlantic Ocean. Inside, protected from the negative 70 degree temperatures outside the steel fuselage, sat 183

∗ Assistant Professor of Law, Southern Illinois University School of Law, and former member of the King & Spalding LLP Special Matters and Government Investigations Team.

∇ A special thanks to Professors Marc Miller, Ellen Podgor, Mark Brown, William Schroeder, and Christopher Behan for their insightful comments regarding earlier drafts of this article. This article is dedicated to Dalton, who arrived just as I was completing this piece.

passengers, many of whom had already drifted off to sleep. In row twenty-nine, however, a tall, unkempt man sat restlessly, his mind likely full of thoughts of both the past that had brought him to this place and the task that lay ahead. He had attempted to board the same flight the day before, but the fact that he had paid cash for his ticket and was carrying no checked luggage so concerned authorities at Charles de Gaulle Airport that they detained him for interrogation until well after the first flight to Miami departed. Now, a mere twenty-four hours later, he was in his desired perch, his message to the world concealed within the soles of his high-top basketball shoes.[1]

The first scream jolted Thierry Dugeon from his deep sleep in row thirty-nine, the air already ripe with the smell of sulfur. As his eyes adjusted to the scene, he saw the man in front of him fighting off a flight attendant who was grasping for his feet and screaming, "I need some help, I need some help."[2] As Dugeon lunged forward and restrained the man's arms, five other passengers and crewmembers raced toward them and tackled the stranger. As belts were passed down the rows to create restraints, the man's shoes, which were smoldering, were dowsed with water.[3] Once restrained, a doctor injected the enraged passenger with a sedative, and the plane fell silent. A short while later, outside in the frigid air, two F-15 fighter jets rose out of the dark sky and guided the plane safely to Boston's Logan Airport.[4]

---

1. *See* Pam Belluck, *Crew Grabs Man; Explosive Feared*, N.Y. TIMES, Dec. 23, 2001, at A1; Dana Canedy, *A Nation Challenged: The Travelers*; *A "Strange" Traveler Acted, and the Passengers Reacted*, N.Y. TIMES, Dec. 24, 2001, at A1; Michael Elliott, *The Shoe Bomber's World*, TIME, Feb. 25, 2002, at 46, *available at* www.time.com/time/magazine/article/0,9171,1001865,00.html.

2. Belluck, *supra* note 1.

3. The above described events are eerily similar to the attempted terrorist attack on Northwest Flight 253 in December 2009 by the "Christmas Day Bomber." In a similar style to Richard Reid, Umar Farouk Abdulmutallab slipped through airport security by hiding his bomb materials in his underwear. Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, Dec. 26, 2009, at A1 (noting the similarities between the "Christmas Day Bomber" and the "Shoe Bomber"); *see also* Mark Hosenball, Michael Isikoff & Evan Thomas, *The Radicalization of Umar Farouk Abdulmutallab*, NEWSWEEK, Jan. 11, 2010, at 37; Charlie Savage, *Nigerian Man is Indicted in Attempted Plan Attack*, N.Y. TIMES, Jan. 7, 2010, at A14. It is as of yet unknown whether Abdulmutallab will plead guilty to his alleged act of terrorism, but the observations and analysis offered in this article will shed considerable light on the likelihood that he will bypass trial in return for a plea.

4. Belluck, *supra* note 1; Canedy, *supra* note 1.

Less than a year later, on October 4, 2002, that tall, unkempt man, Richard Reid, pleaded guilty to eight felony charges, but received no leniency from the prosecution. The charges included attempted murder, attempted use of a weapon of mass destruction, and attempted destruction of an aircraft.[5] It is puzzling that a man who spent years training in Afghanistan and traveling the world for al Qaeda scouting for vulnerable targets would choose to plead guilty in a court whose legitimacy he refused even to recognize.[6] Though Reid had certainly not lost his fervor for al Qaeda, something stronger than his hatred of America prompted his decision to plead guilty, and Reid is certainly not the only terrorist to so acquiesce.

Obtaining the exact number of defendants who have pleaded guilty to terrorism or terrorism related charges since September 11, 2001 is impossible because the federal government refuses to release such information. It is estimated though that there have been several hundred convictions of which over 80% resulted from a plea of guilty.[7] Although the plea rate for terrorism cases is certainly lower than the plea rate for other federal offenses, which on average has remained above 95% for almost every year since 1999, a plea rate in excess of 80% is remarkably high given the psyche of those who engage in the acts being prosecuted.[8] Consider that Richard Reid

5. *See* Government's Sentencing Memorandum at 1, U.S. v. Richard Colvin Reid, CR NO. 02-10013-WGY (D. Mass. Jan. 17, 2003) (containing the government's arguments as to why Richard Reid should be sentenced to spend the rest of his life in prison).

6. *See* Elliott, *supra* note 1, at 49 (detailing Reid's travels to France, Egypt, Turkey, Pakistan, and Afghanistan prior to his attempted bombing of American Airlines Flight 63).

7. While the federal government has previously released both criminal prosecution data and sentencing data through both the United States Sentencing Commission and Transactional Records Access Clearinghouse (TRAC), information related to terrorism prosecutions has not been made public through these forums. In 2006, however, the Department of Justice released a Counterterrorism White Paper, which stated that since 2001 there had been 261 terrorism convictions in 45 jurisdictions, of which 83% were the result of a plea bargain. U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 13–14 (June 22, 2006). Also in 2006, The Center on Law and Security released a study that estimated there had been 307 terrorism convictions since 2001, of which 82% were the result of a plea bargain. CTR. ON LAW & SEC., TERRORISM TRIAL REPORT CARD: U.S. EDITION 4 (2006), *available at* http://www.lawandsecurity.org/publications/TTRCComplete.pdf; *see also* Richard Schmitt, *For the Justice Department, a Welcome Conviction*, LA TIMES, at A15, Apr. 26, 2006 ("[M]ost of the convictions the Justice Department has won since the Sept. 11 attacks have come by defendants pleading guilty to crimes rather than by the government proving its case in a court of law.").

8. Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 476 (Fall 2007).

rejected the authority of the American justice system and expressed his continued allegiance to al Qaeda only moments before subjecting himself to the judgment of a United States district court judge.

While it may be counterintuitive that such a large percentage of terrorism prosecutions are resolved through plea bargains, it appears that even in these extraordinary cases the power of the plea bargaining machine exerts a striking influence. As a result, a close examination of these extraordinary cases offers important insights into the forces that drive the plea bargaining system. Utilizing these insights, this article will critique two divergent and dominant theories of plea bargaining in the current literature and offer a modified theory that harmonizes the conflict between these two perspectives.

In Section I, this article examines the history of plea bargaining and the two theories which dominate the current literature.[9] The first theory, the administrative theory, argues that plea bargaining triumphed because of the rise of prosecutorial power.[10] Such literature argues that prosecutors have become so powerful due to their control of charging decisions and sentencing ranges that they now force defendants to accept plea bargains for which they alone have determined the appropriate punishment in an administrative fashion. The second theory, the shadow-of-trial theory, argues that both prosecutors and defendants participate in the plea bargaining process and engage in a mutually beneficial contractual negotiation.[11] In this model, each party forecasts the expected sentence after trial and the probability of acquittal. The parties then come to a resolution that contains some related proportional discount.

In Section II, the article examines three terrorism prosecutions and furthers our understanding of the plea bargaining machine by discussing three features of these cases.[12] The first feature is that defendants sometimes determine that the inherent benefits of pleading guilty, even without an offer of additional benefits from the government, are a sufficient incentive to forego trial. In these cases,

9. *See infra* Part I (regarding conflicting theories of plea bargaining).
10. *See infra* Part I.A (describing the "administrative theory" of plea bargaining).
11. *See infra* Part I.B (describing the "shadow-of-trial theory" of plea bargaining).
12. *See infra* Part II (describing the Richard Reid, Lodi, California, and Lackawanna Six cases).

the plea bargain is with the criminal justice system itself and not the government, yet it is a plea bargain nonetheless because a guilty plea is exchanged for perceived benefits. The second feature is that defendants, as well as prosecutors, exercise considerable control over the factors that influence decisions regarding whether a guilty plea will be entered and what, if any, leniency will be offered in return. Some of these factors are present in all criminal cases, some are applicable in each type of criminal charge, and some are unique to particular defendants. By demonstrating the significant role played by defendants in the system, this article will challenge the contention of the administrative theory that defendants are unwilling participants in the plea bargaining machine and unable to exercise real influence over the outcome of the process. The third feature is that after both parties have influenced the factors that affect the prosecution's and the defense's analysis of the barriers to success at trial and the barriers to success of the plea bargain, the prosecution makes a final administrative decision regarding the appropriate punishment. In more than 80% of terrorism cases and 95% of federal prosecutions, the defendant then accepts the government's offer.

In Section III, building upon the aspects of the plea bargaining machine examined in Section II, this article will propose a new theory of plea bargaining that both expands on the administrative and shadow-of-trial theories and combines relevant aspects of each into one overarching theory of plea bargaining.[13] Through such an analysis, one will gain a greater understanding of the function of the plea bargaining machine in the criminal justice process, the roles played by its actors, and the factors influencing its operation.

I. CONFLICTING THEORIES REGARDING THE PLEA BARGAINING MACHINE

While plea bargaining pre-dates the American criminal justice system, "its evolution into a force that consumes over 95% of defendants in America is a phenomenon confined predominately to

13. *See infra* Part III (examining the dual chambers of the plea bargaining machine).

the nineteenth and twentieth centuries."[14] George Fisher begins his seminal work on plea bargaining, *Plea Bargaining's Triumph*, with a somber expression of remorse over the machine's rise to prominence: "There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. . . . But though its victory merits no fanfare, plea bargaining has triumphed. . . . The battle has been lost for some time. . . . *Victory goes to the powerful*."[15] While the battle may have been lost for some time, understanding the evolution and future of plea bargaining remains a challenging endeavor.

As alluded to in Fisher's statement above, a general consensus has evolved within plea bargaining scholarship that plea bargaining became a dominant force as a result of prosecutors gaining increasing power and control in an ever more complex criminal justice system. As prosecutors' powers to operate within and manipulate the system grew, their ability to create incentives for defendants to plead guilty also escalated. For instance, through analysis of plea bargaining in Massachusetts, Fisher argues that as the criminal justice system became more sophisticated, prosecutors gained the power to use selective charge bargaining to offer reduced sentences for those willing to negotiate.[16]

---

14. Dervan, *supra* note 8, at 478.

15. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 1 (2003) (emphasis added); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000). For a discussion of scholarship on plea bargaining generally and the debate over whether plea bargaining is an appropriate part of our criminal justice system, see Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006).

16. FISHER, *supra* note 15, at 210 ("[Sentencing Guidelines] invest prosecutors with the power, moderated only by the risk of loss at trial, to dictate many sentences simply by choosing one set of charges over another."); *see also* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 40 (1979); Dervan, *supra* note 8, at 478. For a discussion of charge bargaining and its use by prosecutors, see Joy A. Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 592 (2004) ("Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file."); Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066–67 (2006) ("Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute."); Dervan, *supra* note 8, at 478; Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) ("Charging decisions are a critical sentencing

Key to the success of prosecutors' use of increasing powers to create incentives that attracted defendants was their ability to structure plea agreements that included significant differences between the sentence one received in return for pleading guilty and the sentence one risked if he or she lost at trial.[17] In a 1981 article on plea bargaining, Albert Alschuler wrote of this "sentencing differential" and stated, "Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest that this perception is justified."[18] Among such studies was an examination by David Brereton and Jonathan Casper that analyzed robbery and burglary defendants in three California jurisdictions.[19] The results were shocking and illustrated that defendants who exercised their constitutional right to a trial received significantly higher sentences than those who worked with prosecutors to reach an agreement.[20] Not

---

matter and are left solely to the discretion of the prosecutor. When determining which charges to bring, prosecutors may often choose from more than one statutory offense."); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 177 (2004) ("The power of the prosecutor to charge is two-fold; the power to indict or not . . . and the power to decide what offenses to charge.").

17. Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2002) [hereinafter Bibas, *Bringing Moral Values*] ("The criminal justice system uses large sentence discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty."). Along with sentencing differentials, of course, are considerations by the defendant of the likelihood of success at trial. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) [hereinafter Bibas, *Shadow of Trial*] ("In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains.").

18. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652–53 (1981). Alschuler goes on to state, "Although the empirical evidence is not of one piece, the best conclusion probably is that in a great many cases the sentence differential in America assumes shocking proportions." *Id.* at 654–56; *see also* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 251 (2006) ("While practitioners disagree about the acceptability of a large sentence differential between the post-plea and post-trial sentence, they agree that such a differential is common.").

19. David Brereton & Jonathan D. Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55–59 (1981–82); *accord* H. Joo Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served).

20. Brereton & Casper, *supra* note 19, at 55–59; *accord* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The differential in sentencing between those who plead and those convicted after trial reflects the

limiting themselves to a mere observation of sentencing trends, the researchers also made an insightful statement regarding the impact of high differentials on the rates of plea bargaining:

> The point of the preceding discussion is simple enough: when guilty plea rates are high, expect to find differential sentencing. We believe that recent arguments to the effect that differentials are largely illusory do not withstand serious scrutiny, even though this revisionist challenge has been valuable in forcing us to examine more closely what is too often taken to be self-evidently true.[21]

Significant differentials, Brereton and Casper argued, are a tool used to increase plea bargaining rates by increasing the incentives for negotiation.[22]

A. The Administrative Theory of Plea Bargaining

The scholarship described above regarding the rise of plea bargaining has led to a theory pertaining to the modern operation of the plea bargaining machine. This theory emphasizes the role of the prosecution in dictating the terms and conditions of the bargain and relegates the defendant to the position of an unwilling, passive participant whose only power rests in the ability to accept or reject the government's offer. This article will entitle this model the administrative theory of plea bargaining because at its most

---

judgment that defendants who insist upon a trial are doing something blameworthy."); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 443 (1995) ("Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.").

