

“Queen for a Day” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules

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Proffer agreements, colloquially known as “Queen for a Day” agreements, govern the conditions under which prospective criminal defendants and the government agree to conduct an interview. These agreements generally require criminal defendants, who hope to gain leniency through a reduced sentence or immunity grant, to waive their plea-statement rights, and they permit, in certain circumstances, the prosecution to introduce previously inadmissible proffer statements at trial. Since the Supreme Court’s decision in United States v. Mezzanatto, the terms of Queen for a Day agreements have grown in scope and restrictiveness, dramatically extending the range of use of proffer statements by the government. Absent clear guidance, federal courts presently vary in their approach to waiver of the plea-statement Rules and have upheld the use of proffer statements not only for impeachment, but also for rebuttal (even where the defendant has not testified) and as substantive evidence in the government’s case-in-chief (solely in response to defense counsel advocacy). This Note contends that the scope of permissible waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) requires sharper articulation. Specifically, it argues that the terms of Queen for a Day agreements should be limited to permit waiver of the plea-statement Rules only for the purposes of (1) impeachment of a criminal defendant who testifies at variance with the proffer, and (2) rebuttal of defense witness testimony that materially and explicitly conflicts with the proffer. The scope of permissible waiver

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should be consistent with the intent of the drafters of the Rules, the reasoning of Mezzanatto, and prudential considerations of fairness and public policy in the legal process.

I. INTRODUCTION

Before entering into a cooperation agreement with or granting immunity to a criminal defendant, federal prosecutors will generally require him to make a “proffer” of the information that he will provide in exchange for leniency. Under Federal Rule of Evidence 410¹ and Federal Rule of Criminal Procedure 11(f),² statements made during plea discussions with the government are generally not admissible in evidence.³ In practice, however, a proffer session is governed by the terms of a proffer agreement, known in legal circles as a “Queen for a Day,”⁴ which requires that a defendant make a broad waiver of these exclusionary rights.⁵ The conditions are essentially mandatory, non-negotiable predicates for discussion with prosecutors that are presented on a

1. For the text of Rule 410, *see infra* note 76.

2. For the text of Rule 11(f), *see infra* note 77.

3. For simplicity, this Note refers to Rule 410 and Rule 11(f) as “the Rules” or “the plea-statement Rules.” Rule 11(f) replaced Rule 11(e)(6) in December 2002, *see infra* note 79.

4. The term “Queen for a Day” derives from the popular 1950s television “sob show” *Queen for a Day*. Host Jack Bailey (famed voice of Disney’s “Goofy”) would interview four women before a studio audience about their daily misfortunes. Whoever was judged to be living the hardest life — as determined by the audience’s applause meter — was crowned “Queen for a Day.” The reward for the Queen included a sable-trimmed, red velvet robe, an accompanying jeweled crown, and whatever her Highness had requested, usually kitchen and household appliances. *See* Shawn Hanley, *Queen for a Day*, at <http://history.acusd.edu/gen/projects/hanley/queen> (last modified Jan. 7, 1997) (on file with the *Columbia Journal of Law and Social Problems*).

5. In *United States v. Lauersen*, Judge William H. Pauley III defined a Queen for a Day agreement as:

[A] limited use immunity agreement where the suspect agrees to provide information in exchange for a promise from the Government that any statements made during the proffer will not be used against the profferor. Where plea negotiations break down or an immunity deal is rejected, the . . . Queen for a Day . . . permits a prosecutor to use the proffered statements in a number of circumstances, including to pursue leads, to cross-examine the defendant if she testifies, and for purposes of rebuttal.

No. 98 Cr. 1134, 2000 WL 1693538, at *1 (S.D.N.Y. Nov. 13, 2000), *aff’d* 343 F.3d 604 (2d Cir. 2003); *see* FED. BAR COUNCIL COMM. ON SECOND CIRCUIT COURTS, FED. BAR COUNCIL, PROFFER, PLEA AND COOPERATION AGREEMENTS IN THE SECOND CIRCUIT 3 (2003) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter FEDERAL BAR COUNCIL REPORT].

take-it-or-leave-it basis.⁶ Cooperation and negotiation with the government are imperative for prospective defendants because the Sentencing Guidelines now vest prosecutors with complete authority to dole out rewards for assistance.⁷ A defendant's only means of gaining such aid is by proffering under a Queen for a Day agreement.

In the seminal case of *United States v. Mezzanatto*, the Supreme Court held that a criminal defendant can waive the plea-statement Rules and make otherwise excludable proffer testimony admissible at trial.⁸ In a concurring opinion, however, three Justices emphasized that *Mezzanatto* dealt only with a narrow factual situation: namely, where the defendant testified at trial inconsistently with his proffer statements and where those statements were then used by the prosecutors for impeachment purposes.⁹ *Mezzanatto* left open the weighty question whether a defendant could waive his plea-statement rights and allow the government to utilize his proffer testimony in its case-in-chief.¹⁰

After *Mezzanatto*, the government has dramatically expanded the scope of waiver that it requires in its Queen for a Day agreements. Today the terms of waiver permit use of protected proffer testimony by the government not only for impeachment of the defendant, but also in rebuttal and in the government's case-in-chief when defense counsel makes statements or elicits testimony that conflicts with the proffer.¹¹ Those defendants who are dissatisfied with the provisions offered to them have little recourse but to proceed directly to trial or plead guilty.

6. See *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("Already, standard forms indicate that many federal prosecutors routinely require waiver of Rules 410 and 11(e)(6) rights before a prosecutor is willing to enter into plea discussions."); Richard B. Zabel & James J. Benjamin, Jr., 'Queen for a Day' or 'Courtesan for a Day': *The Sixth Amendment Limits to Proffer Agreements*, WHITE-COLLAR CRIME REP., Oct. 2001, at 1, 5 ("Prosecutors generally refuse to forego or tinker with the language of proffer agreements. Thus, a defendant who chooses not to sign the proffer agreement in effect chooses not to proffer."); Interview with Anonymous White-Collar Defense Lawyer 1 in New York, N.Y. (Jan. 5, 2003) [hereinafter Interview with AWC1].

7. See *infra* Part II.B.

8. *Mezzanatto*, 513 U.S. at 210.

9. *Id.* at 211 (Ginsburg, J., concurring).

10. *Id.* Case-in-chief is defined as: (1) "The evidence presented at trial by the party with the burden of proof," and (2) "The part of the trial in which a party presents evidence to support its claim or defense." BLACK'S LAW DICTIONARY 170 (7th abr. ed. 2000).

11. See *infra* notes 152–158 and accompanying text.

The risks inherent in entering into these more stringent versions of Queen for a Day agreements have now radically increased. Far from elevating the defendant to a favorable position, they may hamper possible defenses at trial. Fear of violating the agreement, thereby opening the door to the introduction of proffer testimony at trial, significantly curbs the arguments that a defendant may present and the testimony that counsel may elicit. Do the limited defenses remaining to criminal defendants suggest that the scope of permissible waiver of the plea-statement Rules has been extended too far? Though some courts have sustained these agreements, others have questioned their suitability.¹² Different limits on the scope of the agreements have been drawn by different courts.¹³ This Note analyzes the various approaches that the courts and government have set forth, and proposes a more suitable and restrictive limit on waiver in Queen for a Day agreements.

This Note contends that the terms of Queen for a Day agreements should be limited to permit waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) only for the purposes of (1) impeachment of a criminal defendant who testifies at variance with the proffer, and (2) rebuttal of defense witness testimony that materially and explicitly conflicts with the proffer. Part II presents the development of Queen for a Day agreements and their role in plea bargaining under the Federal Sentencing Guidelines. Part III explores the presumption of waivability of the plea-statement Rules after *Mezzanatto* and draws attention to the present expansion of the Queen for a Day waiver. Part IV scrutinizes the limits of permissible waiver and concludes, premised on public policy and fairness considerations, that proffer statements should be admissible only for impeachment and limited rebuttal purposes, but not in the government's case-in-chief. Part IV.A surveys the four potential limits on the waiver of the plea-statement Rules employed by the government and courts to date. Part IV.B proposes that the bounds of permissible waiver be fixed short of the government's current position. Part IV.C lays bare the practical and procedural consequences — to both the system and the defendant — of allowing a

12. See *infra* Part III.C.

13. See *infra* Part IV.A.

defendant's proffer to be admissible in the government's case-in-chief.

II. QUEEN FOR A DAY AGREEMENTS IN THE CONTEXT OF THE SENTENCING GUIDELINES

A. THE PROFFER AND THE QUEEN FOR A DAY AGREEMENT

Prior to, as well as after, indictment, a potential or actual defendant and his counsel often meet with the government in "proffer sessions" to answer questions and discuss the possibility of procuring an advantage from the government.¹⁴ Before commencing a proffer session, the government customarily presents the defendant with a standard proffer agreement¹⁵ — more commonly known as a Queen for a Day agreement — that governs the conditions under which the parties agree to conduct an interview.¹⁶ This "curious sobriquet in criminal law"¹⁷ covers the "conventional first step"¹⁸ in the process where defense counsel provides information to the government in an attempt to establish credibility and convince the government to consider a cooperation agreement, a plea agreement, or a non-prosecution agreement.¹⁹

14. Judge Denise Cote defined the term "proffer session" as:

[T]hose interviews in which a defendant submits to questioning by prosecutors in the hope of receiving a benefit from the Government, such as a decision to offer a defendant a cooperation agreement or a representation from the Government that a defendant qualifies for the safety valve provision of the law by having provided truthful information to the Government.

United States v. Chaparro, 181 F. Supp. 2d 323, 326 n.2 (S.D.N.Y. 2002); see also *Mezzanatto*, 513 U.S. at 198 (describing defendant's meeting with government to discuss the possibility of cooperation).

15. See, e.g., *Mezzanatto*, 513 U.S. at 198, 216; United States v. Rebbe, 314 F.3d 402, 404 (9th Cir. 2002); United States v. Duffy, 133 F. Supp. 2d 213, 214 (E.D.N.Y. 2001); United States v. Lauersen, No. 98 Cr. 1134, 2000 WL 1693538, at *1 (S.D.N.Y. Nov. 13, 2000), *aff'd* 343 F.3d 604 (2d Cir. 2003); see also Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 41 (1992); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 94 n.92 (1995). This Note uses the terms "proffer agreement," "Queen for a Day," and "Queen for a Day agreement" interchangeably.

16. FEDERAL BAR COUNCIL REPORT, *supra* note 5, at 3.

17. Frederick P. Hafetz & Burt M. Garson, *The 'Queen for a Day Agreement': A High-Risk Venture*, BUS. CRIMES BULL., Apr. 2001, at 1, 1 (2001).

18. United States v. Stern, No. 02 Cr. 1015, 2003 WL 22309072, at *11 (S.D.N.Y. Oct. 7, 2003).

19. See *Mezzanatto*, 513 U.S. at 198; United States v. Burch, 156 F.3d 1315, 1318 (D.C. Cir. 1998); United States v. Wilkerson, No. 01-40098-01, 2002 WL 1162540 (D. Kan.

The terms of Queen for a Day agreements vary by district²⁰ and are enforced according to principles of contract law.²¹ As such, these terms are of particular importance, given the rights and privileges that the defendant may waive.²²

Initially, Queen for a Day agreements forbade the use of proffer statements as substantive evidence against the defendant. Proffer statements could only be used for leads to other evidence and for impeachment depending on how the defendant testified.²³ Hence, proffer agreements provided only limited use immunity,²⁴ not the statutory use and derivative use immunity granted under

Feb. 15, 2002); *Chaparro*, 181 F. Supp. 2d at 326 n.2; *Duffy*, 133 F. Supp. 2d at 217; Hafetz & Garson, *supra* note 17, at 7.

20. See, e.g., FEDERAL BAR COUNCIL REPORT, *supra* note 5, at 3–13 & app. A (comparing the principal provisions in the proffer agreements of each of the six districts in the Second Circuit).

21. See *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991). See generally Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

22. This is especially true in complex white-collar cases because the bargained-for terms must be followed by the parties involved. See Robert G. Morvillo, *Criminal Contract Law*, N.Y.L.J., Oct. 6, 1992, at 3. The U.S. Attorney's Office for the Southern District of New York's standard Queen for a Day agreement evidences the formulaic language of proffer agreements. In part it provides:

(2) In any prosecution brought against Client by this Office, except as provided below the Government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.

(3) Notwithstanding item (2) above: (a) the Government may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution of Client by the Government; (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

U.S. Attorney's Office for the Southern District of New York, Standard Proffer Agreement, ¶¶ 2–3 (2001) (emphasis omitted) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter 2001 S.D.N.Y. Standard Proffer Agreement].

23. See Joel Cohen, *Has the Federal Government Made It Harder for One's Client to Cooperate?*, N.Y.L.J., Feb. 10, 1998, at 1, nn.1–2 (citing 1988 and 1997 S.D.N.Y. standard proffer agreements).

24. See Nicholas M. Defeis & Nathalie Tauchner, *Examining Proffer Agreements in Federal Cases*, N.Y.L.J., Mar. 9, 2001, at 1.

18 U.S.C. § 6002.²⁵ Having use and derivative use immunity built into the proffer would have tied the prosecutor's hands, potentially preventing him from subsequently charging the defendant, thereby making the process unworkable from a law enforcement point of view.²⁶

Over the past two decades, however, the terms of Queen for a Day agreements have changed, markedly weakening the already limited immunity previously reserved to the defendant.²⁷ Today, Queen for a Day agreements commonly allow the use of proffer statements not only to pursue clues and leads — limited use immunity — but also to cross-examine the defendant should he testify, for rebuttal purposes even if the accused does not testify, and potentially in the government's case-in-chief.²⁸ For example, the standard proffer agreement of the United States Attorney's Office for the Southern District of New York currently provides:

[T]he Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of the Client (including arguments or issues raised sua sponte by the District Court) at any stage of the

25. Statutory immunity under 18 U.S.C. § 6002 (2000) prohibits the use of immunized testimony to obtain leads to other proof. In relevant part, § 6002 provides: "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." A use and derivative use immunity standard seeks to comply with the requirement of *Kastigar v. United States* — that the evidence presented against the defendant was derived from sources independent of the proffer session. 406 U.S. 441 (1972). Under *Kastigar*, once a defendant has shown that he has been compelled to give a statement, the state's burden "is not limited to a negation of taint," but rather the state has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

26. Judge Jack Weinstein sees the issue differently and would not allow clues and leads to be garnered from proffer testimony: "It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the 'fruit of the poisonous tree' doctrine into this area." 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 410.09[4] (Joseph M. McLaughlin ed., 2d ed. 2003).

27. Compare Cohen, *supra* note 23, at 33 nn.1–2 (citing 1988 and 1997 S.D.N.Y. standard proffer agreements), with 2001 S.D.N.Y. Standard Proffer Agreement, *supra* note 22, and FEDERAL BAR COUNCIL REPORT, *supra* note 5, at 3–13 & app. B (discussing and reproducing standard proffer agreements of each of the six districts of the Second Circuit).

28. See *infra* Part III.C.

criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.²⁹

The expanded language in proffer agreements dramatically enlarges the government's ability to use proffer statements and undermines the defendant's ability to contest vigorously the government's accusations at trial.³⁰ As one commentator recently noted, federal prosecutors are "using [proffer statements] not merely as tools for collecting information, but to hem in the defense and foreclose the full panoply of defense theories."³¹ Hence, the standard terms of today's proffer agreements have been extended to the point where failed discussions — combined with the rigidity of sentences under the Federal Sentencing Guidelines and a defendant's corollary motivation to cooperate — may seriously controvert the rights and interests of a defendant.

B. THE IMPORTANCE OF AND MOTIVATION FOR COOPERATION AND PLEA BARGAINING UNDER THE FEDERAL SENTENCING GUIDELINES

In 1984 Congress created the United States Sentencing Commission to formulate a new approach to federal sentencing.³² The main impetus behind this reform movement was Judge Marvin E. Frankel, the "father of sentencing reform,"³³ who criticized the "almost wholly unchecked and sweeping" sentencing authority of federal judges to determine a defendant's sentence based on the facts and equities, limited only by the statutory maximums.³⁴ Specifically, Judge Frankel called for the adoption of "binding" guidelines on sentencing courts to eliminate arbitrary disparities

29. 2001 S.D.N.Y. Standard Proffer Agreement, *supra* note 22, ¶ 3 (emphasis omitted).

30. See *infra* Part IV.B.3.

31. Robert G. Morvillo & Robert J. Anello, *Cooperation: The Pitfalls and Obligations for Defense Attorneys*, N.Y.L.J., Dec. 5, 2000, at 4.

32. Congress created the United States Sentencing Commission with the Sentencing Reform Act of 1984. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 26 and 28 U.S.C.).

33. 128 CONG. REC. 26,503 (1982) (statement of Sen. Kennedy).

34. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) [hereinafter FRANKEL, CRIMINAL SENTENCES]. See generally Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) [hereinafter Frankel, *Lawlessness in Sentencing*].

and leniency in federal sentencing.³⁵ This reform effort culminated with the 1987 enactment of the Federal Sentencing Guidelines,³⁶ which today thoroughly regulate the sentencing process³⁷ and aim to “provide certainty and fairness in meeting the purposes of sentencing.”³⁸

The Sentencing Guidelines have dramatically increased the incentive for defendants to cooperate in federal criminal prosecutions.³⁹ Under the Guidelines, a judge’s hands are essentially tied with respect to sentencing unless a formally recognized ground for departure is present.⁴⁰ Where once a federal judge wholly controlled the fate of the defendant, today he has been largely supplanted by the federal prosecutor.⁴¹ The balance of power has shifted.⁴²

35. FRANKEL, CRIMINAL SENTENCES, *supra* note 34, at 5, 121–23.

36. The hub of the Sentencing Guidelines is a 258-box grid termed the “Sentencing Table.” More specifically:

Along the horizontal axis of the grid is a column entitled “Criminal History Category,” which adjusts the severity of the offender’s sentence based on his past conviction record. The vertical column, entitled “Offense Level,” includes a base score for the crime committed, adjusted for characteristics of the defendant’s actions that the Sentencing Commission has determined to be relevant to criminal sentencing. The Sentencing Guidelines instruct the judge how to calculate each of these factors, and the box at which the offender’s “Criminal History Category” and “Offense Level” intersect determines the range within which the judge may sentence the defendant.

Erron W. Smith, *Apprendi v. New Jersey: The United States Supreme Court Restricts Judicial Sentencing Discretion and Raises Troubling Constitutional Questions Concerning Sentencing Statutes and Reforms Nationwide*, 54 ARK. L. REV. 649, 664 (2001) (internal citations omitted).

37. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

38. 28 U.S.C. § 991(b)(1)(B) (2000).

39. See John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL’Y 423, 424 (1997) (noting that cooperation has increased since the passage of the Sentencing Guidelines); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors*, 68 FORDHAM L. REV. 917, 918–19 (1999) (same).

40. See *Koon v. United States*, 518 U.S. 81, 92 (1996); *Stinson v. United States*, 508 U.S. 36, 42 (1993); Richman, *supra* note 15, at 86; Yaroshefsky, *supra* note 39, at 926–27. See generally Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 418–24 (1992).

41. See 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.”); Richman, *supra* note 15, at 86–88.

42. See Gerard M. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (noting that today “the judiciary plays a severely limited role in determining guilt, and that the prosecutor is the controlling figure in the typical criminal case”).

Prior to the enactment of the Guidelines, the judge had the power to credit a defendant's cooperation in the sentencing calculus, even if the government believed that the defendant's assistance was entitled to little or no weight.⁴³ Now, under § 5K1.1 of the Sentencing Guidelines (Substantial Assistance to Authorities),⁴⁴ the federal prosecutor formally controls whether there is a reward for cooperation and, at least informally, controls the extent of that reward.⁴⁵ Generally, a judge may use cooperation as a basis for downward sentencing departure only upon the prosecutor's motion confirming the defendant's substantial assistance.⁴⁶ A prosecutor's submission of a 5K1.1 letter⁴⁷ determines whether a judge can consider cooperation, making "a cooperating

43. See Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 20 (2001) (referencing the "unlimited power of the judge to sentence anywhere in a legally permissible range"). See generally FRANKEL, CRIMINAL SENTENCES, *supra* note 34; Frankel, *Lawlessness in Sentencing*, *supra* note 34.

44. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002). § 5K1.1 provides minimal directive for proper usage of the substantial assistance provision. The Sentencing Commission has chosen only to put forth a guideline policy statement: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." *Id.*

45. See James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317, 1327-30 (1997) (referencing the limited role the court plays in the § 5K1.1 process after the guidelines); Richman, *supra* note 15, at 101. Section 8C4.1 of the U.S. Sentencing Guidelines Manual, the corporate equivalent of § 5K1.1, also offers corporate criminal defendants the benefit of substantial assistance. Upon the appropriate motion from the government, the court may depart from the guideline range and mandatory minimums. See Burns, *supra*, at 1326 n.27.

46. See Richman, *supra* note 15, at 101; see also LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 3 (1998) ("[W]hether [under 18 U.S.C. § 3553(e)] the resulting § 5K1.1 sentence is lower than a guideline range minimum, or a mandatory minimum statutory requirement, its application must signify the defendant's provision of substantial assistance to authorities.").

47. A 5K1.1 is a letter submitted by government prosecutors to the court detailing the substantial assistance a defendant provided to authorities and recommending a downward departure from the guideline range in line with U.S. Sentencing Guidelines Manual § 5K1.1. Attorney General Ashcroft recently emphasized that a 5K1.1 letter should be submitted only where an individual's assistance is "substantial to the Government's case. It is not appropriate to utilize substantial assistance motions as a case management tool to secure plea bargains and avoid trials." Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors 6 (Sept. 22, 2003), available at <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf> (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter Ashcroft Memorandum].

defendant totally beholden to the Government.”⁴⁸ Indeed, the modern defense lawyer today is less a trial advocate than a conduit for cooperation with the government.⁴⁹ As Judge John S. Martin, Jr.,⁵⁰ himself a former United States Attorney for the Southern District of New York, recently began an opinion:

The adoption of the Sentencing Guidelines has substantially changed the role of the criminal defense lawyer. Counsel’s ability to persuade the judge or jury is now far less important than his ability to persuade the prosecutor that the defendant should be allowed to cooperate with the government and thereby obtain a 5K1.1 letter, which will enable the judge to depart from the sentence that the Guidelines would otherwise mandate.⁵¹

As such, a defendant’s chance for a favorable outcome increasingly depends on a prosecutor’s formal recommendation to the court in the form of a 5K1.1 letter following a proffer session and cooperation.

The rigid and often harsh sentences called for by the Guidelines, and the fact that approximately 95% of all criminal cases

48. Elkan Abramowitz, *Proffer and Informal Immunity Agreements*, N.Y.L.J., Mar. 7, 1995, at 31.

49. See Richman, *supra* note 15, at 105.

50. On June 24, 2003, Judge Martin announced his intention to leave the federal bench because he no longer wished “to be part our unjust criminal system.” John S. Martin Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31. His departure was motivated, in part, by his frustration with recent enactments by Congress that make it more difficult for federal judges to depart from the sentencing guidelines: “[T]he guidelines have taken sentencing power away from judges and shifted it to federal prosecutors. . . . The guidelines, which determine mandatory minimum and maximum sentencing ranges for federal criminal offenses, force judges to impose unjust and harsh penalties that often are neither fair nor effective.” Zachary L. Berman, *NY Judge Leaves Bench Critical of Sentencing Rules*, N.Y. LAWYER, Aug. 18, 2003, at <http://www.nylawyer.com/news/03/08/081803b.html> (on file with the *Columbia Journal of Law and Social Problems*). “For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.” Martin, *supra*; see also *infra* note 70 (referencing the U.S. Judicial Conference’s recent call for a repeal of certain provisions of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (the “PROTECT Act”).

51. *United States v. Fernandez*, No. 98 Cr. 961, 2000 WL 534449, at *1 (S.D.N.Y. May 3, 2000) (holding that a defendant may be sentenced within the guideline range that he would have faced had he been properly advised by his lawyer of the advantages of cooperation).

are disposed of by pleas of guilty or *nolo contendere*, create substantial incentives for defendants to cooperate and obtain a 5K1.1 letter.⁵² Indeed, it is not surprising that nearly one out of every five defendants sentenced nationally receives a 5K1.1 letter.⁵³ The power to grant or withhold such letters is almost unfettered in district courts, where there is “broad deference to prosecutorial decisions to withhold 5K1.1 letters, so long as they are grounded in good faith.”⁵⁴

Similarly, § 3E1.1 of the Sentencing Guidelines (Acceptance of Responsibility) provides defendants with an incentive to admit culpability early in the process in order to reap the maximum downward adjustment.⁵⁵ Under § 3E1.1, a defendant is eligible for a downward departure of two levels if he “clearly demonstrates acceptance of responsibility for his offense,” and an additional one level decrease if the government determines that the defendant “assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty.”⁵⁶ Although multiple avenues exist for granting a defendant a downward departure, nothing in the rules entitles a defendant to a plea agreement with the gov-

52. Wright & Miller, *supra* note 41, at 29 n.1; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414 tbl.5.17 (2001). The number of cases disposed of by guilty pleas has steadily increased over the past century. Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 759–60 (1998).

53. U.S. SENTENCING COMM’N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT, 2d Cir. tbls.8, 9, available at <http://www.ussc.gov/JUDPACK/2001/2c01.pdf> (2001) (on file with the *Columbia Journal of Law and Social Problems*) (detailing guideline departure rates by circuit, district, and primary offense category) [hereinafter U.S.S.C. STATISTICS]. For the year ending September 30, 2001, federal prosecutors made 5K1.1 departure motions in 18.3% of the cases in the S.D.N.Y. and 17.1% of cases nationally. All told, 69.1% of defendants in the S.D.N.Y. and 64% nationally were sentenced within the guideline range. *Id.*; see also *United States v. Chaparro*, 181 F. Supp. 2d 323, 334 n.10 (2002) (citing figures for 2000).

54. Morvillo & Anello, *supra* note 31; see also Elkan Abramowitz, *Prosecutorial Input on Downward Departures for Assistance*, N.Y.L.J., Jan. 5, 1999, at 3; see also, e.g., *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996).

55. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2002).

56. *Id.* Of note, the approved version of the Feeney Amendment attached to the PROTECT Act reemphasized the role of the government prosecutor by amending Application Note 6 to § 3E1.1: “Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, app. 6 (2002) (amended 2003); PROTECT Act, Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671–72 (2003).

ernment.⁵⁷ Indeed, the ability of a defendant to secure leniency from the government results in a “race . . . to the swift,” in which early cooperation is required to ensure that the 5K1.1 letter offer is not withdrawn or lost and that a recommendation for a downward departure for acceptance of responsibility is made.⁵⁸

The pressure to cooperate with the government is particularly strong in white-collar cases, where sentences can be enhanced because of the complexity of the scheme and the amount of money involved,⁵⁹ resulting in significant prison sentences. A sentence under the Guidelines may be increased depending on whether “the offense substantially jeopardizes the safety and soundness of

57. See *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987) (“We have observed that plea agreements are neither constitutionally compelled nor prohibited; they ‘are consistent with the requirements of voluntariness and intelligence — because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.’” (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984))); see also *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.”).

58. *United States v. Fernandez*, No. 98 Cr. 961, 2000 WL 534449, at *3 (S.D.N.Y. May 3, 2000). Clear horizontal equity concerns abound here, as not all defendants who seek to cooperate with the government will be able to do so. See *infra* note 188.

59. This is not to say that the sentences of non-white-collar crimes, for example drug trafficking or other narcotics offenses, are not significantly affected by the pressure to provide substantial assistance under the Federal Sentencing Guidelines. Indeed, taking the Second Circuit as reference point of comparison against the national averages, only drug-related offenses rank above fraud in the granting of substantial assistance departures. The following table sets forth the percentage of cases in which the sentencing court departed based on substantial assistance:

Primary Offense	Substantial Assistance Departure (%)
<i>Drug Trafficking</i>	
Nationally	26.3
Second Circuit	30.4
<i>Fraud</i>	
Nationally	17.4
Second Circuit	19.6
<i>Firearms</i>	
Nationally	12.3
Second Circuit	12.6
<i>Total</i>	
Nationally	17.1
Second Circuit	21.8

See U.S.S.C. STATISTICS, *supra* note 53, tbl.9 (comparing guideline departure rate by primary offense category between nation and Second Circuit).

a financial institution”⁶⁰ (an attribute of most white-collar cases); whether the defendant is an organizer or leader of a scheme involving five or more people;⁶¹ the number of victims;⁶² and the amount of losses incurred.⁶³ If the losses exceed \$100 million — a low hurdle in the great accounting fraud cases of today⁶⁴ — the guideline range is increased by 26 levels.⁶⁵ The determination of criminal charges is of great consequence because prison terms are calculated by a combination of the charges brought against a defendant, expressed as function of “offense level,” and his past criminal history, expressed as a function of “criminal history category.”⁶⁶ “A change of six levels roughly doubles the sentence irrespective of the level at which one starts.”⁶⁷ The harsh nature of criminal sentences recently led Supreme Court Justice Anthony Kennedy to call for a “downward” revision of the Sentencing Guidelines.⁶⁸

The passage of the PROTECT Act and a recent memorandum by Attorney General John Ashcroft have further strengthened the

60. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(12) (2002) (4-level increase).

61. *Id.* § 3B1.1 (4-level increase).

62. *Id.* § 2B1.1(b)(2) (4-level increase if offense involves fifty or more victims).

63. *Id.* § 2B1.1(b)(1).

64. For example, the loss in shareholder value in the six largest accounting scandals has exceeded \$211 billion: Tyco (\$84.2 billion), Lucent (\$55.5 billion), WorldCom (\$26.9 billion), Enron (\$25 billion), Xerox (\$9.8 billion), and Qwest (\$9.8 billion). See PUBLIC CITIZEN, CORPORATE FRAUD AND ABUSE TAXES COST THE PUBLIC BILLIONS tbl. (2002), available at <http://www.citizen.org/documents/corporateabusetax.pdf> (on file with the *Columbia Journal of Law and Social Problems*).

65. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(N).

66. More concretely, a score of 43 is the maximum offense level and corresponds to life imprisonment, irrespective of one’s criminal history categorization. An individual with no criminal history and an offense level of 26, e.g., one who has been involved in a \$100 million scheme to defraud, translates to 63–78 months in prison. See *id.* at 343 (Sentencing Table).

67. *Id.* at 10.

68. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/Justice_Kennedy_ABA_Speech.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Justice_Kennedy_ABA_Speech.pdf) (on file with the *Columbia Journal of Law and Social Problems*) (“[T]he compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward. . . . I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”). Justice Kennedy’s comments are a reaction, in part, to the recent amendments to the Sentencing Guidelines, which went into effect on Nov. 1, 2003. See Amendments to the Sentencing Guidelines (May 1, 2003), available at <http://www.uscourts.gov/2003guid/2003cong.pdf> (last visited Oct. 31, 2003) (on file with the *Columbia Journal of Law and Social Problems*).

hand of the prosecutor. In passing the PROTECT Act, Congress reemphasized “its commitment to the principles of consistency and effective deterrence that are embodied in the Sentencing Guidelines”⁶⁹ by instructing the Federal Sentencing Commission to take measures “to ensure that incidence of downward departures are substantially reduced.”⁷⁰ And, most recently, Attorney General Ashcroft issued a directive limiting the use of plea bargains in federal prosecutions.⁷¹ Under the directive, all federal prosecutors are required to charge defendants with “the most serious, readily provable offense or offenses that are supported by the facts of the case” and limit their use of plea bargains.⁷² Federal prosecutors are now only permitted to plea bargain in six specific situations.⁷³ Together, these directives furnish the government with an even weightier stick with which to prod defendants during proffer sessions for information, clues, and leads since 5K1.1 letters are now only to be given in “rare circumstances.”⁷⁴ An increased number of criminal defendants may be forced to trial because the limitations on prosecutorial discretion make it more difficult to strike plea bargains.⁷⁵ The net result is

69. See Ashcroft Memorandum, *supra* note 47, at 1.

70. PROTECT Act, § 401(m)(2)(A), 117 Stat. 650, 675. The Judicial Conference of the United States, the federal courts’ policy-making body, recently voted to support repeal of certain provisions of the PROTECT Act, which “severely limits the ability of trial judges to depart from Sentencing Guidelines and requires reports to Congress on any federal judge who does so.” See News Release, Administrative Office of the U.S. Courts, Judicial Conference Seeks Restoration of Judges’ Sentencing Authority (Sept. 23, 2003), available at http://www.uscourts.gov/Press_Releases/jc903.pdf (on file with the *Columbia Journal of Law and Social Problems*).

71. Ashcroft Memorandum, *supra* note 47.

72. *Id.* at 2. The memorandum defines “serious offense or offenses” as “those offenses that generate the most substantial sentence under the Sentencing Guidelines.” *Id.*

73. See *id.* at 2–5. The plea bargain exceptions apply: (1) where the possible sentence would be unaffected by a charge of a lower offense; (2) under “fast-track” programs that rely on “charge bargaining” — “i.e., an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense”; (3) where the government determines that the original most serious charge will be difficult to prove in court because of witness access problems, suppressed evidence, or some other justifiable reason; (4) when a defendant agrees to provide prosecutors “substantial assistance” to aid their investigation; (5) where statutory enhancements increase penalties to the point where any incentive to plead guilty is removed; and (6) on a case-by-case basis for other “exceptional circumstances” with written approval by a supervisor. *Id.*

74. *Id.* at 3.

75. See Eric Lichtblau, *Ashcroft Limiting Prosecutors’ Use of Plea Bargains*, N.Y. TIMES, Sept. 23, 2003, at A1.

to place increased pressure on criminal defendants to proffer on the government's terms.

For all of the reasons just noted, defendants are highly motivated to proffer and cooperate with the government. But, proffering with the government is not a cost-free decision. It requires a defendant to sacrifice the default privileges of the federal plea-statement Rules, namely the statutory "cone of silence" that makes statements made during plea and proffer discussions with the government inadmissible against a defendant. The line delineating the scope of permissible waiver of Rules 410 and 11(f), however, has become nebulous in the years following the Supreme Court's decision in *United States v. Mezzanatto*.

III. THE SCOPE OF PERMISSIBLE WAIVER OF THE FEDERAL PLEA-STATEMENT RULES AFTER *UNITED STATES V. MEZZANATTO*

A. FEDERAL RULE OF EVIDENCE 410 AND FEDERAL RULE OF CRIMINAL PROCEDURE 11(F)

Federal Rule of Evidence 410⁷⁶ and Federal Rule of Criminal Procedure 11(f)⁷⁷ provide that statements made during plea dis-

76. Rule 410 states:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. EVID. 410.

77. Rule 11(f) currently provides: "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410." FED. R. CRIM. P. 11(f).

ussions or proffer sessions⁷⁸ are generally inadmissible against a defendant in a civil or criminal proceeding.⁷⁹ Rule 410 states, in relevant part:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions:

. . . .

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty⁸⁰

Although statements made by a criminal defendant during a plea negotiation generally may not be admitted into evidence, there

78. It is worth clarifying that the Rules are applicable to plea discussions generally, including statements made during proffer sessions more specifically. *See infra* notes 253–256 and accompanying text.

79. The most recent amendments to the Federal Rules of Criminal Procedure took place on April 29, 2002, and became effective on December 1, 2002. The 2002 Amendments introduced the wholly revised Rule 11(f) in place of former Rule 11(e)(6). Former Rule 11(e)(6) was substantively identical to Federal Rule of Evidence 410. It read:

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (A) a plea of guilty which was later withdrawn;
- (B) a plea of nolo contendere;
- (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
- (D) any statement made in the course of plea discussions with an attorney for the government which do [sic] not result in a plea of guilty or which result [sic] in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

FED. R. CRIM. P. 11(e)(6) (repealed 2002).

The combination of the identical nature of former Rule 11(e)(6) and Rule 410 and the now complete incorporation of Rule 410 into the Federal Rules of Criminal Procedure through Rule 11(f) supports continued reliance on the advisory committee's notes relating to former Rule 11(e)(6). As such, this Note will continue to rely on the legislative history and advisory committee's notes to Rule 11(e)(6). For the sake of convenience and consistency, this Note will reference Rule 11(e)(6) as either "Rule 11(e)(6) (repealed 2002)" or "former Rule 11(e)(6)."

80. FED. R. EVID. 410.

are two explicit exceptions. A defendant's plea-statements are admissible: (1) "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it"; or (2) "in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."⁸¹

The plea-statement Rules were proposed to foster the disposition of cases by extrajudicial compromise. To the drafters of Rule 410 and former Rule 11(e)(6), plea bargaining was both an inevitable and a proper feature of the judicial system.⁸² Negotiated settlement was thought to be inhibited where a defendant might fear that, upon the breakdown of plea discussions, his plea-statements could later be admissible evidence at trial.⁸³ As such, the Rules erected a cone of silence around a defendant's plea-statements in order "to permit the unrestrained candor which produces effective plea discussions."⁸⁴ In this way, the exclusion of plea-statement evidence in any civil or criminal proceeding is rooted in the "promotion of disposition of criminal cases by compromise"⁸⁵ — specifically as a "means of encouraging pleading."⁸⁶

81. *Id.*

82. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1974 Amendments.

83. *Id.* The legislative history of the Rules clearly indicates a desire by the drafters not to "discourage defendants from being *completely* candid and open during plea negotiations." H.R. REP. NO. 94-247, at 7 (1975), reprinted in 1975 U.S.C.C.A.N. 674, 679 (emphasis added); see also 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 187, at 535 (rev. ed. 1985) ("The intent of both [Rules] is to facilitate plea bargaining, by making it possible for defendants to engage in dialogue with prosecutors without fear that what they say may be used against them if the effort to negotiate a plea ultimately fails.").

84. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1979 Amendments; see also Brief in Opposition to Petitioner's Writ of Certiorari at 1–2, *United States v. Mezzanatto*, 513 U.S. 196 (1995) (No. 93-1340) [hereinafter Respondent's Opposition Brief] ("The drafters knew from history and experience that, if plea-bargaining were to play a meaningful part in the federal criminal justice system, plea-discussions had to take place in a risk-free environment. Indeed, the broad exclusionary language of The Rules reflects this very wisdom."); *Federal Rules of Criminal Procedure: Hearings Before the Comm. on the Judiciary*, 94th Cong. 149–62 (1975) (Statement of Wayne R. LaFave, Reporter, Advisory Committee on Criminal Rules).

85. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1979 Amendments.

86. FED. R. EVID. 410 advisory committee's notes to 1974 Enactment.

Plea bargains are thought not to compromise the judicial process or a defendant's rights, but rather to enhance and bolster the administration of justice.⁸⁷ In *United States v. Santobello*, the Supreme Court emphasized that plea bargaining "is an essential component of the administration of justice,"⁸⁸ and where "[p]roperly administered" is an "encouraged" mechanism for the effective and efficient disposition of criminal matters.⁸⁹ Indeed, plea bargaining not only helps law enforcement allocate resources toward more serious offenders,⁹⁰ but also has become an accepted, inevitable, and "ineradicable fact" of the criminal justice system.⁹¹

This is not to say that the drafters were "entirely happy" that large compromises were made in the drafting of the plea-statement Rules.⁹² They recognized that the bedrock principle of a criminal defendant's right to trial by jury seemed to be undone

87. This is not to say that there was not — nor still is — much academic criticism of plea bargaining. One scholar notes that "[p]lea bargaining undercuts [the] distinctive moral aspects of the criminal law. . . . [N]egotiated dispute resolution 'privatizes' the dispute by empowering the parties themselves to resolve it without any significant involvement by either the public or the courts." Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 219 (1983); see also Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38 (criticizing plea bargaining in practice as a unilateral administrative determination of criminal culpability); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 557–58 (1979) (asserting that plea bargaining conflicts with the liberal-democratic ideals of the criminal justice system); Scott & Stuntz, *supra* note 21, at 1910 (calling for reform of the plea bargaining process because of barriers to efficient bargaining). See generally Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (discussing problems with the system of plea bargaining).

88. 404 U.S. 257, 260 (1971) (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

89. *Id.* at 260; accord FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1974 Amendments.

90. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1975 Enactment.

91. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1974 Amendments; see also *Corbett v. New Jersey*, 439 U.S. 212, 222 (1978) (noting that the state has a "legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process mutually beneficial to both the defendant and the State"); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). See generally MILTON HEUMANN, PLEA BARGAINING 90–91, 117–26, 148–52 (1978) (discussing how the perspectives of defense counsel, judge, and prosecutor are altered during the plea bargaining process).

92. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1975 Enactment.

by the enactment of rules that actively encouraged negotiated settlement.⁹³ Moreover, there was concern that the limited, built-in exceptions for perjury and false statements⁹⁴ might limit a defendant's openness during plea conversations and have the collateral consequence of undermining the goal of complete candor.⁹⁵ In the end, however, the combination of the exploding federal docket⁹⁶ and the need to safeguard the integrity of the judicial system outweighed any concern about a potential "chilling effect" on plea negotiations.⁹⁷ The Rules, then, struck a balance between encouraging necessary and suitable plea bargaining, on the one hand, and discouraging willful manipulation of, and damage to, the judicial process on the other.⁹⁸

Ironically, the legislative history of the Rules foreshadows many of the subsequent legal challenges to the statutory language.⁹⁹ The Senate and the House each proposed separately worded amendments to Rule 410 in 1974¹⁰⁰ and to former Rule 11(e)(6) in 1975.¹⁰¹ The House proposal regarding Rule 410 provided "that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such

93. See *id.* ("No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases.")

94. See FED. R. EVID. 410.

95. See FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1975 Enactment ("The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial system from willful deceit and untruthfulness.")

96. See *id.* ("[C]rowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with.")

97. See Eric L. Dahlin, *Will Plea Bargaining Survive* *United States v. Mezzanatto*, 74 OR. L. REV. 1365, 1392 (1995).

98. See FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1975 Enactment.

99. See generally Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(10), 89 Stat. 370, 372; Federal Rules of Evidence and Criminal Procedure Amendments of 1975, Pub. L. No. 94-149, § 1(9), 89 Stat. 805, 805.

100. See H.R. CONF. REP. NO. 93-1597, at 6-7 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7100.

101. See H.R. CONF. REP. NO. 94-414, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. 713, 714.

plea or offer.”¹⁰² The Senate version proposed amending Rule 410 to include the following language: “[t]his Rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with [an offer to plead guilty] where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.”¹⁰³

One year later, Congress examined the language of former Rule 11(e)(6). The House version permitted “limited use of pleas of guilty, later withdrawn, or nolo contendere, offers of such pleas and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel.”¹⁰⁴ The Senate version of former Rule 11(e)(6) permitted “evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.”¹⁰⁵

The Senate version was eventually accepted in the adoption of Rule 410, but was later altered by the amendment to former Rule 11(e)(6).¹⁰⁶ Though the Rules were tailored to reflect both the importance of plea bargaining to the efficient administration of the justice system and the need to encourage candid negotiations, the question remained whether these goals could be accomplished when a defendant’s plea-statements were subsequently used against him.¹⁰⁷ In *United States v. Mezzanatto*, the Supreme

102. H.R. CONF. REP. NO. 93-1597, at 6–7 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7100.

103. 10 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 410.01[1.-2], at IV-188 (2d ed. 1996), cited in Pamela Bennett Louis, *United States v. Mezzanatto: An Unheeded Plea to Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact*, 17 PACE L. REV. 231, 238 (1996).

104. H.R. CONF. REP. NO. 94-414, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. 713, 714.

105. *Id.*

106. H.R. CONF. REP. NO. 93-1597, at 6–7 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7100. Rule 410 and former Rule 11(e)(6) were brought into accord and were substantively identical following passage by Congress in 1975. See Federal Rules of Criminal Procedure Act of 1975, 89 Stat. 370, 372, § 3(10); Federal Rules of Evidence and Criminal Procedure Amendments of 1975, 89 Stat. 805, 805, § 1(9). See generally Louis, *supra* note 103, at 237–40 (detailing the amendment history of Rules 410 and former 11(e)(6)).

107. See Dahlin, *supra* note 97, at 1368.

Court determined that both could co-exist and were not mutually exclusive.¹⁰⁸

B. *UNITED STATES v. MEZZANATTO* AND THE PRESUMPTION OF WAIVABILITY

The plea-statement Rules do not reference the possibility of waiver by the defendant.¹⁰⁹ In *Mezzanatto*, however, the Supreme Court concluded — in a 7-2 opinion — that “absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.”¹¹⁰ Gary Mezzanatto was arrested by the San Diego Narcotics Task Force and charged with possession with intent to distribute after he sold one pound of methamphetamine to an undercover officer.¹¹¹ Following his arrest, Mezzanatto and his attorney met with prosecutors to discuss the possibility of cooperating.¹¹² As a condition of the discussion, Mezzanatto agreed that any testimony given during the proffer might be admissible to impeach him at trial.¹¹³ Presumably plea and cooperation discussions broke down, for Mezzanatto went to trial.¹¹⁴ As it happened, Mezzanatto testified inconsistently with his proffer, and, over defendant’s objection, the government was permitted to impeach Mezzanatto’s trial testimony by cross-examining him with his prior inconsistent proffer statements.¹¹⁵ Mezzanatto appealed the decision, challenging the district court’s ruling allowing the government to introduce statements made during a failed plea negotiation for the purposes of impeachment.¹¹⁶ The Ninth Circuit agreed and reversed Mezzanatto’s conviction, holding that

108. *United States v. Mezzanatto*, 513 U.S. 196, 208–09 (1995).

109. *See id.* at 200.