21. Brereton & Casper, *supra* note 19, at 69.

22. *Id.* at 45 ("It is this sentence differential (whether conceived of as a reward to guilty pleaders or as a punishment of those who waste the court's time by 'needless' trials) which has traditionally been seen as the engine driving the plea-bargaining assembly line."); *see also* Givelber, *supra* note 20, at 1382 ("The pragmatic justification for differential sentencing is simple and powerful: we want those charged with crimes to plead guilty, and differential sentencing provides an accused with a strong incentive to do just that.").

pronounced, the theory portrays prosecutors as administrative figures handing down punishment in the place of the courts.[23]

Fisher alludes to the idea of prosecutors as the ultimate wielders of an administrative type decision-making power in his work *Plea Bargaining's Triumph*:

> To track the course of plea bargaining's rise, we must discover how prosecutors, who had an almost inherent interest in plea bargaining, secured the power to make it happen, and why judges, who inherently had the power to make it happen, began to see it as in their interest. . . . And criminal defendants, who held a *nominally absolute power* to plead or not to plead but who found themselves hopelessly undefended, must play a real if complicated part.[24]

A more conscious description of defendants as passive players is contained in Donald Gifford's 1983 work entitled *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*.[25] Gifford begins his piece by casting defendants as mere recipients of the government's administrative verdicts in the form of plea offers:

> [P]lea bargains are not consensual agreements entered into by defendants after adversarial negotiation. Rather, the prosecutor substantially dictates the terms of plea agreements in most cases. "Plea bargaining" is in reality the prosecutor's unilateral administrative determination of the level of the defendant's criminal culpability and the appropriate punishment for him.[26]

---

23. It is worthy of mention that the description regarding the administrative and shadow-of-trial theories presented in this article utilizes several strong pieces that establish the outer poles of this debate. While many other articles may fall, sometimes unknowingly, somewhere between these two extremes, this article seeks to definitively address the conflict present in the literature and resolve the inherent discrepancies between the two opposing theories.

24. FISHER, *supra* note 15, at 859 (emphasis added).

25. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983).

26. *Id.* at 39 ("In reality, there is little of the 'give-and-take' which is axiomatic to the Supreme Court's treatment of plea bargaining."); Maureen E. Laflin, *Remarks on Case-Management Criminal*

For defendants in the administrative theory, therefore, there is no significant role other than what Fisher termed two decades later the "nominally absolute power" to accept the government's offer.[27] Gifford even uses the term "administrative determination" in describing the government's role in the plea bargaining machine.[28] This view of the parties' roles in plea bargaining is also discussed by Ronald Wright and Marc Miller, who state in their piece entitled *Honesty and Opacity in Charge Bargains* that the "American criminal justice systems have become administrative systems run by executive-branch officials."[29] As applied to the plea bargaining process, Wright and Miller state, "Guilty pleas could just as easily reflect prosecutorial domination and an administrative system run amok."[30]

In his article entitled *Plea Bargaining and Procedural Justice*, Michael M. O'Hear argues that the modern plea bargaining process is essentially administrative in nature.[31] O'Hear rejects the notion that plea bargains result from a form of contractual negotiation involving two participating parties:

Mediation, 40 IDAHO L. REV. 571, 605 (2004) ("Prosecutors already wield nearly absolute power in the criminal arena and exert that power in the plea bargaining setting."); *see, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional'. . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.") (citations omitted); *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1968) ("Administrative considerations are far more basic. 'We are running a machine,' a Los Angeles trial assistant declares. 'We know we have to grind them out fast.'").

27. FISHER, *supra* note 15, at 859.

28. Gifford, *supra* note 25, at 45 ("[T]he process of determining what charges the defendant will plead to is more an administrative determination than a true negotiation.").

29. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1409 (2003).

30. *Id.* at 1415; *see also* Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037 (2006) ("The enormous power of federal prosecutors to persuade suspects to accept guilty pleas is well documented."); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) ("The substantive evaluation of the evidence and assessment of the defendant's responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor."); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 137 (2008) ("Many scholars have observed that our criminal justice system today is more administrative than adversarial . . . . [Rather than trials assessing evidence,] the meaningful screening of cases now may be prosecutorial rather than judicial.").

31. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).

> Moreover, it is easy to overstate the extent to which plea bargaining really is bargaining. As noted previously, the practice often resembles shopping in a supermarket—with one important exception: the dissatisfied defendant is not free to move on to a different store in search of lower prices. . . . [W]hen prosecutorial lenience is the only reliable means to avoid a draconian sentence, the prosecutor can effectively dictate the terms of the "deal."[32]

Even Justice David H. Souter has argued that defendants in plea negotiations often stand in no position to dictate the terms of the deal. In his dissent in *United States v. Mezzanatto*, he wrote, with regard to waivers of appeal in plea agreements, that defendants are "generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice."[33]

Taken to the extreme, the administrative plea bargaining theory argues that prosecutors have become so powerful that defendants have even lost what Fisher termed the "nominally absolute power to plead or not to plead."[34] Such an argument was advanced by John Langbein in describing plea bargaining as a form of torture and the defendants as unwilling victims of coercive incentives:

> We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his

32. *Id.* at 425; *see also* David Aaron, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3035–36 (1999) ("[T]he coercive power of the prosecutor and the general disequilibrium between the government and the defendant challenge the assertion that a plea bargain is a voluntary agreement or contract.").

33. United States v. Mezzanatto, 513 U.S. 196, 216 (1995); *see also* Robert Elias, *The Law of Personhood: A Review of Markus Dirk Dubber's Victims in the War on Crime: The Use and Abuse of Victims' Rights*, 52 BUFF. L. REV. 225, 240–41 (2004) (book review) ("While it promotes efficiency, it rarely produces any bargain and typically amounts to an unconditional surrender.").

34. FISHER, *supra* note 15, at 859.

> right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.[35]

Under this account, the plea bargaining machine is a torturous contraption into which no defendant would willingly step, yet defendants are forced to accept the government's offer because they are powerless to influence the bargain and risk too much by proceeding to trial.[36]

B. The Shadow-of-Trial Theory of Plea Bargaining

The administrative plea bargaining theory, however, is not the only methodology currently being debated in plea bargaining scholarship. Another line of scholarship has evolved describing more balanced roles for the prosecution and the defense in the plea bargaining machine. This theory has been termed the shadow-of-trial plea bargaining theory.[37]

---

35. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–13 (1978); *see also* David T. Johnson, *American Law in Japanese Perspective*, 28 LAW & SOC. INQUIRY 771, 778–79 (2003) (In discussing plea bargaining, which Kagan describes as "adversarial legalism's ugly child," Johnson states, "I am no fan of plea bargaining. It tortures the truth, coerces defendants, undermines consistency, generates injustice, and concentrates enormous power—to charge, try, and sentence—in the prosecutor's hands.").

36. While less extreme, Donald Gifford wrote of the coercive nature of plea bargaining in his article entitled *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, stating, "The sentencing differential between defendants who are convicted at trial and those who accept the prosecutor's offer to plead guilty is so pervasive and so substantial that few defendants are foolhardy enough to risk testing the prosecutor's determination of the 'value' of their case." Gifford, *supra* note 25, at 46.

37. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH & LEE L. REV. 73, 74 (2009) ("The dominant theoretical model of plea bargaining—so-called 'trial shadow theory'—predicts that, once charged, innocent and guilty persons alike almost always act rationally by pleading guilty rather than contesting guilt at trial."); *see* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 31–32 (Little, Brown & Company Limited) (1966) ("At every stage of this informal process of pre-trial dispositions . . . decisions are in part informed by expectations of what the jury will

In their 1992 article entitled *Plea Bargaining as Contract*, Robert E. Scott and William J. Stuntz argue that plea bargaining's durability rests on the fact that parties can and will reach mutually beneficial agreements:

> Criminal trials are costly for defendants, and even more so for prosecutors. These costs can be saved, and the gains split between the parties, by reaching a bargain early in the criminal process. Consequently, in cases where both parties understand that conviction at trial is virtually certain—a description that fits many, many cases—the incentive to bargain is simple. *Savings in adjudication costs represent the gains from trade*.[38]

With regard to cases in which the likelihood of conviction is less certain, Scott and Stuntz conclude that the bargained for agreement will be "based upon the prosecutor's estimate of the strength of the case at the time of bargaining plus the expected savings in transaction costs from shifting prosecutorial efforts to pleas rather than trials."[39] In all criminal cases, therefore, the plea bargain represents a contract negotiated by both parties that largely reflects the likelihood of

---

do. Thus, the jury is not controlling merely the immediate case . . . , but the host of cases . . . which are destined to be disposed of by the pre-trial process."); Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 512–14, 523 (1979); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) [hereinafter Easterbrook, *Bargaining as Compromise*]; Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983) [hereinafter Easterbrook, *Market System*]; Edward A. Ruttenburg, *Plea Bargaining Analytically—The Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 353 (1979); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66–69 (1971); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992); *see also* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policy*, 96 KY. L.J. 1 (2007) (examining corporate deferred prosecutions agreements through contract policing theories).

38. Scott & Stuntz, *supra* note 37, at 1935 (emphasis added); *see also* Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 PEPP. DISP. RESOL. L.J. 495, 497 (2009) ("In a plea bargain, the power to determine the fate of the case is passed on to the parties who set out its terms in a contractual agreement. Within the framework of a plea bargain, it is possible for the parties to reach agreement regarding every detail connected with the criminal proceedings that is within their power to determine.").

39. Scott & Stuntz, *supra* note 37, at 1948.

conviction at trial and the likely sentence resulting from such conviction.[40]

In his 2004 article entitled *Plea Bargaining Outside the Shadow of Trial*, Stephanos Bibas expands on this theory of plea bargaining, but does not reject the role of the defendant in the process.[41] Instead, Bibas argues that the shadow-of-trial theory should be expanded to account for additional factors that influence the contractual negotiation between the parties beyond merely the likelihood of success:[42]

> First, there are many structural impediments that distort bargaining in various cases. Poor lawyering, agency costs, and lawyers' self interest are prime examples, as are bail rules and pretrial detention. The structural skewing of bargains has grown in the last two decades with the proliferation of mandatory sentences and sentencing guidelines. . . . Second, the shadow-of-trial model assumes that the actors are fundamentally rational. Recent scholarship on negotiation and behavioral law and economics, however, undercuts this strong assumption of

---

40. Under the shadow-of-trial theory, therefore, there are three fundamental questions that dictate the terms of the bargained for agreement:

(1) The trial sentence anticipated if the case were tried and resulted in a conviction;

(2) The likelihood that a trial will result in a conviction; and

(3) The resource costs of trying the case.

According to one author, "Assuming that prosecutors seek to maximize and defendants seek to minimize sentences, the price of any plea should be the product of the anticipated trial sentence and the likelihood of conviction, discounted by some factor to reflect the resources saved by not having to try the case." Covey, *supra* note 37, at 77–78; *see also* Bibas, *Shadow of Trial*, *supra* note 17, at 2465–66 ("Proponents of the shadow-of-trial model do not deny that factors other than the merits influence settlements at the margins . . . . By and large, though, scholars view the shadow of trial as the overwhelming determinant of plea bargaining. Implicitly, they treat other factors as minor refinements to a basically sound model.").

41. *See* Bibas, *Shadow of Trial*, *supra* note 17, at 2464; *see also* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 215 (2007) ("Some of the pioneering work in this area—by Professor Bibas and others—accepts plea bargaining as a given and examines the impact that cognitive bias has on the bargaining decisions made by prosecutors and defendants. That work concludes that cognitive bias sometimes impedes defendants from accepting utility-enhancing plea offers and less frequently induces defendants to accept utility-diminishing plea bargains.").

42. Bibas, *Shadow of Trial*, *supra* note 17, at 2465 ("By and large . . . scholars view the shadow of trial as the overwhelming determinant of plea bargaining. Implicitly, they treat other factors as minor refinements to a basically sound model.").

> rationality. Instead, overconfidence, self-serving biases, framing, denial mechanisms, anchoring, discount rates, and risk preferences all skew bargains.[43]

Based on this approach to the shadow-of-trial theory, Bibas argues that the original analysis regarding expected trial outcome is modified in each case based on the above-described factors.[44] By adding these to the underlying theory, argues Bibas, a more complex and accurate picture of plea bargaining emerges. Importantly, this modification of the traditional shadow-of-trial theory actually expands the role of the defendant in influencing the plea bargaining machine, a position seemingly at odds with the administrative theory.

Through an analysis of three recent terrorism prosecutions that resulted in guilty pleas, this article will demonstrate that both the administrative and shadow-of-trial theories of plea bargaining accurately reflect portions of the plea bargaining process. As such, a theory that combines these two models will present a more complete description of the internal operations of the plea bargaining machine, the roles played by its actors, and the factors at varying stages of the process that influence both whether a guilty plea is entered and what type of benefits are received in return.

II. SETTING THE STAGE—THREE ACTS OF TERROR

A. Richard Reid—A Bargain of One's Own

Shortly after the attacks of September 11, 2001, before the world could even digest the magnitude of the events that had unfolded on the East Coast of the United States, another al Qaeda plot was underway in Europe. The perpetrator of this attack was a young English man who had been in and out of trouble his entire life and whose only sense of purpose seemed to materialize after he embraced the hate inspired teachings of radical extremism.

---

43. *Id.* at 2467.
44. *See id.* at 2545 ("Trials affect pleas, but so do many other influences unrelated to the merits.").

Born in England in 1973, Richard Reid left school at the age of sixteen to enter a life of street crime and car thievery similar to his father's pursuits. Reid's first arrest came in 1990 at the age of seventeen and represented merely the beginning of a revolving door that took him in and out of prison numerous times over the next few years.[45]

In the mid-1990s, Reid reunited with his father, who had been absent for much of his childhood due to his own incarcerations, and was introduced by him to Islam. His father, who converted to Islam while in prison in the 1980s, believed his son could benefit from participating in the faith.[46] Though Reid did not immediately embrace the suggestion, he did decide to convert the next time he was incarcerated.

After being released from prison in 1994, Reid joined the Brixton Mosque and Islamic Cultural Center in London. Perhaps dissatisfied with the Brixton Mosque's moderate tones, Reid quickly left for the notoriously radical Finsbury Park mosque in north London. The Finsbury Park mosque is known to have been frequented by Zacarias Moussaoui, who was convicted of complicity in the September 11, 2001 attacks, and three individuals linked to the failed attempt to bomb the U.S. Embassy in Paris, France, in 2002.[47] It was here that Reid was exposed to radical extremist philosophies and the promotion of jihad.

By 1998, Reid had decided to join the al Qaeda movement, and in 1999 he left England for Pakistan where he crossed the border into Afghanistan to attend terrorist training camps. After receiving training in Afghanistan, Reid returned to England in 2001 before beginning a journey that took him to Israel, Egypt, and Turkey.

---

45. Alan Cowell, *Jailed Briton, The Shadowy Trail and Shift to Islam of a Bomb Suspect*, N.Y. TIMES, Dec. 29, 2001, at A1; Elliott, *supra* note 1, at 48.

46. Elliott, *supra* note 1, at 48 ("Muslims, he says, 'treat you like a human being.' Plus, he says, they get better food in prison. Richard took his father's advice. The next time he was incarcerated, he converted.").

47. *Id.* ("Moussaoui was a regular at Finsbury Park, as were other al-Qaeda operatives, such as Djamel Beghal and probably Kamel Daoudi, two Frenchmen currently being held for their alleged role in a plot to blow up the American embassy in Paris. Nizar Trabelsi, a Tunisian former professional soccer player now being held in Belgium, who is alleged to have been the designated suicide bomber in the Paris-embassy plot, is also thought to have frequented the mosque.").

During these travels, Reid scouted for potential terrorist targets before returning to Afghanistan to be debriefed and, presumably, assigned the mission that would lead him to become the notorious "shoe bomber." According to authorities, after receiving his mission, Reid traveled to the Netherlands and Brussels before arriving in Paris in December 2001.[48]

According to Parisian officials, Reid did not stay at a hotel during his time in the capital, thus implying that he was housed by fellow conspirators in the days preceding the attack. On December 21, 2001, Reid made his first attempt to board an American Airlines flight to Miami. Turned away because of his suspicious appearance and because he had no luggage or carry-on bags for the lengthy flight, Reid returned to Charles de Gaulle Airport on December 22, 2001, and successfully boarded American Airlines Flight 63.[49]

Given Reid's psychological condition at the time of his apprehension after American Airlines Flight 63 landed at Boston's Logan Airport, it appeared unlikely that he would participate in any manner in the American criminal justice system. In fact, one would expect that an individual who was as committed as Reid to the ideals of the al Qaeda network might even attempt to utilize a criminal trial as a forum to condemn the institutions and organizations against which he was fighting.[50] Yet, on October 3, 2002, Reid filed a motion

---

48. *Id.* at 49 ("By the summer of 2001, Reid was back in London. In July he obtained a new British passport in Amsterdam, claiming that he had accidentally put his old one through a washing machine, and flew to Israel on an El Al Flight. Once in Israel, according to security sources there, Reid spent most of his time in Tel Aviv, where he cased the mall and office complex called the Azrieli Center as well as the local bus and train stations . . . . After 10 days in Israel, Reid crossed into Egypt and from there flew to Turkey and back to Pakistan before being debriefed . . . in Afghanistan."); *see also* Cowell, *supra* note 45, at A1 ("Since his arrest there have been increasing indications that Richard Reid's travels in the last three years—to Pakistan, Cairo and the Gaza Strip—had dark purposes as well.").

49. This was not the first time Reid was detained for questioning before boarding a flight. In July 2001, Reid was detained by Israeli officials before boarding an El Al flight to Israel because of suspicious behavior. *See* Cowell, *supra* note 45, at B3.

50. In 2006, Zacarias Moussaoui testified at his trial related to the attacks on September 11, 2001, and boasted of his involvement in the plot and his approval of the event:

> [W]hen he began his long-awaited testimony on Monday, he offered a lengthy description of a far deeper involvement with Al Qaeda and its plots. Not only was he a member of the terror network, he told the jury, he also said that he knew most of the Sept. 11 hijackers, admitted that he lied to investigators about his knowledge of their plot when he was arrested on immigration violations three weeks before the attacks on New York

stating his intent to plead guilty to all charges.[51] The motion also requested that the court remove any reference in the indictment to his having attended an al Qaeda training camp. Unlike most guilty pleas, there was no plea bargain with the government, but, rather, Reid decided to plead guilty without the promise of any leniency from the prosecution. It is important to note that Reid was offered the opportunity to negotiate with the prosecution for a more lenient sentence. Reid, however, declined to cooperate, and the government had made it clear from the beginning that any negotiation would require an agreement that he provide information regarding his involvement with al Qaeda.[52]

Although Reid did not seek leniency from the government, there was a strong incentive for him to plead guilty. He sought to avoid the publicity associated with a trial. Reid's defense attorney stated, "[Reid] has no disagreement with the facts asserted in the charges as to his actions on December 22, 2001, and wants to avoid the publicity associated with a trial and the negative impact it is likely to have upon his family."[53] This same desire to avoid further psychological costs for his family was also the impetus behind his request that any reference to al Qaeda be removed from his indictment. For Reid, the memory of a lone assailant would be less harmful to his family than the image of a radical terrorist working for the same group that had conducted the September 11, 2001 attacks.[54]

> and the Pentagon, and recounted that he was ecstatic when, behind bars, he heard the news of the attacks on a radio he had bought for that purpose.

Neil A. Lewis, *Moussaoui, Undermining Case, Now Ties Himself to 9/11 Plot*, N.Y. TIMES, Mar. 28, 2006, at A1.

51. Pam Belluck, *Threats and Responses: The Shoe-Bomb Suspect; Man Accused of Shoe-Bomb Plot Says He Intends to Plead Guilty*, N.Y. TIMES, Oct. 3, 2002, at A1.

52. *See id.* at A17 ("Attorney General John Ashcroft issued a statement saying: 'Richard Reid, like any defendant, is free to plead guilty to criminal charges. The Justice Department has not entered into any plea agreement with Reid.' The source close to the defense said that the government made it 'pretty clear from the beginning that if Mr. Reid was not willing to cooperate they weren't going to give him anything.'").

53. *Id.* at A17.

54. Recently, Najibullah Zazi became yet another high profile terror suspect to plead guilty. In a manner similar to Richard Reid, Zazi pleaded guilty, "in part out of concern that a widening inquiry would result in more charges against his family members, including his mother." A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. TIMES, Feb. 22, 2010, at A23.

On December 22, 2002, following his plea of guilty, Reid was sentenced to life in prison. At his sentencing, despite his prior efforts to distance himself from al Qaeda for the benefit of his family, Reid informed the judge that he was, in fact, a member of the terrorist organization. In concluding his remarks, Reid pledged his support once more for Osama bin Laden and declared himself to be an enemy of the United States.[55] It is likely that these statements resulted from the court's refusal to remove the references to al Qaeda in the indictment, and, therefore, Reid realized he and his family would be subjected to the stigma of the association despite his initial efforts to the contrary.

The Reid case demonstrates a vital aspect of the plea bargaining machine that has to date been neglected in the scholarship. In every case where the defendant pleads guilty, the defendant receives inherent institutional benefits in return, regardless of whether the defendant also receives additional benefits from the prosecution. This aspect of the system will be termed unilateral plea bargaining because the defendant is trading the right to trial in return for certain benefits offered by the system itself and not by the government.

In cases where the defendant has entered into a bilateral plea bargain with the government, the additional institutional benefits are another incentive to plead guilty. In cases where the defendant will not or cannot engage in bilateral negotiations, such as the Reid case, the defendant may plead guilty merely for these institutional benefits. It should be noted that defendants, such as Reid, who plead guilty merely for the institutional benefits are typically those defendants against whom the government's case is the strongest. This is true for two reasons. First, where the defendant's case is strong, it is unlikely that the smaller benefits associated with a unilateral plea bargain will create a sufficient incentive for the defendant to forego the possibility of acquittal at trial. Second, and by the same token, if the government's case is weak, the prosecution will likely offer some

55. *Man Charged as Accomplice in "Shoe" Case*, N.Y. TIMES, Dec. 4, 2003, at A37. Several years later, Saajid Badat, also from England, pleaded guilty to plotting to bomb an airliner bound for the United States as part of a conspiracy with Richard Reid. Lizette Alvarez, *Briton, in Shift, Pleads Guilty in Bomb Plot*, N.Y. TIMES, Mar. 1, 2005, at A8.

additional benefits to encourage a bargain. Unilateral plea bargaining is a vital, yet ignored aspect of the criminal justice system and should be included in any model of plea bargaining as it is present in every criminal case resulting in a plea of guilty.[56]

Where a defendant is considering the inherent institutional benefits of pleading guilty, there are a variety of factors that might motivate the individual to do so. These might include, among others, the possibility of a reduction in the applicable sentence due to the acceptance of responsibility credit found at section 3E1.1 of the United States Sentencing Guidelines; an increased likelihood that the court will entertain a request for assignment to a specific prison for geographical and health related reasons; or the avoidance of the financial and psychological burdens of a trial on both defendants and their families.[57] In the case of Reid, the benefit he sought from the system was the opportunity for his family to avoid further associational stigma by requesting the court remove reference to al Qaeda in his indictment and by avoiding the negative publicity he and his family would suffer during a lengthy and well-publicized trial.[58] While offers of leniency in return for cooperation were of no interest to Reid, the opportunity to spare his family the societal costs associated with a trial were incentive enough for him to bypass a trial

56. *See* Dervan, *supra* note 8, at 478 (describing plea bargaining as a system in which "rights are exchanged for concessions"); *see also* Alschuler, *supra* note 16; Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 508–11 (1999); Scott & Stuntz, *supra* note 37, at 1912.

57. As an example, under section 3E1.1 of the United States Sentencing Guidelines, a defendant who "clearly demonstrates acceptance of responsibility for his offense" may receive a decrease in the applicable offense level by two levels and, if the original offense level is sixteen or greater, may also receive an additional one level reduction. In the notes section of the chapter, it states, "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2007).

58. Mary A. Farkas & Gale Miller, *Reentry and Reintegration: Challenges Faced by the Families of Convicted Sex Offenders*, 20 FED. SENT'G REP. 88, 90 (2007) ("A 'courtesy stigma' is attached to families, which results in their social marginalization, even though they did not commit a sex offense. For many family members, their identities as spouses, parents, siblings, and children are suspended while they try to negotiate their daily lives."). *See generally* SOCIAL WORK AND DISADVANTAGE: ADDRESSING THE ROOTS OF STIGMA THROUGH ASSOCIATION (Peter Burke & Jonathan Parker eds., 2007) (discussing stigma by association).

and acquiesce to the criminal justice system's desire for his imprisonment.

The Reid case, therefore, demonstrates that in attempting to understand the plea bargaining machine, one must acknowledge that the prosecution is not always in control of the process and, at times, may not even participate. Plea bargains in which defendants trade benefits with the system itself are an important aspect of the machine and must not be discounted when constructing plea bargaining theory. Furthermore, one gains a greater understanding of the diversity of factors influencing whether a plea of guilty will be entered if one realizes that defendants sometimes bargain for benefits other than sentencing reductions and sometimes seek benefits that are available from sources other than the prosecution, such as the court or the criminal justice process itself.

B. Lodi, California—A Pre-Emptive Strike

Shortly after the attacks of September 11, 2001, the Department of Justice and the Federal Bureau of Investigation revised their missions with regard to terrorism prosecutions. Traditionally, the agencies had structured and executed criminal investigations with the purpose of securing convictions for the most readily provable offenses. At times, this approach meant investigations would linger for years as evidence was compiled and the strongest case possible was obtained. In response to the attacks in New York, Pennsylvania, and the District of Columbia, the government quickly realized that this strategy could not persist, and prevention, even at the expense of prosecutions, would become the driving priority for terrorism related investigations.[59]

59. *See* Amy Waldman, *Prophetic Justice*, ATLANTIC, Oct. 2006, http://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/5234/1/ ("The September 11, 2001, attacks on the World Trade Center and the Pentagon prompted a fundamental shift in the American government's approach to Islamic terrorism. Before 9/11, the government largely responded to attacks that had already occurred—by launching cruise missiles at terrorist bases in Afghanistan and Sudan after the 1998 embassy bombings in Africa, for example, or by prosecuting the planners and perpetrators of those bombings in federal court. . . . But after 9/11, the focus turned to prevention.").

Bob Woodward recounts the implementations of the new prevention model of law enforcement after 9/11 in his account of the government's response to the attacks. According to Woodward, at a meeting of the National Security Council, during which FBI director Robert Mueller stated that care needed to be exercised to ensure evidence was not tainted during subsequent arrests and prosecutions, Attorney General John Ashcroft interrupted the conversation and stated, "Let's stop the discussion right here . . . . The chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it."[60]

In a white paper on counterterrorism in 2006, the Department of Justice elaborated on the specific manner in which the agency's mission changed in 2001:

> The events of September 11 transformed the mission of the Department of Justice. The Department revised its Strategic Plan to emphasize the prevention and disruption of terrorism. Indeed, the protection of our national security and the prevention of terrorist acts are our number one goal. On every level, we are now committed to a new strategy of prevention. This includes the design, implementation and support of policies and strategies, including the investigation and prosecution of terrorism and terrorism-related cases and the pursuit of legislative initiatives, which will prevent, disrupt and defeat domestic and international terrorist operations before they occur.[61]

In conformity with this new Department of Justice strategy, termed preemptive prosecution, the FBI was informed that its field offices would no longer be permitted to set priorities, and instead, there was one national priority—prevention.[62]

---

60. BOB WOODWARD, BUSH AT WAR 42 (2002).

61. U.S. DEP'T. OF JUSTICE, COUNTERTERRORISM WHITE PAPER 5 (2006).

62. Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837, 838–39 (2007) ("In the immediate aftermath of September 11, 2001, the government made a dramatic shift in its approach to terrorism prosecutions. The new philosophy called

It was in this climate of prevention and intervention that a much different terrorism investigation and prosecution than that of Richard Reid unfolded against several men from Lodi, California, a community which is located approximately forty miles south of Sacramento and which has had a large Pakistani community since the early 1900s.

On May 29, 2005, at 5:30 a.m., the FBI field office in Sacramento received information from FBI headquarters that an individual on the government's "No Fly" list was traveling from Pakistan to San Francisco. The individual was Hamid Hayat, a twenty-three year old with little direction in his life who drifted between Lodi and his family's home country of Pakistan.[63] In response to this information, the plane was diverted to Japan where FBI agents on the ground interviewed Hayat and then eventually released him to complete his journey home.

Despite being convinced that Hayat posed no immediate threat, the FBI was uncertain of Hayat's long-term intentions upon his arrival back in the United States. Therefore, on June 4, 2005, FBI agents interviewed Hayat again. During this interrogation, Hayat was specifically asked if he had attended any terrorist training camps, to which he responded that he would never be involved in such extremism. Perhaps in an effort to convince authorities of the truth of his statements, Hayat agreed to a request that he return the next day with his father to take a polygraph test. It was upon completing this polygraph test that the case suddenly took a new direction.

According to the FBI, after failing portions of the polygraph test, Hayat admitted to attending terrorist training camps during visits to Pakistan and receiving training in weapons, explosives, hand-to-hand combat, and other paramilitary exercises. When Hayat's father was asked whether his son attended any terrorist training camps, he told the FBI agents there were no such camps in Pakistan. After being

---

for using every available federal criminal statute to pursue people that existing intelligence suggested might be involved in supporting or participating in terrorist organizations and acts of terrorism. The new goal was to detect, prevent, disrupt, and deter terrorism.").