110. *Id.* at 210; *see also* *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (stating that a waiver is knowing if it is made “with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it”).

111. *Mezzanatto*, 513 U.S. at 197–98.

112. *Id.* at 198.

113. *Id.*

114. *Id.* at 199.

115. *Id.*

116. *United States v. Mezzanatto*, 998 F.2d 1452, 1453 (9th Cir. 1993).

the plea-statement Rules could not be waived.¹¹⁷ The Supreme Court reversed.¹¹⁸

1. *The Majority Opinion*

In an opinion by Justice Thomas, the Court concluded that the plea-statement Rules are “presumptively waivable,” following the well-established practice of allowing the waiver of individual rights and evidentiary rules.¹¹⁹ The Court reasoned that a defendant may “knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”¹²⁰ Specifically, the Court found that absent congressional intent to preclude waiver or some “overriding procedural consideration that prevents enforcement of the contract, courts have held that agreements to waive evidentiary rules are generally enforceable even over a party’s subsequent objections.”¹²¹ Although the ma-

117. *Id.* at 1456 (“We therefore hold that the prohibition against the admissibility of statements made during plea negotiations is not subject to waiver.”).

118. *Mezzanatto*, 513 U.S. at 197.

119. *Id.* at 200–09. Justice Thomas’s majority opinion was joined fully by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justices Ginsburg, O’Connor, and Breyer expressed some reservations regarding the majority’s reasoning and concurred separately. Justices Souter and Stevens dissented.

120. *Id.* at 201; *see* *Shutte v. Thompson*, 82 U.S. 151, 159 (1872) (stating that a “party may waive any provision . . . of a statute intended for his benefit”). Recently, the Supreme Court reaffirmed its stance on the waiver of criminal rights. Writing for the Court in *New York v. Hill*, Justice Scalia stated: “We have . . . ‘in the context of a broad array of constitutional and statutory provisions,’ articulated a general rule that presumes the availability of waiver, and we have recognized that ‘[t]he most basic rights of criminal defendants are . . . subject to waiver.’” 528 U.S. 110, 114 (2000) (quoting *Mezzanatto*, 513 U.S. at 200–01, and *Peretz v. United States*, 501 U.S. 923, 936 (1991) (questioning whether a waiver could be used so that a magistrate instead of an Article III judge could preside over felony jury trial selection, and holding that “there is no Constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent”) (internal citations omitted)); *see also* *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding that double jeopardy defense can be waived by pretrial agreement); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that knowing and voluntary guilty plea waives defendant’s privilege against compulsory self-incrimination, right to trial by jury, and right to confront accusers); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (holding that Sixth Amendment right to counsel may be waived).

121. *Mezzanatto*, 513 U.S. at 201–02 (quoting 21 CHARLES ALAN WRIGHT & KENNETH GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5039, at 207–08 (1977)) (internal quotation marks omitted). The Court in *Mezzanatto* also added: “Because the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress’ silence as an implicit rejection of waivability.” *Id.* at 203–04.

jority conceded that there are some evidentiary rights so fundamental “to the reliability of the fact-finding process” that they may never be waived, it concluded that the plea-statement Rules were not of that type.¹²²

Mezzanatto argued that permitting waiver conflicts with the Rules’ purpose of encouraging voluntary settlement.¹²³ The prospect of waiver might make a defendant “think twice” about entering into a proffer agreement, thereby acting “as a brake, not as a facilitator” and ultimately having a “chilling effect on the entire plea bargaining process.”¹²⁴ In the end, however, the Court examined the potential consequences from the perspective of the prosecutor, not the defendant, and determined that the unavailability of waiver might dissuade prosecutors from proceeding in negotiations with the defendant — especially in the early stages.¹²⁵ The majority also reasoned that plea bargaining would be most effectively encouraged were it viewed as a true market situation, with no arbitrary restraints placed on the negotiations or bargaining.¹²⁶ The interested prosecutor could “buy” the defendant’s cooperation without a proffer agreement if he determined that the only means to that crucial information was through the exclusionary provisions of the default plea-statement Rules.¹²⁷ The Court found no evidence of “apocalyptic predictions” coming true concerning the future of plea bargaining under a system that allows waiver.¹²⁸

Mezzanatto also contended that waiver would exacerbate the “gross disparity” in bargaining power and invite prosecutorial abuse.¹²⁹ He argued that because the government is empowered to reward cooperators for their substantial assistance, the defendant is placed in an “incredible dilemma” when asked to sign a

122. *Id.* at 204.

123. *Id.* at 206.

124. *Id.* (citing Brief for Respondent at 23 n.17, *Mezzanatto* (No. 93-1340), and *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993)).

125. *Id.* at 207 (“Thus, although the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it.”). *But see infra* Part IV.C.1.

126. *Mezzanatto*, 513 U.S. at 208. “A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips.” *Id.*

127. *Id.*

128. *Id.* at 209 n.6.

129. *Id.* at 209 (quoting Brief for Respondent, *supra* note 124, at 26).

waiver agreement.¹³⁰ The Court disagreed, noting that the decision a cooperating defendant faces regarding whether to waive his rights under the plea-statement Rules is no different from a host of other critical decisions faced by defendants.¹³¹ As such, the difficult choice “[is] an inevitable — and permissible — attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”¹³² The majority determined that agreements to waive the Rules are enforceable, so long as the defendant knowingly and voluntarily entered into the agreement.¹³³

2. *The Concurring Opinion*

In a pithy three-sentence concurrence, Justice Ginsburg questioned — but did not resolve — whether the plea-statement Rules can be waived to allow use of a defendant’s statements in the government’s case-in-chief:

The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress’ intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case in chief would more severely undermine a defendant’s incentive to negotiate, and thereby inhibit plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.¹³⁴

The concurrence noted that the majority opinion was limited *only* to those instances where the government uses proffer statements to impeach a testifying defendant who has given inconsistent statements during plea negotiations — in other words, the specific facts in *Mezzanatto*.¹³⁵

130. *Id.*

131. *Id.*

132. *Id.* at 210 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)) (internal quotation marks omitted).

133. *Id.*

134. *Id.* at 211 (Ginsburg, J., concurring). The waiver sought by the government in *Mezzanatto* did not address this question, and as such neither did the concurrence.

135. *Id.*

3. *The Dissenting Opinion*

Dissenting, Justice Souter opined that Congress intended to bar waiver of the plea-statement Rules.¹³⁶ Souter noted that the majority opinion “is at odds with the intent of Congress and will render the Rules largely dead letters.”¹³⁷ According to the dissent, two assumptions aimed at encouraging effective plea discussions supported Congress’ adoption of the plea-statement Rules: first, the desire to encourage plea discussions, and second, the promotion of “conditions of unrestrained candor.”¹³⁸ Permitting waiver would diminish the “zone of unrestrained candor” and discourage plea negotiations, a result that could not have been intended by Congress.¹³⁹ The dissenters adopted the argument put forth by Mezzanatto that the Rules have a public function.¹⁴⁰ “[T]he Rules are meant to serve the interest of the federal judicial system,” such that the justice system itself would be harmed were waiver permitted.¹⁴¹

Justice Souter’s dissent foresaw two potential adverse consequences from the majority’s decision to permit waiver of the plea-statement Rules. First, providing defendants the option of waiver would, in the end, make waiver the de facto default rule.¹⁴² This premonition was true at the time and continues to

136. *Id.* at 211 (Souter, J., dissenting).

137. *Id.*

138. *Id.* at 214 (Souter, J., dissenting).

139. *Id.* at 214–15 (Souter, J., dissenting).

140. *Id.* at 214 (Souter, J., dissenting) (adopting argument in Respondent’s Opposition Brief, *supra* note 84, at 8–10); Transcript of Oral Argument, *Mezzanatto* (No. 93-1340), reprinted in 1994 U.S. TRANS LEXIS 170, at *23–*27 [hereinafter Transcript of Oral Argument].

141. *Mezzanatto*, 513 U.S. at 214 (Souter, J., dissenting). The dissenting justices are not alone in their rejection of the majority’s interpretation of congressional intent. To be sure, there has been considerable academic commentary on the topic of waiver, especially since the Court’s opinion in *Mezzanatto*. See DAVID P. LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY § 5.11, at 725 n.24 (rev. ed. 2002) (collecting sources, including many of those listed below); see also, e.g., Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011 (2000); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HAST. CONST. L.Q. 127 (1995); Michael S. Gershowitz, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996); Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541 (1998); Comment, *Waiver — Plea Negotiation Statements*, 109 HARV. L. REV. 249 (1995).

142. See *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting) (“[T]he Rules will probably not even function as default rules, for there is little chance that they will be applied at all.”).

be true today. It is the norm in standard proffer agreements to require a defendant to waive his plea-statement rights prior to discussions with the government.¹⁴³ The significant difference in bargaining power between the government and the defendant places the defendant in a weak position from which to negotiate the terms of the waiver agreement.¹⁴⁴ And, as conceded by the government at oral argument in *Mezzanatto*, the defendant is generally powerless to redefine the terms, resulting in essentially a contract of adhesion.¹⁴⁵ The dissent anticipated that it was only a matter of time before the exception swallowed the rule.¹⁴⁶

The second consequence divined by the dissent was the likelihood that waiver would come “to function as a waiver of trial itself.”¹⁴⁷ While Justice Souter acknowledged that the current form proffer agreements spoke only to the admissibility of statements against the defendant for impeachment purposes, he worried that the “erosion of the Rules has begun with this trickle” such that in time there would be “no distinction between the use of a statement for impeachment and use in the Government’s case-in-chief.”¹⁴⁸ The defendant’s decision to enter into a proffer agreement with the government would then result in his statements later being admitted against him should he fail to reach an agreement. At that point, “the possibility of trial if no agreement is reached will be reduced to fantasy.”¹⁴⁹ That result, noted Jus-

143. See *id.* (“Already, standard forms indicate that many federal prosecutors routinely require waiver of Rules 410 and 11(e)(6) rights before a prosecutor is willing to enter into plea discussions.”); *supra* note 15; see also *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (“Plea agreements . . . commonly contain provisions stating that proffer information that is disclosed during the course of plea negotiations is . . . admissible for purposes of impeachment”); LEONARD, *supra* note 141, § 5.11 (noting that “there is some evidence that the practice has already become common”).

144. See *supra* notes 129–130 and accompanying text.

145. *Mezzanatto*, 513 U.S. at 216; Transcript of Oral Argument, *supra* note 140, at *13–*17. The term “contract of adhesion” is well-defined by Justice Mathew O. Tobriner: “The term signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (Ct. App. 1961), *quoted in* E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 378 (6th ed. 2001).

146. *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting).

147. *Id.* at 217 (Souter, J., dissenting).

148. *Id.*

149. *Id.* at 218 (Souter, J., dissenting).

tice Souter, could not have been intended by a Congress committed to encouraging candid and open plea negotiations.¹⁵⁰

C. PROPHECIES FULFILLED: THE EXPANSION OF THE SCOPE OF WAIVER IN QUEEN FOR A DAY AGREEMENTS

In *Mezzanatto*, the Supreme Court implicitly — and Justice Ginsburg explicitly — left open the question whether a defendant may voluntarily and knowingly waive his rights under the plea-statement Rules to allow the government (1) to use his proffer statements in its case-in-chief, or (2) to rebut contradictory evidence or arguments in those instances where the defendant does not testify.¹⁵¹ Over the past eight years, however, the government has expanded the terms of proffer agreements, no longer restricting their use solely to developing leads and impeaching inconsistent testimony.¹⁵² Although *Mezzanatto* did not define the outer limits of permissible waiver, lower federal courts have since attempted to determine them.

Following *Mezzanatto*, district and circuit courts have upheld Queen for a Day agreement provisions that permit the use of the defendant's proffer statements in rebuttal (even if the defendant does not testify), allow affirmative use of proffer testimony in the government's case-in-chief (even prior to any defense witnesses being called), and authorize other applications. For example, in *United States v. Burch*, the D.C. Circuit upheld the admission of statements made during withdrawn plea negotiations not only for rebuttal or impeachment but also for use in the government's case-in-chief.¹⁵³ In *United States v. Krilich*, Judge Easterbrook of the Seventh Circuit upheld the admissibility of proffer statements even where the defendant did not testify.¹⁵⁴ There the

150. *Id.*

151. See *United States v. Gomez*, 210 F. Supp. 2d 465, 473 (S.D.N.Y. 2002).

152. See, e.g., *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000); *United States v. Krilich*, 159 F.3d 1020, 1024–26 (7th Cir. 1998), *cert. denied*, 2003 WL 22005876, at *1 (Oct. 14, 2003) (mem.); *United States v. Burch*, 156 F.3d 1315, 1319–22 (D.C. Cir. 1998); *United States v. Chiu*, 109 F.3d 624 (9th Cir. 1997); *United States v. Avendano*, No. 02 Cr. 1059, 2003 WL 22454664, at *3 (S.D.N.Y. Oct. 29, 2003); *United States v. Maynard*, 232 F. Supp. 2d 38 (E.D.N.Y. 2002); *United States v. Gomez*, 210 F. Supp. 2d 465 (S.D.N.Y. 2002).

153. *Burch*, 156 F.3d at 1319–22.

154. *Krilich*, 159 F.3d at 1025. The facts of *Krilich* are memorable. *Krilich*, a real estate developer, was convicted of fraud and conspiracy to violate the Racketeer Influ-

court concluded that Krilich's attorney presented testimony through cross-examination of government witnesses that contradicted his client's proffer, thereby allowing the government to introduce previously inadmissible proffer statements at trial.¹⁵⁵ In *United States v. Young*, the Eighth Circuit found that the government could substantively use affidavit statements made during the course of plea negotiations — in which the defendant admitted several elements of federal drug trafficking crimes — at trial because he had knowingly and voluntarily waived his plea-statement rights.¹⁵⁶ In *United States v. Gomez*, the district court held that a Queen for a Day agreement was enforceable and that the prosecution could use defendant's proffer statements to rebut evidence or arguments offered on the defendant's behalf at trial even when the defendant did not testify.¹⁵⁷ In addition, the Ninth Circuit in *United States v. Chiu* sustained the government's use of information, given by the defendant at proffer sessions, to prepare its witnesses.¹⁵⁸

enced and Corrupt Organizations Act (RICO) for developing a scheme to pay off the mayor of Terrance, Illinois, through the medium of a golf tournament. Krilich designed a scheme whereby the mayor's son would be guaranteed to hit a hole-in-one, thereby entitling him to the choice of a 1931 Cadillac or a check for \$40,000. After the son teed off at the ninth hole, Krilich palmed one of the son's golf balls, reached into the cup, and magically retrieved the ball, thus evidencing the son's remarkable athletic feat. *Id.* at 1024.

155. *Id.* at 1024–26. In relevant part, the agreement signed by Krilich stated “nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.” *Id.* at 1024; *see also* *United States v. Dortch*, 5 F.3d 1056, 1068–69 (7th Cir. 1993) (stating that trial court properly allowed government to use defendant's proffer testimony to cross-examine defense witness after defense counsel elicited testimony contradicted by defendant's proffer statements).

156. *Young*, 223 F.3d at 909–11.

157. *Gomez*, 210 F. Supp. 2d at 474–75.