63. Greg Krikorian & Rone Tempest, *2 Men Held in Links to Terror*, L.A. TIMES, June 8, 2005, at B1.

informed of his son's confession, however, the elder Hayat allegedly admitted that his son had attended terrorist camps and that he had provided him with $100 a month allowance during these trips. He also informed the agents that he himself had witnessed weapons training at such camps.

Though at the time of their interrogations neither had engaged in direct acts of terrorism, the Department of Justice's new preventative strategy clearly called for the arrests of both men on whatever charges might be available simply to get them off the street. As a result, the government detained the younger Hayat on two charges of lying to agents about his attending terrorist training camps and receiving weapons training and detained the elder Hayat on a single charge of lying to agents about his knowledge of his son's activities in Pakistan.[64]

The defense attorney for the elder Hayat immediately recognized that the Department of Justice's strategy of preventive prosecution had limited the government's ability to bring more severe charges against the two men. In commenting on the lack of more significant charges, he stated, "We don't see any of that here. If the government can prove they attended a camp and therefore are terrorists, then why didn't they charge them with that?"[65] While it is true that the government had very little to work with during the opening hours of the investigation, they were able to gather sufficient evidence to add a much more significant charge against the son prior to trial—the charge of materially supporting a terrorist network.

Following September 11, 2001, the government did not seek new laws to utilize in the preemptive prosecution model. Rather, the government relied on 18 U.S.C. § 2339B, a law that was initially passed in the 1990s and that barred "material support" of terrorism.[66] The statute makes it unlawful to "knowingly provide[] material

64. Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. TIMES, June 17, 2005, at B1.

65. *Id.*

66. *See* Brian P. Comerford, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 724–25 (2005).

support or resources to a foreign terrorist organization."[67] The term "material support or resources" is defined as follows:

> [C]urrency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials . . . .[68]

As applied to situations such as the Lodi case, the material support statute allowed for prosecution of an individual who had not executed a terrorist attack but who had been linked to a terrorist organization and whom the government believed was a future threat. While the material support charge for Hayat was less than many expected for an individual the government had labeled an al Qaeda sleeper agent, these charges represented the best means of moving forward with a significant preemptive prosecution where little evidence of an actual planned terrorist strike existed.[69] Responding to these concerns, U.S. Attorney McGregor Scott stated, "We have detected, we have disrupted and we have deterred, . . . and whatever was taking shape in Lodi isn't going to happen now."[70] The government, therefore, was satisfied that it had fulfilled its obligation to intervene early even if it resulted in a riskier and less severe prosecution.

Based on the limited evidence that had been gathered, the prosecution moved forward to trial in February 2006. The case lasted

---

67. 18 U.S.C.A. § 2339B(a)(1) (West 2000 & Supp. 2010).

68. *Id.* § 2339A(b). The definition of material support was expanded after September 11, 2001, to include "expert advice or assistance." This addition and the material support law itself have been challenged in court proceedings since 9/11, but the issue of the statute's constitutionality is not within the focus of this article. *See, e.g.*, Humanitarian Law Project v. Ashcroft, 352 F.3d 382, 405 (9th Cir. 2003); *see also* Comerford, *supra* note 66, at 724–25 (discussing the challenges to 18 U.S.C. § 2339B). For a discussion of terrorism laws generally, see Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT'G REP. 38 (2003).

69. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 2 (2005) ("[P]rosecutors have creatively interpreted existing laws banning the provision of assets and other forms of support to terrorist organizations and individuals in order to make it a crime to be an active member of or to receive training from such groups.").

70. Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. TIMES, Sept. 23, 2005 at B3.

several weeks and painted two vastly different pictures of the Hayats. While the defense argued that the confessions had been forced, the prosecution contended that the Hayats were part of a global war. In particular, the prosecution argued that the son was a man "with a jihadi heart and a jihadi mind."[71] To support these assertions, the government relied on evidence such as a note carried by the son in his wallet that read, "Oh Allah, we place you at their throats, and we seek refuge in you from their evil."[72] Furthermore, the government freely acknowledged to the jury that it had acted early and this decision prevented them from gathering all the evidence they would typically procure before indicting a defendant. One of the prosecutors told the jury, "This is not a case where a building has been blown up, and you know, the forensic investigators go in, they go looking through the rubble looking for clues . . . . This isn't that kind of case. This is a charge that allows the FBI to prevent acts of violence like that."[73] He concluded by asking whether Americans would want anything less.[74]

After significant deliberations, the jury deadlocked on the guilt of the elder Hayat, and U.S. District Judge Garland E. Burrell declared a mistrial. The jury, however, returned a verdict of guilty for the son, and he was sentenced to twenty-four years in prison. In reporting on the split outcome, the media focused, as the prosecution had in its own case, on the difficulty associated with proving guilt at trial while implementing the new preemptive prosecution strategy. In summarizing the dilemma, one reporter wrote, "Its supporters say it is an important tool to head off threats. Critics say it allows the government to subject people to lengthy prison terms based on little evidence that they intended to hurt anyone."[75] The government's

71. Rone Tempest, *Lodi Terror Case Goes to the Jury*, LA TIMES, Apr. 13, 2006, at B3.

72. Waldman, *supra* note 59. *See generally* Tempest, *supra* note 71.

73. Waldman, *supra* note 59. *See generally* Tempest, *supra* note 71.

74. Waldman, *supra* note 59.

75. Richard Schmitt, *For the Justice Department, a Welcome Conviction*, LA TIMES, Apr. 26, 2006, at A15. ("The case shows how prosecutors are attempting to use the law to disrupt what they see as evolving terrorist plots before they reach fruition. But the strategy, first enunciated by Atty. Gen. John Ashcroft a few weeks after the attacks at the Pentagon and in New York, has also been highly controversial. Its supporters say it is an important tool to head off threats. Critics say it allows the government to subject people to lengthy prison terms based on little evidence that they intended to hurt

gamble of prosecuting the Hayats based on what little evidence could be gathered resulted in a split verdict, but the government quickly came back and announced they would retry the elder Hayat. Despite taking this strong stand following defeat, both the prosecution and the defense were ready to utilize the plea bargaining machine.

For the prosecution, the specter of another lengthy and expensive trial that might result in a hung jury or an acquittal was not appealing. Hayat also had reason to negotiate as he had already spent a year in jail and risked the possibility of less success with a second jury. As in the Reid case, Hayat was also concerned about the stigma of a terrorism conviction and alerted the prosecution early in the process that he would not plead guilty to any terrorism charges.[76] Eventually, the two sides reached an agreement, and, on May 31, 2006, Hayat pleaded guilty to a customs violation in exchange for a sentence of time served. In explaining the government's decision to enter into an agreement with an individual it had claimed was part of a global jihad, the U.S. Attorney stated, "This outcome, of course, was not the one most desired by the government . . . [but i]t was my decision that the felony plea we announce here today was the best resolution of this matter for the government."[77] Relying once again on the preemptive prosecution strategy to justify the case's resolution, he concluded by stating, "Our region is much safer today than it was one year ago."[78]

For purposes of furthering our understanding of the plea bargaining machine, the first important element of the Hayat case is that, unlike the Reid prosecution, it involved bilateral plea negotiations that resulted in an agreement beneficial to both parties. That the government offered incentives for this plea, however, does not mean that the defendant did not also consider and receive the inherent institutional benefits of pleading guilty. For instance, as with

---

anyone. In effect, 'you prosecute people not for what they have done but for what you fear they might do in the future,' said David Cole, a Georgetown University law professor.").

76. *See* Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. TIMES, Apr. 26, 2006, at B7 ("'There is no way we were ever going to agree to any plea involving terrorism,' Griffin said outside the Sacramento Federal Courthouse, 'because it was not true.'").

77. *Id.*

78. *Id.*

the Reid case, Hayat's guilty plea enabled him and his family to avoid the stigma, financial and psychological burdens, and other hardships of a second trial. Furthermore, Hayat benefited from the certainty of the plea bargaining process, whereas a second trial on the full spectrum of charges meant risking conviction and a lengthy prison sentence.

Second, in contrast to the administrative theory's portrait of an unwilling defendant forced to accept the government's determination of both charges and sentence, Hayat provides an example of an active defendant engaged in the plea bargaining process.[79] First, Hayat made clear his intent to bargain with the prosecution, thus identifying from whom he sought additional incentives beyond the institutional benefits available for pleading guilty. Second, Hayat identified the specific incentives that would encourage him to plead guilty. This is a vital role for the defendant in the plea bargaining system, because it alerts the prosecution to factors important to the specific defendant, therefore increasing the likelihood of a successful plea offer. Here, Hayat alerted the government that he would only accept a plea bargain that did not result in a "terrorism" conviction. Not willing to accept the risks of a complete acquittal for Hayat in the second trial, the government focused on this factor and utilized it to create an offer that was sufficient to result in a plea bargain. Although such a significant benefit might not be offered in all cases, the challenges associated with the government's preemptive prosecution strategy in terrorism cases meant that Hayat was in a position to assert pressure on the government for this concession. Finally, after influencing the plea bargaining machine in a manner that resulted in his receiving the types and quality of benefits desired, Hayat accepted the bargain.

Third, while the modified shadow-of-trial theory appears to more accurately describe the posturing and negotiating that occurs in the preliminary phase of the bilateral plea bargaining process, the administrative theory is correct that prosecutors control much of the

79. Gifford, *supra* note 25; Johnson, *supra* note 35, at 779; Klein, *supra* note 30; Langbein, *supra* note 35, at 12–13; O'Hear, *supra* note 31, at 426; Wright & Miller, *supra* note 29, at 1415. *See generally* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

decision-making regarding the ultimate charges and sentence that will result.[80] In the Hayat case, the defendant exerted significant influence over the prosecution's evaluation of the case through engaging them in negotiations and identifying the type of benefits sought. The government then utilized this information and reached a decision regarding an acceptable plea offer. There is little doubt that if Hayat had refused to accept the government's offer, he would have been prosecuted on the original charges at a second trial. This did not occur, however, because the government, in making its administrative determination regarding the appropriate charge and sentence for the plea agreement, appears to have properly considered both the risks of trial, the barriers to a successful plea deal, and the benefits sought by the defendant when constructing its offer. If this had not been so, Hayat would likely have gone to trial again. While the administrative phase of the bilateral plea negotiations process does result in the government forcing its final determination on the defendant, when examined in conjunction with the first phase of the process it appears less nefarious. Instead, the administrative determination appears more a reflection of the specific case and the benefits important to each side in reaching a resolution. Although not every offer will contain all of the benefits sought by each party, a successful plea offer must contain sufficient incentives for the defendant to accept, and, as demonstrated by Hayat's refusal to plead guilty to a terrorism charge, these incentives must be tailored to the specific defendant and, in many cases, include more than a mere reduction in sentence.

C. Lackawanna Six—Battling an Unknown Mission

Lackawanna, New York, is an old steel town south of Buffalo with a large Yemeni-American neighborhood of over 3,000 people. Families from Yemen began moving to the area forty to fifty years

80. Bibas, *Shadow of Trial*, *supra* note 17, at 2465–66; Church, *supra* note 37, at 512–14, 523; Easterbrook, *Bargaining as Compromise*, *supra* note 37, at 1975; Easterbrook, *Market System*, *supra* note 37, at 309–17; Landes, *supra* note 37, at 66–69; Ruttenburg, *supra* note 37; Scott & Stuntz, *supra* note 37, at 1935; *see* KALVEN & ZEISEL, *supra* note 37, at 31–32.

ago, and today they have established a strong neighborhood, which they consider to be "one big family."[81] In 1998, however, a former member of the community reappeared and forever changed the history of this neighborhood.

Kamal Derwish moved to Lackawanna in 1998 and almost immediately began speaking at the local mosque about his beliefs.[82] For the most part, his early activities seemed like legitimate community building as he spoke of keeping kids off the street and away from drugs. Over time, however, he began taking more extremist positions and eventually convinced seven young men to travel to Afghanistan to attend al Qaeda training camps. Unbeknownst to the small Lackawanna community at the time, Derwish was an al Qaeda recruiter sent to New York to convince as many individuals as he could to join his cause.[83]

As the seven Lackawanna men set off for Afghanistan in the spring of 2001, they devised a story to cover their tracks. They told their friends and family they were traveling to Pakistan to study with an Islamic evangelical group. According to one of the seven, "It was adventure . . . . You're going to learn how to use weapons. That part of it was like the exciting part. You're going to be able to shoot, you know, and this and that."[84] After arriving in Pakistan, the group traveled into Afghanistan where they were greeted by Osama bin

---

81. Brian P. Comerford, *supra* note 66, at 726–32; Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1; Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, BYU L. REV. 1255, 1270 (2006); *see also* Chesney, *supra* note 69, at 39–45 (providing a general factual description of Lackawanna case).

82. According to the FBI, Derwish was born in Lackawanna in 1973, but his family moved to Saudi Arabia. In the 1990s, he attended an al Qaeda training camp in Afghanistan and fought in Bosnia. He returned to Saudi Arabia in 1997 and was imprisoned for extremist activities. In 1998, he moved back to Lackawanna to begin recruiting for al Qaeda. Purdy & Bergman, *supra* note 81.

83. *Id.* (describing an FBI memorandum regarding al Qaeda recruiters, "'After a mosque is chosen,' the memo says, an operative 'identifies young Islamic men who are attending the center for worship and knowledge of Islam.' Then 'a friendship is developed with each individual and over time, each individual's interests, emotional state, strengths and weaknesses are identified.' After a while, discussions 'begin to detail historical Muslim conflict' and the persecution and rape of Muslims.' Finally, 'individual members are approached about becoming prepared to defend Muslim beliefs and fight for Jihad.' The description, the memo says, is based on 'how Kamal Derwish recruited the Buffalo cell members.' Put another way, Mr. Derwish was not just trying to return young men to the ways of the Prophet; he was trying to lure them to Osama bin Laden.").

84. *Id.*

Laden. At this point, several of the group realized they had made a terrible mistake, and as a result, four of the men left the six-week training camp early.[85]

At the same time the men were in Afghanistan, an unsigned, handwritten letter arrived at the FBI field office in Buffalo, New York. The note stated that eight men from Lackawanna had traveled to an al Qaeda training camp.[86] Shortly thereafter, the FBI contacted one of the men, Sahim Alwan, who, having left the training camp early, was already back in New York. Alwan met with an agent, but merely related the agreed upon cover story regarding religious study in Pakistan. There was no evidence of a crime, and, having been presented with a plausible explanation for Alwan's travels, the FBI moved on to other matters. After September 11, 2001, however, the government's focus returned to Lackawanna.