158. *Chiu*, 109 F.3d at 626. The court in *Chiu* took an extremely literal reading of the proffer statement's language, which stated that “[e]xcept as otherwise provided . . . the government will not offer in evidence in its case-in-chief or at the time of his sentencing, any statements made by your client at the meeting.” *Id.* Use of the information was only disallowed to the extent that it was formally presented as evidence at trial. Derivative use of the information for the preparation of witnesses apparently did not trigger the case-in-chief exception: “The use of Chiu's statements to prepare witnesses is analogous to rebutting defendant's evidence or pursuing leads to other evidence.” *Id.*

IV. WHERE AND WHEN TO DRAW THE LINE — MARKING THE BOUNDS OF PERMISSIBLE WAIVER OF THE FEDERAL PLEA-STATEMENT RULES

Courts have not uniformly approached the extent to which a defendant may waive his plea-statement rights. Though some lower courts have read *Mezzanatto* broadly, others have questioned its expansion.¹⁵⁹ The “groundswell of doubt”¹⁶⁰ percolating within these courts makes clear that the reasoning in the D.C., Seventh, and Ninth Circuits is far from accepted gospel. The nebulous and incomplete nature of *Mezzanatto* and the divergent approaches of the federal courts necessitate a serious examination of the contexts in which proffer statements should be used and the appropriate reasons for permissible waiver. Four options are currently being pursued with varying, yet marked, success.¹⁶¹

A. THE SUGGESTED OPTIONS

1. *Option 1: The Government’s Current Position*

Government prosecutors have asserted that proffer agreements can be structured to permit the government to introduce a defendant’s protected plea-statements should a defendant put on any affirmative defense or his counsel make a factual assertion.¹⁶²

159. See *United States v. Duffy*, 133 F. Supp. 2d 213, 216 (E.D.N.Y. 2001) (citing *United States v. Doe*, No. 96 Cr. 749, 1999 WL 243627, at *9 (E.D.N.Y. Apr. 1, 1999) (stating that enforceability of waiver is “subject to question, at least when the waiver extends beyond the use of statements to impeach the defendant”); *United States v. Lauersen*, No. 98 Cr. 1134, 2000 WL 1693538, at *8 (S.D.N.Y. Nov. 13, 2000) (“[A] groundswell of doubt has been expressed in this Circuit concerning the enforceability of the waiver contained in the Proffer Agreement, ‘at least when the waiver extends beyond the use of the statements to impeach the defendant.’” (citing *Doe*)), *aff’d* 343 F.3d 604 (2d Cir. 2003); *United States v. Fronk*, 173 F.R.D. 59, 70 n.10 (W.D.N.Y. 1997) (“[I]t certainly is not clear whether a majority of the Supreme Court would uphold the type of waiver at issue here, one that is not limited to impeachment purposes.”).

160. *Lauersen*, 2000 WL 1693538, at *8.

161. The analysis in Part IV will focus not so much on the finer details of the individual proffer agreements, which are not wholly identical. Rather, it will examine how the courts have read these agreements and the related consequences of such judicial interpretations.

162. See *United States v. Rebbe*, 314 F.3d 402, 408 n.2 (9th Cir. 2002) (referencing the government’s statement to the court concerning the defendant’s options: “I can’t think of anything, as I sit here today, that would *not*, in my mind, trigger the Government’s right to rebut.” (emphasis added) (internal quotation marks omitted)); *Krilich*, 159 F.3d at 1025

Defense counsel would be limited to making arguments during opening statement and summation that are consistent with the defendant's proffer and would be restricted to witness questioning and arguments concerning only issues of "credibility, weight and sufficiency of the government's evidence in ways that [are] extrinsic to the facts of the case."¹⁶³ Such a result fulfills the prophecy in Justice Souter's *Mezzanatto* dissent that in time "the possibility of trial if no agreement is reached will be reduced to fantasy."¹⁶⁴ Courts have generally rejected this option.¹⁶⁵

2. Option 2: The Case-in-Chief Exception

The D.C. Circuit has permitted the government to draft agreements that allow for the introduction of the defendant's proffer statements in its case-in-chief if defense counsel makes statements or elicits testimony on cross-examination inconsistent with the defendant's proffer.¹⁶⁶ Under this scenario, though the defendant has neither testified (or put on any defense case at all) nor directly contradicted his proffer, his attorney's attempt to refute affirmatively his previous position opens the door.

(referencing the prosecutor's contention that "putting on *any* defense permits the United States to introduce the [proffer] statements. A plea of not guilty followed by passivity at trial is about all the defendant can do." (emphasis in original)); *Duffy*, 133 F. Supp. 2d at 216 (noting that "any affirmative theory of factual innocence, including, for example, any argument that there was no conspiracy or that Duffy had no part in it, would permit the government to offer Duffy's proffer").

163. *Krilich*, 159 F.3d at 1025 (quoting contention of prosecutor) (internal quotation marks omitted); *accord Rebbe*, 314 F.3d at 408; *United States v. Maynard*, 232 F. Supp. 2d 38, 40 (E.D.N.Y. 2002); *Duffy*, 133 F. Supp. 2d at 215 (noting available defenses).

164. *United States v. Mezzanatto*, 513 U.S. 196, 218 (1995) (Souter, J., dissenting).

165. *See Rebbe*, 314 F.3d at 408 ("Rebbe had available to him a range of possible arguments and defenses at trial that could have been used without triggering the proffer's admission."); *Krilich*, 159 F.3d at 1025–26 ("Statements are inconsistent only if the truth of one implies the falsity of the other."); *Duffy*, 133 F. Supp. 2d at 216 ("I do not see how Duffy's attorney can effectively represent him under these conditions.").

166. *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (observing that no distinction exists "between permitting waivers for purposes of impeachment or rebuttal and permitting waivers for the prosecution's case-in-chief"); *accord United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000) (upholding prosecution's use of defendant's affidavit statements "in any prosecution or proceeding" against the defendant where he violated plea agreement with government).

3. *Option 3: Impeachment Only of Defendant's Inconsistent Trial Testimony*

Other courts have concluded that the defendant's proffer testimony can only be used for impeachment where the defendant takes the stand in his own defense and gives inconsistent testimony.¹⁶⁷ This option would restrict the use of proffer statements to the facts of *Mezzanatto*.¹⁶⁸

4. *Option 4: The Addition of a Rebuttal Exception*

Finally, the Ninth and Seventh Circuits have gone so far as to extend *Mezzanatto* to include the use of proffer testimony not only for impeachment but also for rebuttal purposes.¹⁶⁹ Where the defense puts forth evidence or arguments that contradict his proffer statements, the government may use the defendant's admissions in rebuttal even if he does not testify.

B. A PROPOSED LIMITATION ON WAIVER

Waiver requires a uniform approach that equitably balances the interests of the government and the defendant. A fair in court balance is imperative not only to give the defendant the

167. See, e.g., *Krilich*, 159 F.3d at 1024–26 (upholding waiver that permitted, *inter alia*, use of statements at trial for impeachment); *United States v. Dortch*, 5 F.3d 1056, 1069 (7th Cir. 1993) (upholding admission of proffer testimony for impeachment where defendant “elicits or adduces testimony materially different from his proffer statements” (internal quotation marks omitted)); see also *United States v. Doe*, No. 96 Cr. 749, 1999 WL 243627, at *9 (E.D.N.Y. Apr. 1, 1999) (“I am mindful that the enforceability of a defendant’s waiver of the protection afforded by those rules is subject to question, at least when the waiver extends beyond the use of the statements to impeach the defendant.”); *United States v. Fronk*, 173 F.R.D. 59, 71 n.10 (W.D.N.Y. 1997) (questioning whether a majority of the Supreme Court would uphold a waiver that is not limited to impeachment purposes). Those courts that uphold a rebuttal exception will also generally uphold a less restrictive impeachment exception as well. See *infra* note 169 and accompanying text.

168. See *Mezzanatto*, 513 U.S. at 199.

169. See *Rebbe*, 314 F.3d at 408 (stating that “district court’s decision to admit Rebbe’s proffer statements in rebuttal was not erroneous”); *Krilich*, 159 F.3d at 1024–26 (upholding waiver that permitted, *inter alia*, use of statements to rebut inconsistent evidence elicited from government witnesses); see also *United States v. Avendano*, No. 02 Cr. 1059, 2003 WL 22454664, at *3 (S.D.N.Y. Oct. 29, 2003) (holding proffer testimony admissible for rebutting testimony, evidence, or arguments presented by or on behalf of defendant); *United States v. Chen Xiang*, No. 02 Cr. 271, 2003 WL 21180400, at *2 (S.D.N.Y. May 20, 2003) (same); *Maynard*, 232 F. Supp. 2d at 40 (same); *United States v. Gomez*, 210 F. Supp. 2d 465, 474–75 (S.D.N.Y. 2002) (same).

opportunity to adjust his line of defense and to provide defense counsel with the requisite flexibility to advocate zealously for his client, but also to ensure that the government is able to effectively ferret out and present the truth at trial. This Note proposes that the line delineating the scope of permissible waiver be narrowly drawn to (1) encompass impeachment, where the defendant testifies inconsistently with the proffer, and (2) allow some use in rebuttal, where the defense has called witnesses whose testimony materially and explicitly conflicts with the proffer.¹⁷⁰ This proposed limitation is based not on constitutional argumentation, but instead is premised on public policy and fairness considerations that protect the legal process.

Waiver of the plea-statement Rules for impeachment is appropriate if and when the defendant takes the stand and presents a different version of the facts.¹⁷¹ The government should not be hamstrung by the default rule of inadmissibility in the teeth of a defendant's potential perjury. The integrity of the system argues in favor of admissibility.¹⁷² Similarly, extending permissible waiver to cover rebuttal of defense witness testimony that materially and explicitly conflicts with the defendant's proffer also enhances the truth-seeking function of the criminal justice system. The variance ought to be clearly inconsistent with the proffer and related to a material point at issue. The door to rebuttal ought not to be opened by minor discrepancies on peripheral matters.¹⁷³

170. It is worth noting — though the issue seems never to have been contested — that proffer statements may also be used to develop subsequent clues and leads; otherwise, the government might never be able to have a plea negotiation that failed because of the difficulty of satisfying the requirements of *Kastigar*. See *supra* note 25.

171. Mere argument by counsel should not be enough to open the door.

172. Cf. *United States v. Tramunti*, 500 F.2d 1334, 1343–44 (2d Cir. 1974) (affirming, in a context unrelated to the waiver of the plea-statement Rules, the use of immunized, grand jury testimony to impeach a defendant's trial testimony; determining that the overall purpose of an immunity grant is to ascertain the truth, and should a defendant thwart "the inquiry by evasion or falsehood . . . such conduct is not entitled to immunity"). Other courts have followed *Tramunti*. See, e.g., *United States v. Black*, 776 F.2d 1321, 1326 (6th Cir. 1985); *United States v. McGee*, 798 F. Supp. 53, 59 (D. Mass. 1992); see also *United States v. Havens*, 446 U.S. 620, 627–28 (1980) ("[A] defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government."); *Walder v. United States*, 347 U.S. 62, 65 (1954) (permitting the use of illegally seized evidence for impeachment purposes).

173. The difficulty in judging inconsistency at trial is further exacerbated by the manner in which proffer testimony is recorded. It may not always be clear what the defendant "really said" during the proffer session because the defendant's statements are generally

There is a critical distinction between the use of proffer testimony to respond to defense counsel's cross-examination of government witnesses and its use to rebut defense evidence. Defense counsel knows his witness' testimony in advance and thus should be aware of any conflict with the defendant's proffer statements. The decision to call the witness is also made with full knowledge of the attendant risks. By contrast, when defense counsel challenges and raises doubts on cross-examination about the testimony of a government witness and the government's theories, he is reacting to the prosecution's presentation. The government has called the witness to prove its case; the defense has not called the witness to establish the defendant's innocence. Typically, defense counsel does not know what the government witness will say or volunteer on cross-examination. Whether a witness' wording to an answer is inconsistent with a defendant's proffer statements may turn on subtle differences in phraseology or on the court's interpretation of the proof presented at trial.¹⁷⁴ For this reason, it is appropriate to allow the use of proffer statements to rebut defense witness testimony but not government witness cross-examination. And the testimony must be materially and explicitly at variance with the proffer — after all, how can counsel gauge what a court will deem contradictory to his client's proffer testimony *ex ante*, when it is only *ex post* that faint differences are evaluated?

recorded through handwritten notes. No exact transcript is taken. The nature of human discourse and human error makes strict comparisons between courtroom testimony and proffer notes increasingly difficult the further the statements vary from outright inconsistency — e.g., I said “black” versus I said “white” — to marginal difference — e.g., I said “brown” versus I said “burnt sienna.”

174. See *United States v. Krilich*, 159 F.3d 1020, 1025–26 (7th Cir. 1998) (laying bare the reality that the admission into evidence of a defendant's proffer statements can turn on faint distinctions in the trial testimony elicited by defense counsel), *cert. denied*, 2003 WL 22005876, at *1 (Oct. 14, 2003) (mem.); *United States v. Maynard*, 232 F. Supp. 2d 38, 40 (E.D.N.Y. 2002) (advising counsel that the “court remains available to provide counsel with some advance warnings of potential dangers, pitfalls, and traps, balancing truth finding with a fair opportunity to defend”); *United States v. Duffy*, 133 F. Supp. 2d 213, 216 (E.D.N.Y. 2001) (discussing similar “line drawing problems”); see also *supra* note 173; *infra* notes 227 and 243 and accompanying text.

C. RATIONALES FOR THE PROPOSED LIMITATION ON WAIVER

Sound policy and systemic reasons support restricting the scope of permissible waiver of the plea-statement Rules to exclude use of proffer testimony in the government's case-in-chief and permitting use only for impeachment and some rebuttal of inconsistent defense witnesses' testimony. First, to allow otherwise will chill plea bargaining. Second, to allow otherwise ignores the disparity of bargaining power between the government and the defendant. Third, to allow otherwise overlooks the prudential considerations that support the integrity of the system and protect a defendant's rights. Fourth, to allow otherwise eviscerates the purpose of the plea-statement Rules and controverts the drafters' legislative intentions. Finally, to allow otherwise deters those who believe they are innocent from proffering, thereby inhibiting the disposition of non-meritorious cases through extrajudicial means.

1. *Chilling Effect on Plea Bargaining*

Allowing the government to utilize proffer statements in its case-in-chief will further discourage Queen for a Day sessions and plea negotiations. The *Mezzanatto* majority rejected the claim that waiver of the plea-statement Rules would have a "chilling effect" on plea bargaining, making defendants "think twice" about entering into the process.¹⁷⁵ The Court instead focused on the "other essential party to the transaction: the prosecutor."¹⁷⁶ Precluding waiver might prevent the government from negotiating with defendants. Particularly, early in the investigative process, many prosecutors "may be unwilling to proceed without it."¹⁷⁷ The Court found no need to detail any counterargument because "there [was] no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining."¹⁷⁸

175. *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995) ("[T]here is no reason to believe that allowing negotiation as to waiver of the plea-statement Rules will bring plea bargaining to a grinding halt; it may well have the opposite effect.").

176. *Id.* at 207.

177. *Id.*; see also Hughes, *supra* note 15, at 15 (discussing the "painfully delicate" decisions prosecutors face in determining whom to prosecute and to whom to extend leniency).

178. *Mezzanatto*, 513 U.S. at 207; see also *supra* note 125.