As was discussed with regard to the Lodi investigation, the Department of Justice's and FBI's missions changed drastically following the September 11, 2001, attacks.[87] FBI Director Robert Mueller stated, "Our overriding priority right now is prevention."[88] In conformity with this strategy, FBI officials in Buffalo, New York, stated of the Lackawanna men, "If we don't know for sure they're going to do something, or not, we need to make sure that we prevent anything they may be planning, whether or not we know or don't know about it."[89] As such, the FBI made the Lackawanna group a top national priority, despite the lack of evidence or information regarding plans for any future attacks. At the height of the investigation, the FBI was producing field reports on the situation twice a day, and the President received daily briefings on the matter.[90]

---

85. *Id.*

86. *Id.*

87. Purdy & Bergman, *supra* note 81. ("From Sept. 11 on, the driving goal of the government was to find the next sleeper cell before it struck.").

88. *Id.*

89. *Id.*

90. *Id.* ("Headquarters ordered written updates twice a day, at 6 a.m. and 2 p.m. Mr. Mueller was briefed twice daily, the officials said, and he often made Lackawanna part of his daily briefing to President Bush. Stanley Borgia, then second in command in the Buffalo F.B.I., said, 'I would look at my watch and say, 8:30. The president is saying to the directors, 'What's going on in Buffalo?'").

Throughout this stage of the investigation, however, the Lackawanna men remained consistent regarding their cover story, and little in the way of new evidence materialized. Then, in the summer of 2002, events unfolded that forced the government to respond, despite the lack of evidence of any crime. By this time, two of the seven Lackawanna recruits were outside the United States. One had moved to Yemen and another, Mukhtar al-Bakri, was traveling in the Middle East in preparations for his wedding in Bahrain. During this trip, al-Bakri emailed back to the United States a message that read, "The next meal will be very huge. No one will be able to withstand it except those with faith."[91] For the intelligence community, the term "meal" was synonymous with attack, and the FBI was left with the choice of piecing together a preemptive prosecution or waiting for further evidence at the risk of allowing a terrorist attack to go unstopped:

> Once the C.I.A. gave Lackawanna the "most dangerous" label . . . the administration asked, "Can you guarantee to me that these people won't do something?" Mr. Watson [the FBI's counterterrorism chief at the time] said.
> "And the answer," he said, "is we think we can. We are probably 99 percent sure that we can make sure that these guys don't do something—if they are planning to do something. And under the rules that we were playing under at the time, that's not acceptable. So a conscious decision was made, 'Let's get 'em out of here.'"[92]

As one official noted of the decision, "What do we do if we believe they're going to do something, and we have nothing to pull them off the street with?"[93]

The government determined that the answer was to find one member of the Lackawanna group who would turn on the others and

91. *Id.*
92. Purdy & Bergman, *supra* note 81.
93. *Id.*

provide the evidence necessary to bring charges of material support of a terrorist organization. Just as in the Lodi case, the government had no direct evidence of a terrorist plot but could creatively use the material support statutes to bring charges related to the men's attendance at al Qaeda training camps. This, the government contended, would be a means of stopping any future plans for which the men might be preparing. As such, in the middle of the night, Bahraini police burst into the hotel room of newly married al-Bakri, the sender of the "meal" email, and arrested him.[94] On September 11, 2002, on the first anniversary of the 9/11 attacks, FBI agents traveled to Bahrain to interrogate al-Bakri. He admitted almost immediately that he and the other five men still in Lackawanna had traveled to Afghanistan to attend a training camp. A short while later in Lackawanna, the FBI approached Alwan with details from the interrogation of al-Bakri. Realizing the charade was over, he too confessed to the actual events. The arrests of the remaining four men in Lackawanna followed shortly thereafter. In announcing the arrests, Deputy Attorney General Larry Thompson stated, "United States law enforcement . . . has identified, investigated and disrupted [an al] Qaeda-trained terrorist cell on American soil."[95]

The six defendants faced a two-count indictment on charges of providing material support to a terrorist organization.[96] The first charge, providing material support, carried a maximum ten-year sentence, while the second charge, conspiracy, carried a maximum fifteen-year sentence. Under these charges, each defendant faced a possible twenty-five year sentence. The six pleaded guilty in quick succession, each determining that the benefits of a guilty plea outweighed the risks associated with proceeding to trial. In return for the pleas, the government dropped the conspiracy charges, and each man received a sentence between seven and ten years depending on

94. *Id.*

95. *Id.* Derwish was killed on November 3, 2002, in the Yemeni dessert by a missile fired from a CIA Predator drone. *Id.* The seventh Lackawanna man to attend the training camps, who had relocated overseas prior to the arrests, was detained by authorities in Yemen in January 2004 and, reportedly, remains in their custody. Brian P. Comerford, *supra* note 66, at 730 (2005).

96. Marc Santora, *Six Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. TIMES, Oct. 22, 2002, at A19.

his conduct and cooperation, a significant reduction from the potential twenty-five year sentence they faced at trial.

Faysal Galab was the first to plead guilty, and he received the most lenient prison term of all the men in return—seven years.[97] Shafal Mosed pleaded guilty and apologized to the court for his actions. According to Mosed's attorney, the government threatened to declare him an enemy combatant if he refused to cooperate.[98] The government argued for a lighter sentence because Mosed assisted law enforcement and left the training camp early.[99] He received eight years in prison, as did Yasein Taher who also cooperated.[100] Sahim Alwan pleaded guilty and received nine and a half years in prison.[101] Yahya Goba pleaded guilty in return for a recommended sentence of eight years, although the court sentenced him to ten years in prison. According to his attorney, Goba pleaded guilty, in part, because of family considerations and the possibility that the government would charge him with a more serious crime.[102] Mukhtar al-Bakri was the last of the six men to plead guilty, and he received a sentence of ten years.[103] According to his attorney, he pleaded guilty out of fear that the government would file additional charges.[104]

In summarizing the government's efforts to respond to the Lackawanna Six, the FBI agent first assigned to investigate the mysterious anonymous letter informing the government of a potential

---

97. Robert F. Worth, *Accused Member of Terror Cell Near Buffalo Agrees to Guilty Plea*, N.Y. TIMES, Jan. 11, 2003, at A9; *see also* Roya Aziz & Monica Lam, *Profiles: The Lackawanna Cell*, FRONTLINE, Oct. 16, 2003, http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/profiles.html.

98. Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15 ("Lee A. Albert, a law professor at the University of Buffalo who has followed the case, said that the use of the material support ban against the Lackawanna defendants was 'a reach,' and that prosecutors might have been worried that their case would not hold up at trial."); *see also Another Man in Buffalo Case Pleads Guilty to Qaeda Link*, N.Y. TIMES, Mar. 25, 2003, at D7.

99. David Staba, *New York Man in Qaeda Case Will Serve Eight Years*, N.Y. TIMES, Dec. 10, 2003, at A28.

100. *Guilty Plea in Lackawanna Case*, N.Y. TIMES, May 13, 2003, at B10; *see* Aziz & Lam, *supra* note 97.

101. Aziz & Lam, *supra* note 97; *Plea by Man Who Met bin Laden*, N.Y. TIMES, Apr. 9, 2003, at B13.

102. Aziz & Lam, *supra* note 97; *New York Man Admits to Attending Al Qaeda Training Camp*, N.Y. TIMES, Mar. 26, 2003, at B15.

103. Aziz & Lam, *supra* note 97.

104. Matthew Purdy, *Sixth Man Pleads Guilty to Al Qaeda Training*, N.Y. TIMES, May 20, 2003, at A17.

terrorist cell summarized the case by stating, "We were looking to prevent something. And we did. Obviously nothing happened. So we all did our job."[105]

First, as with the Hayat plea negotiation, the Lackawanna Six engaged in bilateral negotiations with the government. Once again, however, the institutional benefits of pleading guilty were a factor in the success of the plea bargaining machine. Yahya Goba pleaded guilty in return for a recommended sentence of eight years, in part, because of family considerations.[106] Just as Richard Reid pleaded guilty solely for the institutional benefit of sparing his family the difficulty of a terrorism trial, so too was at least one of the Lackawanna Six motivated by considerations of stigma and other trial related costs.[107]

Second, once again the role of the defendant in the initial phase of the plea bargaining process contrasts with that portrayed by the administrative theory of plea bargaining.[108] As in the Hayat matter, the government's case was weakened by the preemptive prosecution model of law enforcement adopted for terrorism investigations after 9/11. As such, the government was forced to utilize "material support" statutes that were not intended to serve as a mechanism for removing terrorist cells from the streets. Due to the resulting lack of direct evidence and the tenuously applied charges, a significant risk of acquittal for at least some of the men existed if bargains were not reached prior to trial. Seizing this opportunity, the defendants engaged the government and sought specific benefits in return. Here, except as noted above, the defendants appear to have been most interested in reductions in sentence in return for their guilty pleas.

---

105. Purdy & Bergman, *supra* note 81. In response to questions about a later terrorist plot and the need for pre-emptive prosecution, Homeland Security Secretary Michael Chertoff stated, "We don't wait until someone has lit the fuse to step in." Eric Lipton, *Recent Arrests in Terror Plots Yield Debate on Pre-emptive Action by Government*, N.Y. TIMES, July 9, 2006, § 1, at 11.

106. *New York Man Admits to Attending Al Qaeda Training Camp*, *supra* note 102.

107. Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 L. LEGAL STUD. 355, 362 (2007); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 540 (1996).

108. *See* FISHER, *supra* note 15, at 859; Gifford, *supra* note 25; Johnson, *supra* note 35, at 779; Klein, *supra* note 30, at 2037; Langbein, *supra* note 35, at 12–13; O'Hear, *supra* note 31, at 426; Wright & Miller, *supra* note 29, at 1415.

This is an important aspect of these negotiations as compared with the Hayat matter, in which the defendant also sought to reduce the stigma associated with the prosecution through rejection of any terrorism related charges. Furthermore, as in the Hayat matter, the defendants played the ultimate role of accepting the government's offers.

Finally, the second phase of bilateral plea bargaining is again demonstrated by the defendants' acceptance of the government's administrative determination of the appropriate charge and sentence, because each determination was based on the government's analysis of the likelihood of success at trial, the barriers to a successful plea bargain, and the benefits sought. Once again, while the shadow-of-trial theory appears to more accurately describe the posturing and negotiating that occurs in the preliminary phase of the bilateral plea bargaining process, the administrative theory more aptly describes the process by which the government makes its actual plea offer.[109]

III. THE DUAL CHAMBERS OF THE PLEA BARGAINING MACHINE

Through examination of three terrorism prosecutions that resulted in guilty pleas, this article has demonstrated both that the concept of plea bargaining must be expanded to include unilateral and bilateral plea bargaining and that a combination of the administrative and modified shadow-of-trial theories provides a more accurate representation of the two phases of the bilateral plea bargaining process. In Section III, this article will seek to construct a theory that reflects these findings. This theory, which will be termed the benefit distribution theory, will expand our current understanding of both the breadth of the plea bargaining machine and the roles of the

109. *See* KALVEN & ZEISEL, *supra* note 37, at 31–32; Bibas, *Shadow of Trial*, *supra* note 17, at 2465–66; Church, *supra* note 37, at 512–14, 523; Easterbrook, *Market System*, *supra* note 37, at 309–17; Easterbrook, *Bargaining as Compromise*, *supra* note 37, at 1975; Landes, *supra* note 37, at 66–69; Ruttenburg, *supra* note 37, at 353; Scott & Stuntz, *supra* note 37, at 1935.

prosecution and the defense in the negotiation and decision-making process.[110]

A. Bilateral Plea Bargaining

1. Calculating the Outcome Differential

Where the government and the defendant are both willing to consider bilateral plea negotiations, the process begins with each party evaluating the likelihood of success at trial as described in the traditional shadow-of-trial theory. The difference between the likelihood of conviction at trial and a guaranteed conviction at trial is the "outcome differential."[111] In its most simplistic terms, the outcome differential is reflective of the strengths and weaknesses of the prosecution's and defense's cases. As such, the weaker the government's case is, the larger the outcome differential will be, and vice versa.[112]

While the amount and force of evidence is a key consideration in determining the outcome differential, this calculation must account for all barriers to the prosecution's or defense's success at trial and, in many cases, includes a variety of considerations. It is here that many of the institutional barriers to success described by Stephanos

110. Scholars have distinguished between "routine" plea bargaining cases, which are low-level offenses that rarely result in incarceration, and "adversarial" plea bargaining cases, where the seriousness of the offense and the significance of the potential punishment result in more structured bargaining. The terrorism cases described in this article certainly fall within the "adversarial" plea bargaining category. As such, the model of plea bargaining constructed herein is a highly sophisticated model tracking the complexities of such "adversarial" bargaining. Nevertheless, this model is equally applicable to "routine" plea bargaining cases, although certain steps in the model may be less pronounced due to the minimal risk of incarceration and the presence of unique considerations such as "going rates" for minimal offenses. O'Hear, *supra* note 31, at 415–16 (noting that field studies of plea bargaining have drawn a distinction between routine cases and more adversarial interactions).

111. *See* Figure 1.

112. *See* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 788–89 (2008) ("[T]he vast majority of defendants enter plea bargains, which often agree upon sentences in the hopes that judges will rubber-stamp them. Even though these sentence bargains do not involve sentencing hearings or appeals, the parties bargain at least in part in the shadow of the likely sentence. When prosecutors hold all the aces at sentencing, they can drive hard bargains. Conversely, when their hands are weaker or less predictable, it is easier for defendants to bluff about insisting on a sentencing hearing and call prosecutors' bluff."); *see also* Alschuler, *supra* note 26, at 59 ("A Chicago prosecutor says, 'When we have a weak case for any reason, we'll reduce to almost anything rather than lose.'").

Bibas become important, such as poor lawyering.[113] In the context of the terrorism prosecutions that this article has examined, the difficulties experienced by the government due to the policy of preemptive prosecution and the tenuous application of the material support statute are examples of barriers to success at trial. In a similar manner, the defendants' likelihood of success at trial in the Lackawanna Six case was impacted by the confessions of two of the men prior to the arrests of the other men.[114] As demonstrated by these two examples, the factors influencing the outcome of a case may be applicable to criminal prosecutions generally, a type of criminal offense such as terrorism, or be unique to a particular matter or defendant.[115] The following model demonstrates the manner in which the size of the outcome differential shifts based on the barriers to success at trial.

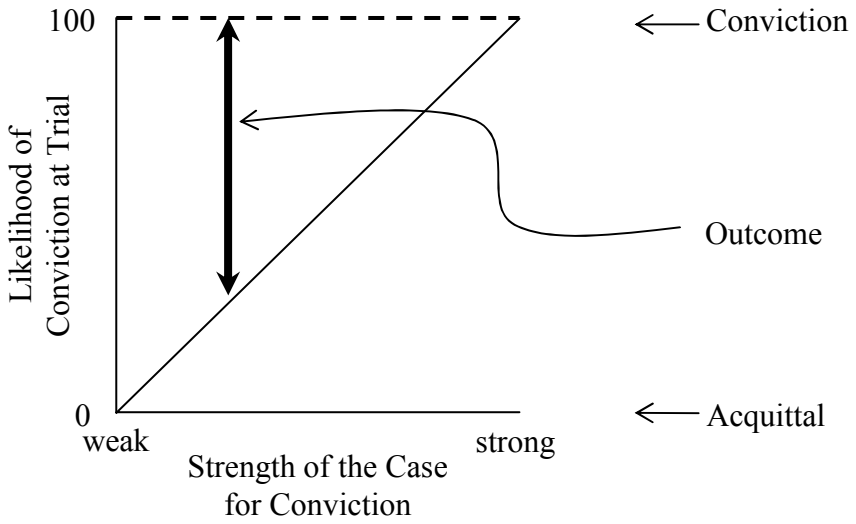
113. Bibas, *Shadow of Trial*, *supra* note 17, at 2465–66. When considering the impact of poor lawyering, the strength of both the defense attorney and the government attorney are key considerations. *See* Ronald F. Wright, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. 68, 71–72 (2008) ("Just as there are differences among defendants that matter when we evaluate plea negotiation practices, there are differences among prosecutors."); Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81 (2001) (discussing the importance of the defendant's perception of his or her attorney).

114. *See supra* notes 95–104 and accompanying text.

115. *See* Covey, *supra* note 37, at 78–79 ("Where plea bargain prices are based primarily on expected trial outcomes, a defendant's ability to negotiate a lenient plea bargain will largely depend on the strength of the evidence and the potential resource savings from a guilty plea. Prosecutors should be willing to "pay" greater discounts for guilty pleas where the evidence is weak or the resource costs of trial are greater relative to expected trial sentences.").

FIGURE 1

Sliding Scale of Outcome Differentials



During this first part of the initial assessment of the case, both the prosecution and the defense have the ability to influence the other's perceptions by highlighting or emphasizing the strengths or weaknesses of the case and alerting the other to the manner in which the party will support its position or challenge the other's assertions.[116] For instance, in the Hayat matter, the defense alerted

116. While the judiciary plays almost no role in plea bargaining in the federal system and in most state systems, there are a few notable exceptions. As Jenia I. Turner noted in her work on judicial participation in plea negotiations:

> In plea bargaining, as in many areas of the American criminal justice system, the role of the judge is essentially passive. In an adversarial system like ours, the parties initiate the case and direct its progress, including its possible disposition as a plea bargain. The judge's role is limited to reviewing the bargain once it is presented. Many jurisdictions, including the federal, expressly prohibit judges from participating in or commenting on the plea negotiations.

Turner, *supra* note 18, at 199; *see also* FED. R. CRIM. P. 11(c)(1) ("An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions."); ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (Supp. 1968) ("The trial judge should not participate in plea discussions."); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV.

the government that, although the defense was willing to negotiate, it believed that there was a high likelihood that an attack of the preemptive nature of the prosecution would be successful in a second trial.[117] By posturing in this manner, the defense influenced the government's analysis of the case and, presumably, increased the assessed outcome differential. Examining the unique barriers to success at trial in the three terrorism cases described above, the below model creates an estimate of the applicable sizes of the outcome differentials for each.[118]

959, 971–72 (2009) (noting courts' reluctance to interfere in the plea bargaining process or thwart proposed bargains); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 39 (2002) ("The clearest effect of plea bargains on trial judges is to marginalize them. Judges have little voice in traditional plea bargains."). *But see* Brady v. United States, 397 U.S. 742 (1970); Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 678 (2009) (noting that in *Brady*, the trial court informed the defendant that he thought the defendant might get the death penalty, and, when the defendant indicated he would enter a plea of guilty, stated, "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury.").

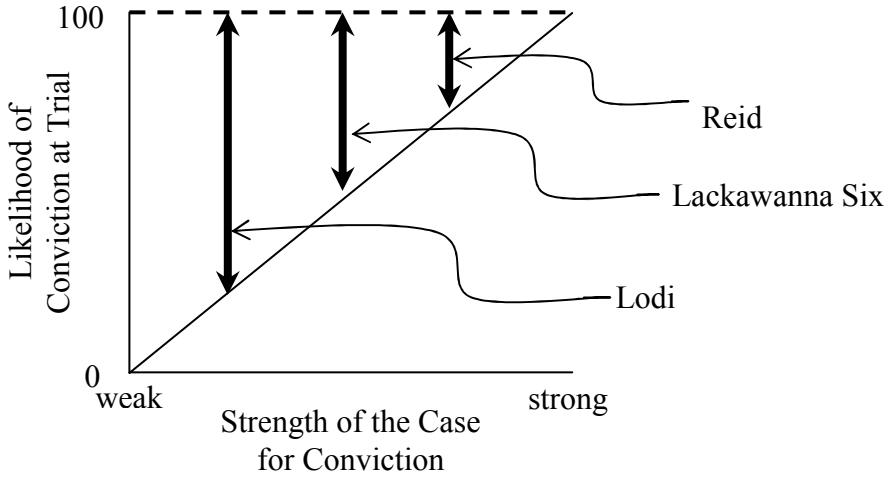
As the judiciary plays almost no role during plea negotiations in the federal system and in many state systems, this article will not specifically incorporate the role of judges into the model. Where judges do engage in the plea bargaining process, however, the above model of plea bargaining is easily expanded to account for their influence at various stages of the negotiation. For instance, where a judge indicates to a defendant during a preliminary hearing that it would be in his or her best interest to plead guilty, this would impact both the defendant's and the prosecution's assessment of the case and, therefore, the applicable outcome differential. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33 n.11 (2002) (noting that an interesting feature of the New Orleans criminal justice system is the involvement of judges in plea bargaining, including sometimes negotiating with defendants; an involvement the authors note may be a trend around the country).

117. *See supra* notes 76–77 and accompanying text.

118. *See* Figure 2.

FIGURE 2

Estimated Outcome Differentials in the Three Terrorism Cases



2. To Negotiate a Plea or Not

Once each party has conducted its evaluation of the outcome differential, each must determine whether the case is one in which they will either offer or entertain a plea offer. In most prosecutions, the outcome differential is significant enough to encourage the government to offer some benefits to the defendant, even if fairly *de minimis*, to create an incentive to plead guilty.[119] This is due in part to the reality that plea deals necessarily permit the government to preserve resources that may then be utilized in other cases. For instance, even in the Reid case, in which the outcome differential was almost non-existent, the government offered the possibility of a bargain in return for information and cooperation.[120] By the same token, the outcome differential is typically not so large as to convince

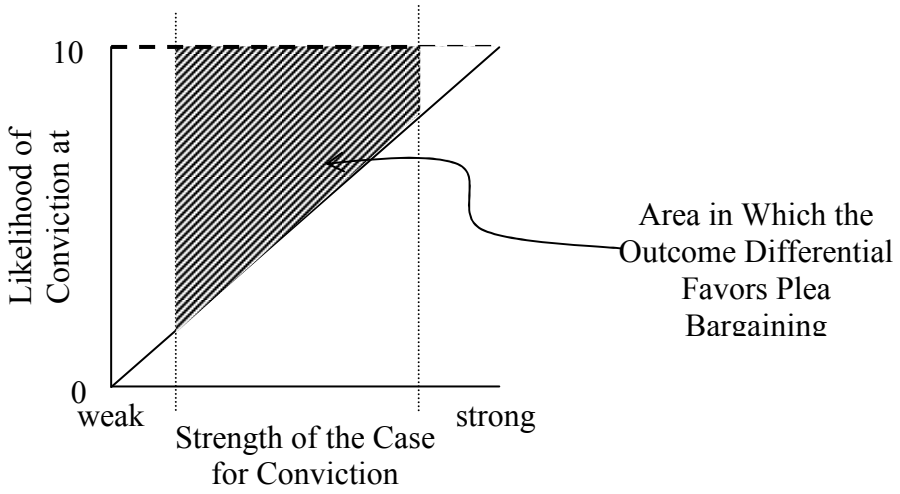
119. *See* Figure 3.

120. While there are very few instances in which the government would make no plea offer to the defense, this possibility must be accounted for in the outcome differential theory. An example of a situation in which the government might not deal is where the case is highly publicized and the government intends to "send a message" through trial.

a defendant not to entertain an offer from the government, as cases in which the outcome differential is this large would likely never be brought by the government or result in an indictment from a grand jury.[121] As this article has described, over 95% of federal prosecutions result in a plea of guilty. Therefore, in most cases the parties' assessments of the outcome differential results in a decision to engage in bargaining. Below is a model of the manner in which the size of the outcome differential affects the likelihood that the government will offer the defendant a bargain and that such offer will be entertained by the defense.

FIGURE 3

Likelihood of Plea Negotiations



The shaded area above represents the area in which the outcome differential is significant enough to induce the government to make an offer, but not so significant as to dissuade the defendant from entertaining the proposal.

121. *See* Figure 3.

3. Establishing and Distributing Available Benefits

Once the parties determine that negotiations will occur due to the size of the outcome differential, the next part of the plea bargaining process is a determination by each party of acceptable terms. As with the calculation of the outcome differential, both the prosecution and the defense play significant roles in this evaluation. While the outcome differential calculation required analysis of all barriers to success at trial, this portion of the analysis focuses on the barriers to the success of the bargain itself. It is here that the institutional and psychological barriers to plea bargaining affect the eventual offer from the government and the final determination from the defendant regarding whether to accept.

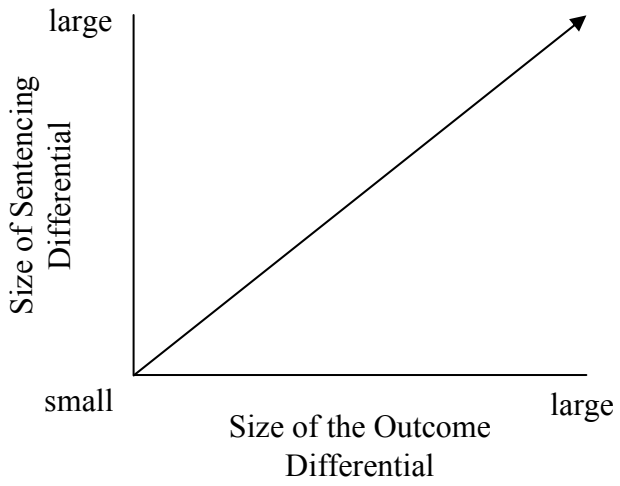
In the traditional shadow-of-trial plea bargaining theory, where the likelihood of success at trial is the only consideration and a reduction in sentence is the only incentive available from the government, one could predict that the size of the outcome differential and the sentencing differential would be similar. Therefore, where the outcome differential is high, both parties' assessments of the appropriate and acceptable sentencing differential would also be high.[122] This direct relationship is demonstrated in the model below.[123]

122. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1243–44 (2008) ("Most commentators that have advocated reform of plea bargaining have begun by criticizing the dramatic gap between plea and trial sentences. This differential, alternatively referred to as the 'plea discount' or 'trial penalty,' depending on the perspective, is indisputably the engine that drives the plea-bargaining machine.").

123. *See* Figure 4.

FIGURE 4

Relative Increases in Outcome Differential and Sentencing Differential



As illustrated in the model above, in a simplistic plea bargaining system the outcome differential and the sentencing differential track closely.

Plea bargaining in the American criminal justice system, however, is a more complex endeavor. First, on a case-by-case basis the prosecution may be required to offer a particular defendant a sentencing differential that is higher than predicted based solely on the case's outcome differential. Examples include cases where a defendant needs additional incentives to overcome a psychological barrier to pleading guilty or where the government will seek additional cooperation from the defendant after his or her conviction. Second, the prosecution may agree to hold back certain charges or prosecutorial options in return for a guilty plea. When such benefits are offered, the corresponding sentencing differential relating to the charges actually brought need not be as large to induce a defendant to accept the bargain. Finally, sentencing considerations are not the only

benefits defendants seek. Rather, defendants are often interested in other non-sentencing rewards, even if receipt of these benefits might result in a less significant sentencing differential. Because of these additional exchanges of benefits between each side of the bargain, the actual sentencing differential in each case may vary widely from that which would be predicted through examination of the outcome differential alone.[124]

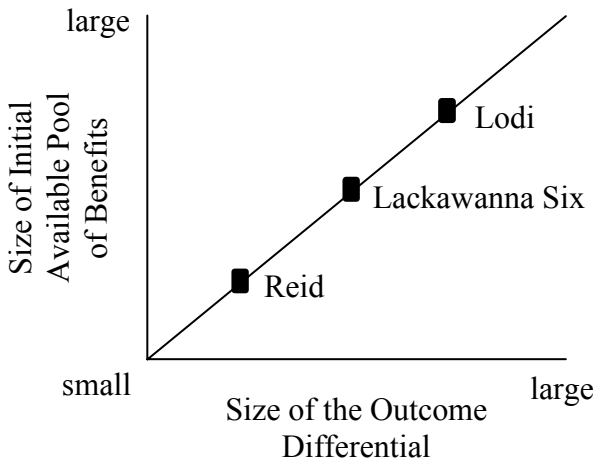
To account for the impact of the exchange of additional benefits described above and more accurately predict the impact of such exchanges on sentencing, an intermediary step must be added to plea bargaining models. This additional step reflects that the outcome differential is not directly related to the eventual sentencing differential but instead to the calculation of the appropriate pool of benefits available to the defendant in return for pleading guilty. Where the defendant's chances of success at trial are high, the initial pool of available benefits will be high. Similarly, where the defendant's chances of success at trial are low, the initial pool of available benefits will also be low. Below is a model of the initial pools of benefits in the three terrorism cases described herein.[125]

124. Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M.L. REV. 159, 159 (2008) ("Plea agreements take numerous forms and often involve many different types of concessions by both the government and the defendant.").

125. *See* Figure 5.