But, the majority's assessment of the repercussions on the criminal justice system does not comport with reality. First, prior to the use of the newly expanded waiver provisions, the government was not deterred from entering into plea negotiations and proffer agreements.¹⁷⁹ Prosecutors have a long history of entering into plea negotiations and proffer agreements *without* these extensive waiver provisions.¹⁸⁰ Government lawyers are always interested in hearing a prospective defendant's story. It allows the government to evaluate his credibility, determine the strength of any defense or mitigating factor, and ascertain what value he may have as a cooperator.¹⁸¹ There is no empirical evidence to suggest that prosecutors would decline to enter into Queen for a Day agreements or that they have been significantly constrained absent the provision permitting use in the case-in-chief.¹⁸²

Second, despite the assertions by the *Mezzanatto* majority,¹⁸³ it is not clear that plea bargaining has been unaffected by requiring waiver of the plea-statement Rules.¹⁸⁴ Indeed, the New York Council of Defense Lawyers, a leading organization of the criminal defense bar, has vigorously protested to the United States Attorney for the Eastern District of New York that today's Queen for a Day agreements are deterring defense counsel from engag-

179. Furthermore, it is the experience of some practitioners that "prosecutors would not refuse to hear the proffers of defendants in the absence of broad waiver especially since they are motivated to pursue overriding law enforcement objectives, and since a narrower waiver does not disadvantage them, but merely limits their advantages if the case proceeds to trial." Zabel & Benjamin, *supra* note 6, at 5.

180. See *supra* note 23 and accompanying text.

181. See Lynch, *supra* note 42, at 2125.

182. Indeed, the majority in *Mezzanatto* only references the government's "limited resources" as a rationale in support of the prosecution's case for the requirement of waiver. *Mezzanatto*, 513 U.S. at 207.

183. *Id.* at 209 n.6 (noting that "[r]espondent has failed to offer any empirical support for his apocalyptic predictions, and data compiled by the Administrative Office of the United States Courts appear to contradict them").

184. Further, arguments that rely on evidence of continued proffering ignore the purpose of the plea-statement Rules — namely the encouragement of proffering and plea bargaining. See FED. R. EVID. 410 advisory committee's notes to 1974 Enactment. The Rules aim to *optimize* the number of potential proffers and amount of extrajudicial discourse, not to maintain a steady, absolute number. The argument that the marketplace will tolerate today's restrictive waiver provisions — i.e., that enough individuals are willing to sign these agreements to meet the government's demand for cooperators — does not comport with the purpose of the Rules. That significant pockets of the defense bar shun the current proffer arrangement evidences the suboptimal result caused by the broad waiver provisions of today's Queen for a Day agreements.

ing in proffer discussions.¹⁸⁵ Moreover, nationally recognized criminal defense lawyers claim that in many cases today the potential risks are so great that proffering may not be worthwhile.¹⁸⁶ Furthermore, given the potential loss of the ability to mount a full defense, defendants who choose to participate may be less forthcoming in their admissions — and possibly untruthful — until the probability of a 5K1.1 letter or immunity grant is nearly certain.¹⁸⁷ Given the potential prejudice to those who continue to trial, it is likely that more defense lawyers will curtail their participation in government proffer sessions.

Finally, while defendants rely on prosecutors for recommendations of leniency, prosecutors also depend on defendants; prosecutors need the little fish to bait and hook the larger ones.¹⁸⁸ Inside witnesses are critical in large, complex white-collar and narcotics investigations. Without such assistance, prosecutors are often

185. See Meeting Minutes of Eastern District of New York Liaison Committee of the New York Council of Defense Lawyers (Mar. 27, 2003) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter NYCDL Meeting Minutes]. The Minutes of the Liaison Committee note:

Most of our time was spent on proffer agreements. We made the point that the provision which allows introduction of the client's statements at trial "to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution" . . . was deterring our members from bringing in for proffers many people who might well be able to persuade the U.S. Attorney not to indict. This, we argued, prevented them from being advised of a potential defendant's defense and from being able to make a fully informed prosecutive decision.

Id. at 1.

186. Cohen, *supra* note 23; Morvillo & Anello, *supra* note 31, at 6; Interview with AWC1, *supra* note 6. Given the expansion of the terms of proffer agreements, a leading white-collar criminal defense attorney contends that he will no longer proffer unless his client has no alternative but to plead guilty. It has been over five years since he has proffered — a period of time that parallels the expansion of the scope of the waiver of the plea-statement Rules. Interview with AWC1, *supra* note 6; see also Michael G. Considine, *Proffer Sessions Revisited: The Pitfalls Grow*, BUS. CRIMES BULL.: COMPLIANCE & LITIG., Apr. 2002, at 3, 3 (noting that some criminal defense lawyers now refuse to proffer because the risks outweigh the benefits); Hafetz & Garson, *supra* note 17, at 8 ("Because the downside is so great, defense counsel should consider a Queen for a Day agreement only when the client cannot risk trial and is forced to seek a plea-cooperation agreement."); Barry Tarlow, *RICO Report*, THE CHAMPION 56, 62 (Sept./Oct. 2003). See generally 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.2(h), at 108–109 (2d. ed. 1999).

187. See Zabel & Benjamin, *supra* note 6, at 5.

188. Adding to the disincentive to proffer is the reality that in large, multi-defendant cases, the government cannot grant leniency to all witnesses who make proffers. There will be some who must proceed to trial. Clear horizontal equity concerns arise here, given that not all defendants who desire to cooperate with the government will reap that benefit.

unable to obtain convictions of the principal wrongdoers.¹⁸⁹ If the bargaining situation should prove too perilous, the whistle-blowing client may refuse to cooperate. Thus, over-reaching agreements frustrate two goals: “the conservation of judicial resources via guilty pleas, and the production of evidence against criminals.”¹⁹⁰ The majority in *Mezzanatto* explicitly noted the value of these “small fish” and concluded that prosecutors have the option of not waiving the plea-statement Rules if the prosecution considers the information valuable.¹⁹¹ While prosecutorial discretion to adjust the scope of waiver to achieve optimal information flow and cooperation might exist in the abstract, in reality the government has taken the position that — except perhaps at the far margin — the expanded language in Queen for a Day agreements is mandatory¹⁹² and nonnegotiable.¹⁹³ The end result is that these agreements will deter more profferors than would be optimal for the government to obtain an extensive understanding of the facts.¹⁹⁴ Only the truly risk adverse (or the innocent) will

189. On October 31, 2002, Andrew Fastow, Enron’s Chief Financial Officer, was charged in a 78-count indictment relating to his involvement in the collapse of Enron. The scale of the government’s indictment of Mr. Fastow is likely attributable in large part to the assistance provided by Michael Kopper, Fastow’s one-time protégé and former managing director of Enron’s global finance arm, and the first ex-Enron employee to plead guilty and cooperate with the authorities. Michael Hedges & Mary Flood, *Fastow Faces 78 Counts*, HOUSTON CHRON., Nov. 1, 2002, at A1, available at <http://www.chron.com/cs/CDA/story.hts/special/enron/1642597> (on file with the *Columbia Journal of Law and Social Problems*). Additionally, the indictment of former WorldCom chief financial officer Scott Sullivan in August 2002 was significantly aided by three of Mr. Sullivan’s former lieutenants: David Meyers (former Controller), Betty Vinson (former Director of Management Reporting), and Troy Normand (former Director of Legal Entity Accounting). *Ex-WorldCom Directors Plead Guilty*, BBC NEWS, Oct. 10, 2002, at <http://news.bbc.co.uk/2/hi/business/2318229.stm> (on file with the *Columbia Journal of Law and Social Problems*).

190. Rasmusen, *supra* note 141, at 1550.

191. *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995).

192. *See id.* at 216 (Souter, J., dissenting).

193. *See Zabel & Benjamin, supra* note 6, at 5 (noting that prosecutors generally do not alter proffer language and as such, “a defendant who chooses not to sign the proffer agreement in effect chooses not to proffer”); Interview with AWC1, *supra* note 6 (noting that he has been unsuccessful in negotiating alterations in Queen for a Day agreement language). *But see United States v. Krilich*, 159 F.3d 1020, 1025 (7th Cir. 1998) (suggesting that parties to the agreement have control of “their choice of language”).

194. What is more, the government may not recognize that a reduced amount of proffering has potentially resulted in suboptimal information flow. *See Yaroshefsky, supra* note 39, at 960–61 (examining the bases for prosecutors’ belief in the truthfulness of cooperators generally and suggesting specifically that a prosecutor “can convince [himself] very easily in that scenario that the cooperator is now being truthful because this was [his] mind set”).

choose to proffer. To date, the chilling effect of proffer agreements and resulting suboptimal information flow have not entered the judicial calculus. They should.

2. *The Lack of a Zero-Sum Marketplace and Corollary Prejudice to the Defendant from Unequal Bargaining Power*

The majority in *Mezzanatto* restricted its analysis to the issue of voluntary and informed consent, avoiding inquiry into the unequal bargaining power of the participants.¹⁹⁵ So long as the defendant had been properly informed of the scope of his waiver and had given his consent voluntarily, the agreement was valid and enforceable.¹⁹⁶ This limited, contract-based approach views the ambit of the defendant-prosecutor relationship in unrealistic, zero-sum terms.¹⁹⁷ An examination of both initial entry and final exit conditions¹⁹⁸ reveals that the negotiation dynamic — whether successful or unsuccessful in the end — yields a further and tangible value primarily to the government.

Traditionally, if plea negotiations break down under Rules 410 and 11(f), the government and the defendant are no worse off. The government's evidence is the same as it was before, and the defendant still retains the ability to defend himself as if the negotiations had never commenced.¹⁹⁹ That is, if the gains and losses of both parties are added together, treating losses as negatives, the sum total is zero.²⁰⁰ Neither side is prejudiced for attempting

195. See generally Comment, *supra* note 141, at 254–59 (providing an original and persuasive perspective on the bargaining positions of the parties to a plea negotiation).

196. *Mezzanatto*, 513 U.S. at 210.

197. By definition, a situation is characterized as zero-sum where “one side’s gain in every transaction is the other side’s loss.” John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 734 (1984).

198. See Comment, *supra* note 141, at 257.

199. See FED. R. EVID. 410; FED. R. CRIM. P. 11(f). The Rules provide for only two explicit circumstances under which a defendant’s statements are admissible. That said, it is acknowledged that traditionally, under the old system, prosecutors did gain an advantage by speaking face-to-face with the individual. These conversations permit prosecutors to see a defendant in person, speak with her, hear her story, and evaluate her credibility. Additionally, derivative use for garnering clues and leads is permitted. See *supra* note 170. These benefits, however, are assumed in this argument to be commensurate with the benefit the defendant gains in speaking frankly with the government.

200. Put in algebraic terms, the defendant enters the negotiation with statements (S_I) and defense (D_I) and the prosecutor enters with evidence (E_I) and prosecution theory (P_I). If negotiations break down, defendant leaves with full control over S_I and D_I , while the

to resolve a dispute through private, extrajudicial negotiation. Thus, after a failed set of negotiations both parties to the discussions part ways and return to the status quo ante.

Under the new and expansive view of waiver, the defendant is forced to bear “all the risk” if the negotiations falter.²⁰¹ While merely providing a defendant the *opportunity* to cooperate with the government, waiver is an “initial entry condition” that places the government under no obligation to reach a final cooperation or plea agreement.²⁰² In this way, the government loses no advantage by rejecting the offer to cooperate, but rather is significantly bettered, gaining access to new information cost-free.²⁰³ The defendant may be worse off for participating in a failed proffer negotiation, having potentially restricted his ability to cross-examine government witnesses effectively or to take certain factual positions at trial, lest he open the door for the use of proffer testimony in the government’s case-in-chief.²⁰⁴ The defendant may be locked into an inflexible defense theory — one that might change after his attorney has conducted further legal and factual investigation and received discovery from the government.²⁰⁵ The Queen for a Day procedure has not forced the government to make any significant tactical outlays, save for the expenditure of government resources,²⁰⁶ while the defendant has largely inter-

prosecutor departs with full control of E_1 and P_1 . The net result is a non-change in condition by both parties, or zero-sum.

201. United States v. Duffy, 133 F. Supp. 2d 213, 217 (E.D.N.Y. 2001).

202. *Id.* at 217–18; see also Comment, *supra* note 141, at 258.

203. At least one commentator has suggested that the informational benefit gained by the government may be more than just a post-negotiation windfall: “The lack of definite commitment when a waiver is demanded as an initial entry condition presents the distinct possibility that prosecutors will use the waiver as a means of gathering information before determining whether a plea bargain is warranted.” Comment, *supra* note 141, at 258. There is room for reasonable conjecture that such “fishing expedition” took place in *Mezzanatto*. *Id.* at 258 n.52 (referencing *Mezzanatto*, 513 U.S. at 199); see also Respondent’s Opposition Brief, *supra* note 84, at 15–16 (“Specifically, a prosecutor may use the plea-discussion setting as a pretext for what is in fact an interrogation to gut defendant’s case.”); Lynch, *supra* note 42, at 2125 (“And for any prosecutor, there is, at a minimum, a tactical advantage in hearing in advance a defendant’s likely defenses at trial.”).

204. See *supra* notes 162–165 and accompanying text.

205. No doubt, the defense’s subsequent access to both Jencks Act and *Brady* materials from the government will alter the defense theory as well. See 18 U.S.C. § 3500 (2000); *Brady v. United States*, 397 U.S. 742, 751 (1970).

206. See Petitioner’s Brief at 10, 26–27, *Mezzanatto* (No. 93-1340) (noting the “significant commitment of prosecutorial resources” expended during proffer sessions).

nalized all the costs.²⁰⁷ Hence, the parties' entry and exit conditions substantially differ. And, *Mezzanatto* and its progeny have not sufficiently accounted for the structure of the negotiation.²⁰⁸

The parties to this bilateral monopoly possess significantly disparate bargaining power positions.²⁰⁹ Most critics and courts, including the majority in *Mezzanatto*, validate plea bargaining in terms of laissez-faire market and contract theory.²¹⁰ In a potential cooperation situation, the accused comes to the bargaining table with information that he hopes to exchange for the prosecutor's 5K1.1 letter or immunity grant. But in reality, the bargaining power is asymmetrical. The government is the "sole purchaser[] of the convictions and incriminating information that a

207. Again, examined algebraically, the non-zero-sum result is evident. Assume the same starting positions as presented *supra* note 200. Upon the breakdown of negotiations, however, the government may leave with at least one asset of value — information — while the defendant may lose at least one of value. Hence, rather than leaving the negotiation in possession of S_1 and D_1 , the defendant could likely leave with S_2 and D_2 , or S_2 and D_1 (or some other permutation). The prosecution's position could be altered as well, with the government departing the negotiation with E_2 , which might lead to prosecution theory P_2 . The defendant has suffered a loss of tactical advantage that must be later internalized, while the prosecution has gained new evidence upon which to build his case. The process has created value for the government, while creating loss for the defendant.

208. This observation is recognized, though not taken to its logical conclusion, by Judge Nina Gershon in *Duffy*: "Far from leveling the playing field, however, this 'waiver' simply places the government in the same position that it would have been in had there been no proffer agreement, because Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 would have required the same thing." *United States v. Duffy*, 133 F. Supp. 2d 213, 218 (E.D.N.Y. 2001).