FIGURE 5

Pool of Initial Available Benefits in Each Terrorism Case



As discussed above, the initial pool of benefits available to defendants based on their outcome differential may then increase or decrease in size depending on several considerations. First, the government may increase a defendant's available pool of benefits to overcome barriers to the success of the plea offer.[126] Therefore, where a defendant is overconfident, this factor might not influence the outcome differential because it is not a barrier to the government's success at trial but might be a barrier to the success of the plea bargain itself.[127] As such, the government might offer the

126. *See* Bibas, *Shadow of Trial*, *supra* note 17, at 2496–2527 (discussing psychological barriers to plea bargaining).

127. There are many reasons a defendant might be 'overconfident.' One such reason is a belief by the defendant, whether true or imaginary, that he is innocent of the charged conduct. *See* Covey, *supra* note 37, at 130 ("Plea bargaining's pricing model misprices pleas in part because it fails to incorporate a critically important piece of information—the defendant's subjective knowledge of guilt or innocence—into the pricing mechanism."). Another such reason might be that a defendant has no prior criminal convictions and, therefore, is more reluctant than a recidivist to accept a bargain that requires the establishment of a criminal record. *See* Wright, *supra* note 113 at 70 ("While recidivists do account for a large number of the bodies in the criminal court system, it would be a mistake to ignore the large group

defendant an increase in the relative size of the available pool of benefits in exchange for the defendant abandoning this trait.[128] Second, the government may request additional benefits from the defendant beyond a willingness to plead guilty, such as an agreement to cooperate in future investigations or prosecutions.[129] In such cases, the defendant's available pool of benefits increases in size in return for the defendant's agreement to satisfy the government's additional request. Where the government agrees to increase a defendant's available pool of benefits, as described above, the resulting impact is demonstrated below.[130]

---

of defendants who have no prior convictions. . . . [B]ecause the fact of convictions should concern these defendants more than the amount of punishment, they are more likely to hold out for a dismissal or an acquittal in a weak case."). Consideration of such barriers to the success of plea bargains and their relative impact on the eventual sentencing differentials necessary to induce bargains is absent from the traditional shadow-of-trial formulas but are a central consideration in the benefit distribution theory.

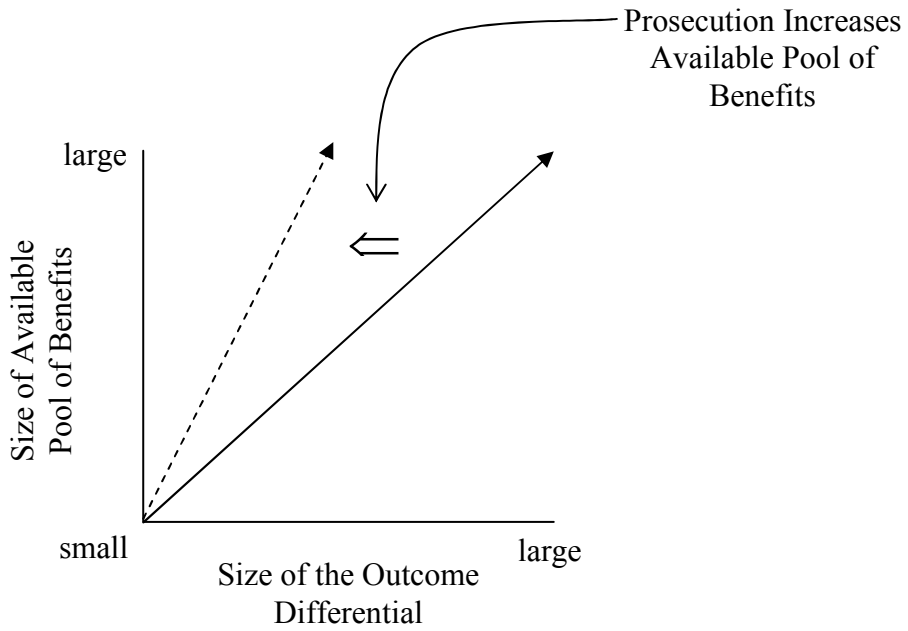
128. It is important to understand that certain factors have broad implications and the potential to influence various aspects of the plea bargaining process. In fact, some factors, such as wealth, might impact both the assessment of the likelihood of success at trial and the evaluation of the actual plea agreement because they impact both structural and psychological influences. For instance, if a defendant is wealthy, he may have a stronger defense team, which would be a structural factor influencing the assessment of success at trial. At the same time, wealth and a strong defense team might encourage a defendant to be more risk averse, a psychological barrier to success of the plea bargain itself. As such, wealth might both increase the outcome differential and result in an increase in the relative size of the available pool of benefits to create a greater incentive for the defendant to plead guilty. *See* Bibas, *Shadow of Trial*, *supra* note 17, at 2465–66.

129. *See* Cicchini, *supra* note 124, at 162 ("In many cases, defendants provide information that results in convictions for far more serious criminal behavior of co-actors, or even of individuals in unrelated cases. In short, the benefits flowing to the government from the plea bargaining system are numerous, far reaching, and incredibly valuable.").

130. *See* Figure 6.

FIGURE 6

Impact of Prosecution Increasing Available Pool of Benefits



Third, just as the prosecution may act in a manner that increases the defendant's available pool of benefits, the government may also act to diminish these available benefits. Most commonly, such diminutions occur where the prosecution has agreed to charge bargaining and will not utilize readily provable conduct to bring more severe charges or to apply harsher statutes, including statutes carrying mandatory minimum sentences. Obviously, where the prosecution agrees to forgo more serious charges in return for a guilty plea, it will not be necessary to also offer the defendant a significant pool of benefits for application when being sentenced for the conduct and charges actually contained in the plea agreement.[131] As a result, a

131. *See* James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. OF LEGAL ANALYSIS 119, 130 (2009) ("[P]rosecutors make use of their charging discretion to engage in

defendant with a relatively large outcome differential may still have a small pool of available benefits for application at sentencing because the pool of available benefits has been significantly drained in return for the prosecution's agreement not to bring additional or more aggressive charges.

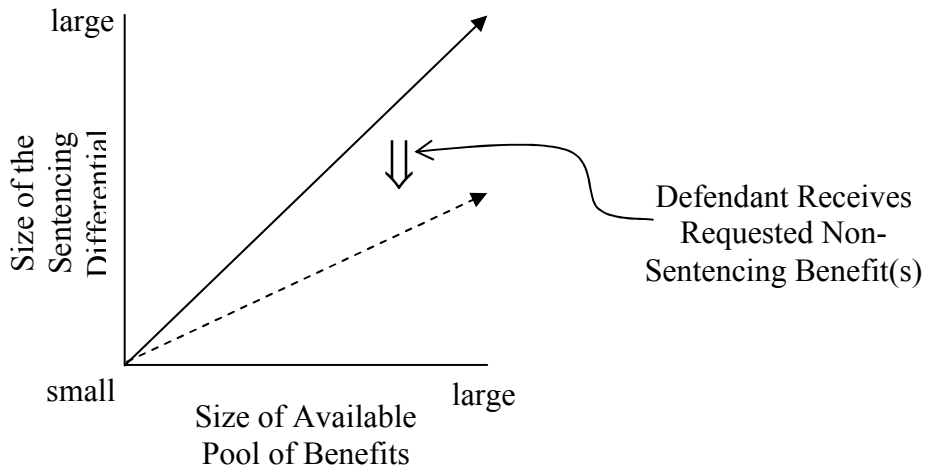
Once the size of the defendant's available pool of benefits has been altered based on barriers to the success of the plea bargain, including considerations of benefits desired by the government beyond a mere plea of guilty and any agreements from the government regarding uncharged or under-charged conduct, the defendant's role in the process once again becomes vital. At this stage of the negotiation, the defendant is able to influence the use of the remaining pool of benefits between sentencing and non-sentencing considerations. If the defendant seeks only to utilize the benefits pool to influence sentencing, the resulting sentencing differential will be relative in size to the total size of the available pool of benefits. However, if the defendant seeks other non-sentencing benefits, such as a recommendation regarding a particular prison or category of criminal offense for reasons related to social stigma, the applicable pool of benefits shrinks, resulting in a related diminution in the size of the eventual sentencing differential. This occurs because the defendant cannot increase the size of the available pool of benefits, and any specific requests, whether sentencing or non-sentencing, necessarily reduce the size of the remaining pool.[132]

'charge bargaining'—plea bargaining with the accused in which the prosecutor offers a lighter sentence in return for a plea of guilty to a lesser charge."); Wright & Miller, *supra* note 29, at 1414 ("The same set of facts can sustain various charges with varying penalties."); Lynch, *supra* note 30, at 2132 ("There is, to be sure, an element of trading involved: the defendant does have an expensive set of procedural rights that can be invoked, and so always has at least something—the certainty and ease of a conviction that will not need to be processed through the adversarial judicial process—to trade to the prosecutor for a reduced charge.").

132. *See* Figure 7.

FIGURE 7

Influences of Defense Receiving Non-Sentencing Benefits on Remaining Available Pool of Benefits to Influence Sentencing Differential



The three terrorism cases discussed in this article illustrate the manner in which the government may increase the available pool of benefits in return for additional concessions or cooperation; the manner in which the government may diminish the available pool of benefits in return for foregoing more aggressive charging; and the manner in which the defendant may influence the utilization of the final available pool of benefits. For instance, Reid was offered a more lenient sentence by the government in return for cooperation in ongoing terrorism investigations.[133] Although Reid declined the offer, it demonstrates the government's willingness to exchange cooperation for an increase in Reid's available pool of benefits.[134] Had Reid accepted this offer, his sentencing differential would have

133. *See supra* note 52 and accompanying text.
134. *Id.*

grown larger than that originally predicted by the outcome differential in his case. In the Lodi case, Hayat refused to plead guilty to a terrorism related charge.[135] Although this decision did not play a significant role in his eventual sentence for a customs violation because he received a sentence of time served, it illustrates Hayat's willingness to utilize some of his available pool of benefits in return for not being charged with an offense that carried a significant stigma.[136] As a result, the remaining pool of benefits available to influence Hayat's sentencing differential shrunk. Importantly, this decision was made by Hayat and illustrates once again that defendants do play a significant role in the plea bargaining machine. Finally, in the Lackawanna case, there is evidence that the defendants pleaded guilty, in part, in return for the government dropping conspiracy charges and because of concerns that the government would file even more serious charges if the case proceeded to trial.[137] There is also evidence that the government threatened to classify the defendants as enemy combatants if the cases did not settle at the plea bargaining stage.[138] This is an example of the government reducing the relative size of the defendants' available pool of benefits in return for an agreement not to bring more serious charges and, in a manner unique to terrorism cases, not labeling the defendants as enemy combatants. Such charging and classification concessions from the government certainly had a significant impact on the individuals' final sentences and aid in explaining why the final sentencing differentials in these cases were not reflective of the initial assessment of the government's likelihood of success at trial.

---

135. *See supra* note 76 and accompanying text.

136. Tempest & Bailey, *supra* note 76, at B7.

137. *New York Man Admits to Attending al Qaeda Training Camp*, *supra* note 102 ("[Mr. Goba's lawyer said] his client had agreed to the plea deal . . . because of the possibility that the government could bring more serious charges, like treason.").

138. Eric Lichtblau, *supra* note 98 ("Mr. Brown said his client had decided to plead guilty after prosecutors suggested that Mr. Mosed could be declared an enemy combatant and be held indefinitely without a lawyer, or be charged with treason and face execution."); *see* Carl Takei, *Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of "Enemy Combatant" Detention Violate the Right to Due Process*, 47 B.C. L. REV. 581, 584 (2006) ("When a prosecutor uses the threat of enemy combatant detention as leverage in a criminal case, the threat creates extraordinary pressure to plead guilty.").

4. The Final Administrative Determination

Once the first phase of the plea bargaining process is complete and the prosecution and defense have determined the applicable outcome differential, calculated the size of the defendant's available pool of benefits, and determined how the benefits will be distributed between sentencing and non-sentencing related benefits, the second phase begins, which is the administrative phase.

The administrative phase is a byproduct of the exhaustive first phase of the bargain and represents the government's unilateral decision regarding the final offer that will be presented to the defendant. While the administrative theory of plea bargaining is correct that the government wields significant power during this phase and defendants often accept the government's final determination of a just result, these acts must be considered in the context of the earlier role of the defense. Prior to the government shifting into its administrative role, the defendant influenced the prosecution's determination regarding the strength of the case, the factors influencing the success of a plea offer, and the manner in which the offer would distribute benefits between sentencing and non-sentencing considerations. As such, the defendant's influence in the second phase, though indirect, is significant.

Furthermore, consideration must be given to the success of such offers by the government. Over 95% of defendants in the federal system plead guilty, most as part of a bargain with the government. While the administrative theory of plea bargaining argues that many of these defendants are forced to unwillingly accept the government's offer, this appears to overly diminish the defendant's true role in the plea bargaining process. Given the extensive role of the defendant in the first phase of the bargain, it is more likely that plea bargaining rates are high because most of the offers are considered reasonable by both parties, each having performed the analysis described above in phase one. Though it may be true that many defendants still feel a sense of despair at agreeing to the ultimate determination, for close to 95% of defendants the offer is significant enough to create an

incentive to plead guilty.[139] As such, the fact that the government controls this final phase of the process should not be interpreted to mean that defendants play no role in the operation of the plea bargaining machine; just as the fact that defendants control the ultimate decision whether to accept an offer or move forward to trial should not be interpreted to mean that the government is a mere bystander in the process as a whole.

B. Unilateral Plea Bargaining

Regardless of whether bilateral plea negotiations occur, an important aspect of any guilty plea is consideration of the benefits associated with unilateral plea bargaining between the defendant and the criminal justice system. Under the theory of unilateral plea bargaining, defendants sometimes trade their right to a trial in return for the inherent benefits of pleading guilty. These inherent benefits are bestowed by the system and may encourage a plea of guilty regardless of whether the defendant is also entertaining an offer from the government.[140]

---

139. The significance of defense counsel in the plea bargaining process must not be overlooked. Defense counsel plays a significant role in the parties' assessments of the likelihood of success at trial and the evaluation of barriers to the success of the plea negotiations. Beyond this, defense counsel also serves as a guide for the defendant, assisting him or her in navigating the process, voicing the defendant's positions, concerns, and desired distribution of benefits, and helping the defendant analyze and consider the available alternatives. As such, a poor defense attorney might act as an additional barrier to the success of the plea bargain itself, should he or she fail to properly counsel the defendant regarding the risks and realities of the criminal process. Alschuler, *supra* note 116, at 680 ("The practice of plea bargaining often transforms criminal defense attorneys from courtroom champions into the point men and women of a coercive system. The principle function of counsel is to explain to their clients just how the legal system's armaments work and to force these clients to recognize the coercive power of the alternatives they face.").

140. One form of unilateral plea bargaining not discussed at length in this article occurs when an individual confesses to the charged conduct to demonstrate a commitment to the ideology that inspired his or her acts. An example of this type of defendant is "Times Square Bomber" Faisal Shahzad, who attempted to detonate an S.U.V. full of explosives in New York's Times Square on May 1, 2010. Shahzad entered a plea of guilty to terrorism charges in June 2010 and stated, "I want to plead guilty, and I'm going to plead guilty 100 times over." Benjamin Weiser & Colin Moynihan, *A Guilty Plea in Plot to Bomb Times Square*, N.Y. TIMES, June 22, 2010, at A1. Shahzad went on to state, "I am part of the answer to the U.S. terrorizing the Muslim nations and the Muslim people." Scott Shane, *Wars Fought and Wars Googled*, N.Y. TIMES, June 27, 2010, at WK1, *available at* http://www.nytimes.com/2010/06/27/weekinreview/27shane.html. While Shahzad's decision to plead guilty is interesting, it adds little to our understanding of the plea bargaining machine or the motivations that encourage a large majority of terrorism defendants to select plea bargaining over trial. This is

1. Stigma and Plea Bargaining

While a thorough examination of all of the inherent benefits of pleading guilty is outside the scope of this article, there are three such benefits for consideration in the terrorism cases discussed above. First, and almost entirely overlooked in existing plea bargaining literature, is consideration of stigma. Stigma is an "external incentive founded on the reluctance of individuals to interact with a person who breaches social norms."[141] While all manner of criminal behavior creates varying levels of stigma, being labeled a "terrorist" is perhaps one of the most stigmatizing.[142] Although stigma is most closely linked to the actual perpetrator of the crime, family members can also suffer from its adverse affects.[143] As one commentator noted,

---

because Shahzad could have achieved the same result by going to trial. Recall that in 2006, Zacarias Moussaoui proceeded to trial and then used the stand as a mechanism to boast of his involvement in the 9/11 plot. Lewis, *supra* note 50. As such, Shahzad's decision to plead guilty appears to say less about the plea bargaining machine and more about his own forum preferences for asserting his allegiance to terrorism. Further, it may in fact be the case that Shahzad is actually motivated by one of the unilateral plea bargaining considerations discussed at length in this piece, but, unlike Richard Reid and others, he has chosen to mask his true motivations.

141. Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355, 362 (2007) ("[S]tigma operates by limiting and constraining both social and commercial opportunities. These constraints are the by-product of the willingness of individual—private enforcers—to punish the perpetrators of crime by limiting social or professional interactions with them."); *see also* ANTON J. M. DIJKER & WILLEM KOOMEN, STIGMATIZATION, TOLERANCE AND REPAIR: AN INTEGRATIVE PSYCHOLOGICAL ANALYSIS OF RESPONSES TO DEVIANCE 6 (2007) ("Stigmatization is a type of social control that does not distinguish between a person and his or her deviant behavior or temporary condition, that is aimed at excluding the person from a relationship or society.").

142. *See* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 131 (2009) ("The stigma attached to an individual who is thought of as a potential terrorist is, needless to say, extremely high. Indeed, to be mistakenly identified as a suspected terrorist would be a nightmare of extraordinary proportions.") (quoting Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watch Lists*, 115 YALE L.J. 2148, 2153 (2006)).

143. *See* Farkas & Miller, *supra* note 58, at 90 ("A 'courtesy stigma' is attached to families, which results in their social marginalization, even though they did not commit a sex offense. For many family members, their identities as spouses, parents, siblings, and children are suspended while they try to negotiate their daily lives."). *See generally* SOCIAL WORK AND DISADVANTAGE: ADDRESSING THE ROOTS OF STIGMA THROUGH ASSOCIATION (Peter Burke & Jonathan Parker eds., 2007) (discussing stigma by association); Sally Mason, et al., *Developing a Measure of Stigma by Association with African American Adolescents Whose Mothers Have HIV*, 20 RES. ON SOC. WORK PRAC. 65 (2010) (discussing familial stigma suffered by those whose family members have HIV); Cristina Parfene, et al., *Epilepsy Stigma and Stigma by Association in the Workplace*, 15 EPILEPSY & BEHAV. 461 (2009) (discussing stigma by association); P. Werner & J. Heinik, *Stigma by Association and Alzheimer's Disease*, 12 AGING & MENTAL HEALTH 92 (2008) (examining stigma by association with regard to Alzheimer's disease); Patrick W. Corrigan, et al., *Blame, Shame, and Contamination: The Impact of Mental Illness*

"Family members [of offenders] report being ostracized and disrespected by neighbors, lifetime acquaintances, and relatives because of their . . . offender connections. They feel constantly watched by neighbors and others in the community."[144] As another commentator stated, "[B]ecause the offender has committed an act which is socially unacceptable, his family members are often thought of as criminals, too."[145] Further, although scholarship on stigma and criminal law has focused on the deterrent force of the concept, it is equally true that stigma can be motivational.[146] In the case of Reid, the possibility that reference to al Qaeda might be removed from his indictment and the ability to avoid a trial, both of which he believed would reduce the stigma suffered by his family as a result of his actions, created an incentive for him to plead guilty.[147] While the benefit of avoiding familial stigma will rarely be a sufficient incentive for a defendant to plead guilty where the government's case is less than assured, where the defendant's conviction is highly likely at trial, preventing the pain and lasting negative consequences of an internationally publicized spectacle might well be enough to result in

---

and Drug Dependence Stigma on Family Members, 20 J. FAM. PSYCHOL. 239 (2006) (examining stigma associated with family members suffering from mental illness and drug dependence); Susan B. Goldstein & Vera A. Johnson, *Stigma by Association: Perceptions of the Dating Partners of College Students with Physical Disabilities*, 19 BASIC & APPLIED SOC. PSYCHOL. 495 (1997) (discussing associational stigma related to interaction with individuals with disabilities).

144. Farkas & Miller, *supra* note 58, at 90; *see also Sentencing Memorandum on Behalf of I. Lewis Libby in* U.S. v. Libby, CR. NO. 05-394 (RBW), 20 FED. SENT'G REP. 33, 42 (2007) ("The public nature of Mr. Libby's indictment, trial, and conviction will ensure that he and his family carry the stigma of those convictions forever. The impact of Mr. Libby's convictions, on himself and his family, is profound and devastating. It will continue to be so, regardless of the sentence this Court chooses to impose.").

145. Susan H. Fishman, *Losing a Loved One to Incarceration: The Effect of Imprisonment on Family Members*, 59 PERSONNEL & GUIDANCE J. 372, 373 (1981); *see also* RACHEL CONDRY, FAMILIES SHAMED: THE CONSEQUENCES OF CRIME FOR RELATIVES OF SERIOUS OFFENDERS 61–93 (2007) (discussing secondary stigma). Condry states:

> In our society . . . the ties that bind kin together are strong enough for dishonour to flow from the actions of one relative to another, and for a family to have a reputation which can be damaged by the actions of one member. When those actions comprise some of the most grave and vilified crimes in our society, the whole family can be tainted with the resulting stigma.

Id. at 61–62.

146. Rasmusen, *supra* note 107, at 540 (1996) ("Once the criminal's behavior becomes known, other individuals become more reluctant to interact with him. This private reluctance may be as powerful a disincentive to crime as public punishment.").

147. *See supra* notes 53–54 and accompanying text.

a plea of guilty. For Reid, this benefit was enough, and he accepted the deal.[148]

2. *The Financial and Psychological Costs of Trial*

Second, defendants are often motivated to plead guilty by consideration of the financial and psychological costs of trial on both themselves and their families.[149] While it may be desirable to exercise one's right to trial in hopes of exoneration, the collateral costs of selecting this course are often untenable. Consider the choices made by Umer Hayat in the Lodi case. Hayat indicated that he pleaded guilty because of the incentives offered by the government and the reality that a plea bargain would spare himself and his family the costs of a second trial.[150] As with considerations of stigma, defendants' decisions to spare themselves and their families the financial and psychological costs of trial are not properly categorized as benefits granted by the prosecution. More accurately, these are benefits inherent to the plea bargaining system and offered in each case where the defendant embraces the option of pleading guilty. Furthermore, it is important to observe that in the Hayat matter, as opposed to the Reid case, the defendant was motivated to plead guilty by a combination of benefits offered by the prosecution and benefits inherent to the system.[151]

---

148. *Id.* (discussing Richard Reid's decision to plead guilty).

149. *See* Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. 260, 261 (2009), *available at* http://www.pennumbra.com/response/05-2009/Bowers.pdf ("[O]nce an innocent defendant is arrested and charged wrongfully, the costs of proceeding to an imperfect trail often swamp the costs of pleading to lenient bargains."); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 728 (2008) ("A grand jury must determine whether sufficient evidence exists to justify a trial, and an affirmative decision will subject a criminal defendant to the economic, personal, reputational, and psychological costs of standing trial and defending against the indictment's charges."); O'Hear, *supra* note 31, at 418–19 ("Prosecutors can act in a high-handed way because few defendants can afford to go to trial. The costs of trial extend far beyond the litigation expenses. . . . For those who secure pretrial release, there will be a desire to draw tedious, inconvenient, and sometimes humiliating court appearances to an end.").

150. *See supra* Part II.B (discussing Umer Hayat's motivation for pleading guilty).

151. The Reid case and the Hayat case demonstrate the manner in which bilateral and unilateral plea bargaining can either operate independently or in tandem during a case. While some defendants, such as Reid, will find the benefits of unilateral plea bargaining sufficient in and of themselves to give up their right to trial, other defendants, such as Hayat, will only acquiesce to the plea bargaining machine in return for the combined benefits of each. Further, other defendants may not be interested in the benefits

3. *Additional Institutional Benefits*

Finally, in determining whether to plead guilty, a defendant might also consider the credit received under the United States Sentencing Guidelines for acceptance of responsibility or other institutional advantages not controlled by the prosecution, such as currying favor with the judge regarding a requested prison assignment. For example, under the federal sentencing guidelines, a defendant who is determined by the court to have "accepted responsibility" is eligible for a reduction in their offense level of two points, even where the government objects.[152] Importantly, in the comments, the guidelines state the following regarding guilty pleas:

> This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. . . . Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 . . . , will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a).[153]

Where defendants become eligible for a reduction in their offense level because they have pleaded guilty, the eventual sentencing benefits may be significant, even without additional benefits from the government. For instance, defendants charged with conduct resulting in an offense level of nine will face a minimum of four months in

---

inherent to pleading guilty, and will find motivation only in the benefits being offered by the government.

152. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2009). Where the government supports a defendant's receipt of credit for acceptance of responsibility, the defendant may be eligible for an additional point reduction. *Id.* § 3E1.1(b).

153. *Id.* § 3E1.1, comments 2–3 (2009); *see also Sentencing*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 681, 698–99 (2009) ("Reductions based on defendants' acceptance of responsibility have withstood challenges that they violate defendants' Fifth Amendment right against self-incrimination, Fifth Amendment right to due process, and Sixth Amendment right to jury trial.").

prison if convicted at trial, but may be sentenced to probation if they receive credit for pleading guilty. Further, defendants charged with conduct resulting in an offense level of forty-three will face a mandatory sentence of life in prison. In return for a guilty plea, however, the same defendants may be eligible for a sentence of just twenty-seven years in prison. Although twenty-seven years is a significant period of incarceration, for a defendant aged eighteen at the time of conviction, this means the difference between release when he or she is forty-five years old or spending the rest of his or her natural life behind bars.[154] The inherent benefits available under the sentencing guidelines may not be sufficient to motivate all defendants to plead guilty, but they may be sufficient for some, with or without the offer of additional benefits from the government.

Although most of the above described considerations have traditionally been considered outside the scope of the plea bargaining machine, they should properly be included within any model of plea bargaining as they can significantly impact a defendant's decision whether to plead guilty. Furthermore, while the government can certainly bring these benefits to the attention of the defense, they cannot control them, and, therefore, a defendant's consideration of unilateral plea bargaining benefits is once again an example of the significant role played by defendants in the operation of the machine.

CONCLUSION

Two theories have dominated recent scholarship regarding the operation of a system that leads to over 95% of defendants pleading guilty. While the administrative theory argues that prosecutors have become so powerful that they force defendants to accept plea bargains in which they alone determine the appropriate punishment, the shadow-of-trial theory contends that both prosecutors and defendants participate in the plea bargaining process like a

154. This calculation includes consideration of "good time," which permits a 15% reduction in a federal inmate's sentence for good behavior while in prison. Such "good time" does not apply to inmates who are sentenced to terms of life in prison.

contractual negotiation. As is so often the case, both appear to be correct and represent different portions of the plea bargaining process.

Plea bargaining is a much larger machine than many have previously articulated, and, within this machine, there are two distinct types of bargain. First, both the defense and the prosecution play active roles in bilateral negotiations, each influencing the others' determination until, at the end of the process, the government makes its final administrative determination of a just result. This is not a process where defendants are subjected to the whims of the government without any voice or participation, but rather a complex evaluation of the barriers to success at trial and the barriers to success of the plea bargain itself. Plea bargaining has triumphed, therefore, because the process effectively captures both parties' interests and resolves the conflict in a manner appealing to all but a handful of defendants. Second, defendants, even without engaging in bilateral negotiations, may engage in unilateral bargaining and accept the inherent benefits of pleading guilty. In this second type of bargain, defendants assert themselves as independent actors, accepting the rewards of pleading guilty even where the government exerts no control. Regardless of whether defendants engage in bilateral bargaining, unilateral bargaining, or both, they are an important and vital aspect of the plea bargaining machine.

It is true that there are many factors, rational and irrational, known and unknown, that influence the decisions in each case regarding whether a plea bargain will be offered and whether it will be accepted. The benefit distribution model of plea bargaining described in this work is a first step towards compartmentalizing the inner workings of the plea bargaining machine and isolating the stages at which varying factors influence the ultimate decisions of the government regarding the offer it will present and of the defendant regarding whether to accept. Although much research remains to delve into the inner reaches of the plea bargaining machine and explore the operation of this process that captures 95% of defendants, the benefit distribution model offers a mechanism through which to conduct this future research. Plea bargaining is not a perfect system

to resolve criminal cases, and it presents many areas for concern. The initial steps to correcting its deficiencies, however, cannot come until there is a better understanding of its operation. Through this and future research, one can strive to better the criminal justice system in the United States, a system which is, for all intents and purposes, the plea bargaining machine itself.