209. See Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1297 (1996) (referencing the asymmetric bilateral monopoly in the context of plea bargaining); Rasmusen, *supra* note 141, at 1582 (noting that "[p]lea bargaining is not a situation of anonymous market competition for a good of known quality, but the negotiation of a relational contract, difficult to enforce and for a good of unknown quality, where two parties are in a bilateral monopoly"); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1478–79 & n.25 (1993) (remarking that the plea bargaining market is one dominated by the "prosecutor as monopsonist," who has "the ability, in the absence of the judge, to dictate the price, that is, the terms, of the plea agreements").

210. See, e.g., *Mezzanatto*, 513 U.S. at 208 (describing the plea bargain in market-bazaar-type terms: "A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."); cf. *United States v. Gregory*, 245 F.3d 160, 165 (2d Cir. 2001) (cooperation agreement); *United States v. Gomez*, 210 F. Supp. 2d 465, 475 (S.D.N.Y. 2002) (proffer agreement). But see Lynch, *supra* note 42, at 2129–30 ("For all but the most doctrinaire free market micro-economists, the very term 'plea bargaining' is distasteful. Justice, critics of plea negotiations point out, is not a matter of bazaar haggling, but of thoughtful adjudication of claims. . . . Something called 'plea bargaining' can hardly be other than an expedient stepchild in a judicial system.").

multitude of criminal defendants have to sell.”²¹¹ The government controls the process and terms of the bargain.²¹² Queen for a Day agreements are required before the parties can enter into cooperation agreements, and the terms are non-negotiable contracts of adhesion, presented on a take-it-or-leave-it basis.²¹³ The government is the sole judge of the defendant’s truthfulness and helpfulness — the necessary predicates to stage two of the cooperation process. Furthermore, under the expansive view of waiver, the government reserves the right to utilize the proffered information in ways that may render meaningless the defendant’s ability to defend himself at trial.

The disparity in bargaining position is further amplified by the Sentencing Guidelines.²¹⁴ The coercive aspects of the proffer process, although flagged by Justice Souter, were not directly tackled or resolved by either the majority or the dissent in *Mezzanatto*.²¹⁵ In practice, the defendant makes a difficult decision: he must weigh the risk of entering into a contract of adhesion against going to trial and foregoing the potential rewards of leniency for providing substantial assistance.²¹⁶ This “incredible di-

211. Standen, *supra* note 209, at 1472–73.

212. *See id.* at 1473–74.

213. This asymmetry has led the Second Circuit to recognize that within the plea bargaining context, the government maintains “certain awesome advantages in bargaining power.” *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996); *accord Alabama v. Smith*, 490 U.S. 794, 802–03 (1989); *Corbitt v. New Jersey*, 439 U.S. 212, 218–21 (1978); *Scott & Stuntz, supra* note 21, at 1919–24 (laying out the contract law arguments that differentials in bargaining power between the defendant and the government support duress- and unconscionability-based attacks on the enforcement of plea agreements). *But see Brady v. United States*, 397 U.S. 742, 751 (1970) (declining to hold “that a guilty plea is compelled . . . whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged”).

214. For a more detailed discussion of the impact of the Sentencing Guidelines on cooperation and plea bargaining, *see supra* Part II.B; *see also Duffy*, 133 F. Supp. 2d at 217 (noting that “the United States Sentencing Guidelines have placed such a premium on cooperation that defendants are *under more pressure than ever* to proffer in the hope that they will be able to provide ‘substantial assistance’ and secure a more lenient sentence” (emphasis added)).

215. *Compare Mezzanatto*, 513 U.S. at 209–10 (dismissing Mezzanatto’s contention of “gross disparity of bargaining power” by asserting that the “dilemma flagged by respondent is indistinguishable from any of a number of difficult choices that criminal defendants face everyday”), *with id.* at 216 (Souter, J., dissenting) (“[D]efendants are generally in no position to challenge demands for these waivers.”).

216. *See id.* at 209.

lemma²¹⁷ is validated by the Court without proper consideration of what procedural rights and protections are sacrificed by the defendant under the expanded Queen for a Day waiver.²¹⁸ Though a defendant's position may not be so restricted as to render a proffer agreement unconscionable *ex post*, this is not to say that its terms should not be drafted more equitably *ex ante*.

3. Prudential Considerations of a Defendant's Rights Under Broad Waiver

Although a criminal defendant may waive many of the protections granted by the Constitution and other laws,²¹⁹ there are limits. Certain rights and protections serve so weighty a public purpose that waiver would be contrary to the fair administration of justice.²²⁰ In the end, the *Mezzanatto* majority concluded that the interests served by the plea-statement Rules were of the former type, and that allowing their waiver for impeachment purposes “enhances the truth-seeking function of trials and will result in more accurate trial verdicts.”²²¹ In dissent, Justice Souter argued that the plea-statement Rules are not personal in nature, but rather are intended to serve the interests of the federal justice

217. *Id.*

218. Comment, *supra* note 141, at 253–54.

219. See, e.g., *Faretta v. California*, 422 U.S. 806, 834 (1975) (permitting waiver of Sixth Amendment right to counsel); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (allowing defendant to knowingly and voluntarily waive Fourth Amendment right to be free from warrantless searches); *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938) (sanctioning the waiver of right to a jury trial and ability to confront and cross-examine witness); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (upholding waiver of Fifth Amendment privilege against self-incrimination).

220. See *Mezzanatto*, 513 U.S. at 204; 21 WRIGHT & GRAHAM, *supra* note 121, § 5039, at 207–08. In particular, the Court addressed this point in *United States v. Ready*. See 82 F.3d 551, 555 (2d Cir. 1996) (“[N]o circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined.”); see also *Wheat v. United States*, 486 U.S. 153, 162 (1988) (holding that a court may decide to decline a defendant's waiver of his right to conflict-free counsel); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992) (holding that Speedy Trial Act not waivable because of its public importance); *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (“No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”). The subject of public versus private rights subsumed much of the debate in *Mezzanatto*. See, e.g., Transcript of Oral Argument, *supra* note 140, at *17–*22 (argument by Government); *id.* at *25–*30 (argument by Respondent).

221. *Mezzanatto*, 513 U.S. at 204.

system, and are not waivable.²²² Neither opinion, however, discussed the plea-statement Rules in the context of other rights to elucidate *why* the Rules should or should not be shielded from waiver.²²³

In *United States v. Duffy*, the district court determined that there is a limit to waiver of the plea-statement Rules, holding that certain terms of the government's proffer agreement violated the defendant's Sixth Amendment right to a "meaningful" defense and effective assistance of counsel.²²⁴ At trial, the government asserted that the proffer provision in dispute did not deprive Duffy of the ability to put on a proper defense because he would only trigger the waiver provisions if he were to put forward statements that contradicted the proffer.²²⁵ The court struck the waiver provision because it prohibited the defense from effectively arguing "any affirmative theory of factual innocence."²²⁶ The court also recognized the impracticality of a trial judge policing the line between testimony that contradicted a defendant's proffer and testimony that did not.²²⁷

222. *Id.* at 214 (Souter, J., dissenting).

223. The Supreme Court has never taken the opportunity to spell out completely why one procedural protection or right should be given priority over another, though "[i]nherent fairness, the vulnerability of criminal defendants, and public policy have been cited as reasons to deny waiver of certain procedural, statutory, or constitutional rights." Comment, *supra* note 141, at 254 n.33; see also *Smith v. United States*, 360 U.S. 1, 9 (1959) (holding that use of indictments in death penalty cases protects a criminal defendant and is non-waivable); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (holding that permitting waiver of the liquidated damages provision of the FLSA would flout public policy). *But see Adams v. United States ex. rel. McCann*, 317 U.S. 269, 279 (1942) (permitting waiver of the Sixth Amendment right to counsel); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 762 (1989) (holding that a defendant may waive his Fourth and Fifth Amendment rights so long as waiver is intelligent and voluntary).

224. 133 F. Supp. 2d 213, 216 (E.D.N.Y. 2001). The provision at issue allowed the government to use any statements made by Duffy "as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [Duffy] at any stage of the criminal prosecution (including but not limited to detention hearing, trial or sentencing)." *Id.* at 214.

225. *Id.* at 215. More telling is the government's later concession that Duffy is really left with minimal available defenses lest floodgates open to the admission of his proffer statements: "Duffy can argue that the government has not satisfied its burden of proof, and he can generally attack the credibility of the government's witnesses." *Id.*

226. *Id.* at 216.

227. See *id.*; see also *United States v. Maynard*, 232 F. Supp. 2d 38, 40 (E.D.N.Y. 2002) (examining, in some detail, how a trial judge might assist the defense at trial in determining those "potential dangers, pitfalls, and traps" that could open the door to disadvantageous statements); *supra* notes 173–174; *infra* note 243 and accompanying text.

Though the argument is couched in constitutional terms — and even if not constitutionally repugnant — the court in *Duffy* is forceful in its logic and highlights two practical consequences of permitting the use of defendant's proffer statements in the case-in-chief: the government might not be put to its burden at trial and a defendant might be denied effective assistance of counsel. First, our criminal justice system does not require a defendant to prove his innocence; the government must prove the defendant's guilt beyond a reasonable doubt.²²⁸ If the government fails to meet that burden, the defendant goes free, regardless of actual guilt.²²⁹ The expanded waiver provisions turn the tables, often making the case the government's to lose rather than to win. Restricting available arguments and defenses that can be presented by defendant's counsel to those that do not conflict with the proffer statements significantly lowers the bar for conviction, assisting the government in meeting its burden of proof.²³⁰ So too, if the court allows use of proffer statements in the government's case-in-chief, they may fill the otherwise missing gaps in the government's proof. This type of burden shifting is at odds with our system of justice.²³¹

Second, the current waiver provisions may deny a defendant the effective assistance of counsel. Should proffer sessions prove

228. See *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

229. Furthermore, in civil cases, the plaintiff ordinarily need only prove its claim by a preponderance of the evidence, or in cases of fraud, by “clear and convincing evidence.” In either case, both standards are well short of the criminal standard. See KEITH N. HYLTON & VIKRAMADITYA S. KHANNA, TOWARD AN ECONOMIC THEORY OF PRO-DEFENDANT CRIMINAL PROCEDURE 7 n.25 (Boston Univ. Sch. of Law, Working Paper No. 01–02, Mar. 30, 2001 (rev. Aug. 12, 2002), available at <http://www.bu.edu/law/faculty/papers> (on file with the *Columbia Journal of Law and Social Problems*)).

230. Such a restriction would contravene the criminal defense lawyer's ethical obligation to force the government to prove its case. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 304 (4th ed. 1999) [hereinafter ANNOTATED MODEL RULES]; see also *Old Chief v. United States*, 519 U.S. 172, 199–200 (1997) (O'Connor, J., dissenting) (“At trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on *each* element.”); *United States v. Cavin*, 39 F.3d 1299, 1308 (5th Cir. 1994) (noting that duties of client loyalty and zealous representation require the advocacy of positions that the lawyer, in good faith, believes have an arguable basis, despite possible contrary authority).

231. See *Patterson v. New York*, 432 U.S. 197, 215 (1977); see also ANNOTATED MODEL RULES, *supra* note 230, at 304 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)) (recognizing the constitutional principle that the state must prove every element of the crime and may never shift its burden of proof to the defendant).

fruitless and the defendant forced to stand trial, “[p]ractically speaking, all [defense] counsel can do is to argue reasonable doubt.”²³² This result contravenes a lawyer’s duty to represent his client zealously and the client’s corresponding right to that unflinching advocacy.²³³ The lack of aggressive representation deprives a defendant of the chance to put forth the best defense. Under the Rules, defense counsel can make any credible defense or argument that is supported by the evidence in the record.²³⁴ So long as the defendant does not take the stand and lie, the notion that otherwise protected statements should be admitted because a lawyer has effectively suggested theories of innocence through his cross-examination of government witnesses turns the system on its head.

Preventing defense counsel from zealously cross-examining government witnesses is inconsistent with the adversary system. Our criminal justice system is premised on the prosecution’s demonstration of “legal guilt” and the defense’s arguments for “legal innocence.”²³⁵ The defense lawyer’s function is not to un-

232. *Duffy*, 133 F. Supp. at 216. At least one scholar has argued that defense counsel “do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney’s every word, action, and attitude be consistent with the conclusion that his client is innocent.” Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966).

233. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (2001) (“[A] lawyer should represent a client zealously within the bounds of the law.”) [hereinafter MODEL CODE]; see also *Nix v. Whiteside*, 475 U.S. 157, 188 (1986) (recognizing “the values of zealous and loyal representation embodied in the Sixth Amendment”). Furthermore, a defendant may be less forthcoming and truthful with his attorney *ex ante* given the concern that his defense could be compromised *ex post*. Such a result would run afoul of desired norms. “[C]ounsel cannot properly perform their duties without knowing the truth.” ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 23 (1930), reprinted in AM. BAR ASSOC., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 262–63 (1967 ed.).

234. See ANNOTATED MODEL RULES, *supra* note 230, R. 3.4(e); see also NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBLY: PROBLEMS OF PRACTICE AND THE PROFESSION 174 (1996) (noting that a lawyer may argue for inferences, though perhaps false, which are reasonably supported by the evidence). Case law supports the proposition that defense counsel may adopt this tactic, while a prosecutor may not. See, e.g., *United States v. Latimer*, 511 F.2d 498, 503 (10th Cir. 1975) (finding in the context of defense counsel’s closing argument, that “even if improper argument is made by defense counsel, the door is not thereby opened to similar conduct by the prosecution”).

235. See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339, 340–43 (1987) (“[F]actual guilt’ or innocence, or what Professor Subin would call ‘truth,’ is not the principle [sic] issue in the system. Our concern is with the legitimate use of the prosecutor’s power as embodied in the concept of ‘legal guilt.’”). But see Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a*

veil the objective truth for the jury — demonstrating how each fact aligns with each element of the crime²³⁶ — that, arguably, is the prosecution's duty. On the contrary, defense counsel acts as “a screen in the system” to ensure that the government proves each element of its case beyond a reasonable doubt and that its case is tested against all available alternative inferences.²³⁷ Thus, perfect truth is tempered by procedural safeguards.²³⁸

Some may argue that permitting waiver of the plea-statement Rules helps to ensure that defendants are, at all times, truthful in their dealings with the government. A defendant proffering under the protections of Rules 410 and 11(f) could safely fib and tell the government what he thinks it would like to hear. Should the prosecutors call his bluff and find him to be acting dishonestly, the defendant leaves unmarked, as his proffer statements are inadmissible at trial.²³⁹ Conversely, it may also be argued that proffering under a broad waiver of the Rules potentially discourages defendants from presenting one story during the proffer and substituting a wholly different one at trial. Hence, enforce-

False Defense, 1 GEO. J. LEGAL ETHICS 689, 689–702 (1988) (refuting Mitchell's arguments). See generally STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 403–17 (4th ed. 1995) (discussing the Subin-Mitchell debate).

236. See *United States v. Jackson*, 405 F. Supp. 938, 946 (E.D.N.Y. 1975) (“But trials are not designed to get at the total truth in all its mystery: they only allow decision of narrow issues of fact and law within the limitations of a moderately effective litigation system.”).

237. Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055, 1062, 1068 (2000).

238. By contrast, the prosecutor owes a higher duty to seek a fair and just result. In *Berger v. United States*, the Supreme Court noted:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935); see also ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(c) (1992) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

239. FED. R. EVID. 410; FED. R. CRIM. P. 11(f). For the text of the Rules, see *supra* notes 76–77.

ment of broad waiver provisions prevents a “fraud on the court”²⁴⁰ by the proffering defendant.²⁴¹

But this argument proves too much. The integrity of the judicial process is already protected by permitting testifying defendants to be cross-examined with their inconsistent Queen for a Day statements and allowing their use in rebuttal if the defense calls witnesses who materially and explicitly contradict the defendant’s proffer.²⁴² There is a significant difference, however, between eliciting testimony from government witnesses during cross-examination that challenges the government’s case and eliciting testimony from the defense witnesses that conflicts with the client’s own words. In the former instance, the defense lawyer is not affirmatively advancing his arguments. Rather, the attorney is working within confines of the government’s factual presentation.

The defense also has not affirmatively called the witness who is being cross-examined. Instead, the defense is at the mercy of what the government witness will say. The witness may touch on topics or phrase responses in ways that may contradict what the defendant said at his proffer. These nuanced differences do not call for per se admissibility of proffer statements.²⁴³ To allow oth-

240. *United States v. Duffy*, 133 F. Supp. 2d 213, 218 (E.D.N.Y. 2001) (internal quotation marks omitted) (rejecting this argument).

241. *See id.*; *United States v. Rebbe*, 314 F.3d 402, 408 (9th Cir. 2002) (“Such waivers may help ensure that criminal defendants make proffers to the Government that are straightforward and honest.”); *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998) (“By authorizing the prosecutor to use his statements if he should contradict himself, [the defendant] made his representations more credible.”), *cert. denied*, 2003 WL 22005876, at *1 (Oct. 14, 2003) (mem.). *See generally* Rasmussen, *supra* note 141.

242. Furthermore, it may be that the American Bar Association’s ethical rules of conduct already effectively check frauds on the court. *See* MODEL CODE, *supra* note 233, DR 7-102; MODEL CODE, *supra* note 233, EC 7-26 (cited in Zabel & Benjamin, *supra* note 6, at 7 n.35). In *United States v. Lauersen*, the court noted that ethical obligations do not permit defense counsel to present arguments or elicit testimony that contradict his client’s proffer statements, as counsel was duty-bound to only present arguments grounded in good faith. No. 98 Cr. 1134, 2000 WL 1693538, at *8 (S.D.N.Y. Nov. 13, 2000), *aff’d* 343 F.3d 604 (2d Cir. 2003); *see also* *Nix v. Whiteside*, 475 U.S. 157, 176 (1986); *Benedict v. Henderson*, 721 F. Supp. 1560, 1563 (N.D.N.Y. 1989); *People v. DePallo*, 754 N.E.2d 751, 753–54 (N.Y. 2001). Hence, since defense counsel is under an ethical duty to represent his client properly — and not deceptively — the need for the plea-statement Rules to provide a stop-gap to prevent frauds on the court may be superfluous.

243. *See supra* notes 173–174 and 227 and accompanying text. What is more, per se admissibility would require the inclusion of complicated and unwieldy mid-trial inquiries by defense council. *See, e.g., United States v. Maynard*, 232 F. Supp. 2d 38, 40 (E.D.N.Y. 2002) (“The court remains available to provide counsel with some advance warnings of

erwise introduces a two risks that may deter defense counsel from zealously representing his client: first, counsel may retreat in his cross-examination for fear of violating the proffer agreement; second, defendants may choose not to proffer in order to retain greater flexibility at trial. A lawyer can and should have the opportunity to raise doubts about the credibility of a witness and the prosecution's theories without sacrificing his entire defense.²⁴⁴ It is his ethical duty to argue from the record and hold the government to its burden.²⁴⁵

On cross-examination, not all lines of questioning by the defense that are at odds with the defendant's prior statements validate the admissibility of the defendant's previous statements.²⁴⁶ The court in *Krilich* illustrated this distinction by demonstrating that two seemingly incongruous statements may not be so inconsistent as to justify the introduction of proffer testimony.²⁴⁷ Simply put, "[s]tatements are inconsistent only if the truth of one implies the falsity of the other."²⁴⁸

4. *Evisceration of the Plea-Statement Rules and Considerations of Congressional Intent*

Congress could not have intended that the Department of Justice, through executive fiat, be empowered to restrict Rules 410 and 11(f) to the point of atrophy and malfunction.²⁴⁹ Current

potential dangers, pitfalls, and traps, balancing truth finding with a fair opportunity to defend.”).

244. See Cohen, *supra* note 23 (questioning whether a “defendant [should] be wedded to a supposedly ‘immunized’ statement for trial purposes even if the defense calls no witnesses and simply makes arguments from testimony elicited on cross-examination of the prosecutor’s own witnesses”).

245. See *supra* notes 230–234 and accompanying text.

246. See *Krilich*, 159 F.3d at 1025 (“Impeachment of a witness need not be ‘contrary to’ or ‘inconsistent with’ a defendant’s admission of guilt in a bargaining proffer.”), *cert. denied*, 2003 WL 22005876, at *1 (Oct. 14, 2003) (mem.); *accord Rebbe*, 314 F.3d at 408; *United States v. Gomez*, 210 F. Supp. 2d 465, 476 (S.D.N.Y. 2002).

247. *Krilich*, 159 F.3d at 1025 (noting that “the statements ‘I faked the hole-in-one on the ninth hole’ (*Krilich*, in the proffer) and ‘I did not see *Krilich* palm a golf ball at the ninth hole on June 19’ (a witness, on cross-examination) are not inconsistent”; stating that “[i]nvestigation via cross-examination of witnesses’ ability (or willingness) to observe and recount the facts they claim to have observed therefore could not have justified introduction of the proffer statements”).

248. *Id.* at 1025–26.

249. Congressional silence on the subject of waiver does not suggest that Congress intended a waiver of the Rules. Perhaps Congress ought to amend the Rules to declare

Queen for a Day agreements have the effect of making the Rules serve no practical purpose. Such a result contravenes the purpose of enacting the legislation in the first place. Congress examined the issue of plea negotiations and concluded that except for two situations such statements were inadmissible. Indeed, Congress explicitly noted that “neither a plea nor the offer of a plea ought to be admissible for any purpose.”²⁵⁰ *Mezzanatto* held that the Rules may be waived in a factual situation where the defendant testified inconsistently with his proffer statements.²⁵¹ Waiver in this limited area, however, does not necessarily open the door to unrestricted waiver of a congressionally enacted rule with clear legislative intent.

That the drafters included only narrow, explicit exceptions to the Rules evidences that they did not intend that wholesale waiver be permissible. Even if Congress contemplated and allowed for waiver of the Rules, it seems antithetical to congressional intent that such waivers should establish the potential for the admissibility of plea-statements as the de facto default rule. Congress could not have drafted Rules 410 and 11(f) with the aim that they be eviscerated by the government’s mandatory waiver exception. If the Rules are to be changed, Congress is the appropriate body to do so.

The consequences of waiver of the plea-statement Rules are radically different today as compared to when the Rules were initially drafted. The Rules were enacted well before the Sentencing

affirmatively whether, and to what extent, waiver of the Rules is and ought to be permitted. See Respondent’s Opposition Brief, *supra* note 84, at 18 (“[O]nce the government decides to engage in a plea-discussion, it must do so according to the Congressional will. The government may not override The Rules to suit its own purposes, either on a case-by-case basis or as a blanket policy on all cases.”). But see *United States v. Mezzanatto*, 513 U.S. 196, 203–04 (1995) (“Because the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress’ silences as an implicit rejection of waivability.”).

250. H.R. CONF. REP. NO. 94-414, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. at 714. The non-acknowledgment by the Court in *Mezzanatto* of this explicit statement by Congress flies in the face of the intended scope of the Rules.

251. *Mezzanatto*, 513 U.S. at 200–10. The holding in *Mezzanatto* is contrary to the conference committee’s decision to delete the Senate’s proposal permitting waiver where a defendant testified inconsistently with his proffer. See *supra* notes 99–107 and accompanying text; see also *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982) (“We regard this legislative history as demonstrating Congress’ explicit intention to preclude use of statements made in plea negotiations for impeachment purposes.”).

Guidelines fundamentally altered the criminal justice system. Congress could not have intended to provide the government with the power to uniformly require broad waivers, because at the time of drafting the reality was that prosecutors had not yet acquired their present power bestowed by the Sentencing Guidelines. In the mid-1970s, true negotiation between the prosecutor and defendant was possible. Today, the field has changed. The Sentencing Guidelines provide the government with enormous leverage to require the waiver as a condition for discussion because defendants will feel that the cost is too high if they do not proffer. This level of influence did not exist when the Rules were drafted.²⁵² The very existence of the Rules, in both form and substance, is a testament to this conclusion.

Some may argue that Congress did not intend for the plea-statement Rules to apply to proffer discussions. Judge Weinstein asserts that Rule 410 “applies to statements only when the defendant has made a plea or was a participant in plea discussion. . . . The rule does not protect statements made in an attempt to cooperate with the authorities, even in hope of inducing leniency from [the] government, because cooperation with authorities does not qualify as plea bargaining.”²⁵³ In considering the application of the plea-statement Rules to proffer discussions, however, courts have not adhered to such a rigid interpretation of “plea discussions.”²⁵⁴ A flexible interpretation correctly views a proffer statement not so much as a separate and distinct event in

252. The legislative history and the advisory committee’s notes do not discuss inequalities of bargaining power or the potential of waiver as prerequisite for discussion. See FED. R. EVID. 410 advisory committee’s notes; FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee’s notes.

253. 2 WEINSTEIN & BERGER, *supra* note 26, §§ 410.09[5]–.09[4]. To determine whether a particular discussion qualifies as a plea negotiation, several circuits apply the two-part test announced in *United States v. Robertson*, under which one first asks whether the “accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused’s expectation was reasonable given the totality of the objective circumstances.” 582 F.2d 1356, 1366 (5th Cir. 1978).

254. See *Mezzanatto*, 513 U.S. at 197 (examining waiver of plea-statement Rules where “respondent and his attorney asked to meet with the prosecutor to discuss the possibility of cooperating with the Government”); *United States v. Serna*, 799 F.2d 842, 848 (2d Cir. 1986) (holding that whether a defendant engaged in plea negotiations is a question of fact); see also *United States v. Fronk*, 173 F.R.D. 59, 68–69 (W.D.N.Y. 1997) (“Under [a] rigid view, only those negotiations that specifically mention a defendant’s willingness to plead guilty to a particular criminal offense meet the requirements of [former] Rule 11(e)(6). This view is inconsistent with both the practical realities of plea negotiations and Second Circuit precedent.”).

the cooperation process, but as a necessary part of the plea discussion continuum.²⁵⁵ Indeed, every Justice in *Mezzanatto* accepted without discussion the applicability of the plea-statement Rules to proffer sessions. In the absence of a waiver of proper scope, the protections of the plea-statement Rules should apply to Queen for a Day statements.²⁵⁶

5. *The Risk to the Innocent: The Innocence Proffer Distinguished*

The vice of allowing broad use of proffer statements (beyond impeaching inconsistent testimony and for some rebuttal) is particularly apparent in one specific proffer context. Proffers come in a variety of flavors, including the so-called “innocence proffer,” where a defendant enters into a Queen for a Day agreement and presents his version of the facts with the hope of persuading the government not to bring criminal charges.²⁵⁷ By making an innocence proffer, the person under investigation takes two justifiable risks: first, he tips his hand regarding his defense and the testimony he is likely to present at trial, allowing the government to prepare for and defeat that evidence. Second, he opens himself up to cross-examination should he testify inconsistently at trial. But, these are fair and calculated risks taken in the hope that the government will not bring criminal charges. If the government does bring charges, he will go to trial and defend himself rather than plead guilty. In order to avoid trial altogether, he is willing to bear certain risks associated with entering into a Queen for a

255. See *Fronk*, 173 F.R.D. at 68–69 (“Regardless of whether these discussions occur over weeks and months or are so truncated by circumstances that they last only a few minutes, they are a necessary part of plea discussions . . . [and] ‘set the table’ for specific dispositional offers and counter-offers . . .”).

256. The provisions of the proffer agreements in the Second Circuit, however, do not uniformly approach the applicability of the Rules to proffer statements. The Eastern District of New York requires a defendant to agree that the plea-statement Rules do not apply to proffer sessions. See FEDERAL BAR COUNCIL REPORT, *supra* note 5, app. at B4. The Northern District of New York requires a knowing and voluntary waiver of the Rules. See *id.* app. at B6. The Southern District of New York and the District of Vermont require a general waiver of any claim that could be asserted under applicable law. See *id.* apps. at B7, B12. Finally, the District of Connecticut and the Western District of New York make no reference to the plea-statement Rules or the necessity of waiver. See *id.* apps. at B1–B2, B9–B10.

257. See *United States v. Okehi*, No. 02 Cr. 1455, 2003 WL 21649440, at *1 (S.D.N.Y. July 14, 2003) (“At an innocence proffer meeting a defendant appears before the prosecutor and agents and explains his side of the case, often under an agreement that the information will not be used against the defendant at trial unless he testifies differently.”).

Day agreement, upon pain of having his proffer statements later received in evidence to impeach him.

That said, in the case of a defendant asserting his innocence, it seems fundamentally unfair to restrict the defendant to presenting the exact defense theory at trial as he did during his Queen for a Day session for fear of opening the door to the use of proffer statements by the government in its case-in-chief. First, why would an innocent defendant wish to deprive himself prematurely of the opportunity to present an alternative defense at trial for the chance to proffer with the government? Second, why would an innocent defendant wish to put on the record that which could be contradicted by himself or his attorney at trial, even if he chooses not to testify, thereby further empowering the government? Permitting broad waiver of the plea-statement Rules has the perverse consequence of dissuading defendants from making innocence proffers, thereby foregoing an opportunity to persuade prosecutors not to proceed with non-meritorious cases.²⁵⁸ Such an outcome does not serve the public interest.

V. CONCLUSION

Since the Supreme Court opined in *United States v. Mezzanatto* that a defendant may knowingly and voluntarily waive the protections of the plea-statement Rules, the terms of Queen for a Day agreements have grown in scope and restrictiveness. Federal courts have upheld waivers that permit the use of proffer statements in rebuttal, even when the defendant does not testify, as well as their substantive use in the government's case-in-chief, solely in response to defense counsel advocacy. The continued expansion of the terms of Queen for a Day agreements has left criminal defendants in a compromised position that was neither

258. The New York Council of Defense Lawyers recently brought this deterrence effect to the attention of the United States Attorney for the Eastern District of New York:

[T]he provision which allows introduction of the client's statements at trial "to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution" . . . was deterring our members from bringing in for proffers many people who might well be able to persuade the U.S. Attorney not to indict. This, we argued, prevented them from being advised of a potential defendant's defense and from being able to make a fully informed prosecutive decision.

NYCDL Meeting Minutes, *supra* note 185, at 1.

foreseen nor could have been intended by the drafters of the plea-statement Rules.

This Note concludes that the terms of Queen for a Day agreements should be restricted to permit waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) *only* for the purposes of (1) impeachment of a criminal defendant who testifies inconsistently with the proffer, and (2) rebuttal of affirmative defense witness testimony that materially and explicitly conflicts with the proffer. Considerations of public policy and fairness bolster this recommendation. Allowing use in these circumstances protects the integrity of the criminal justice system. Permitting a broader waiver that allows for the introduction of proffer statements in the government's case-in-chief will have deleterious consequences. Prospective criminal defendants will be less likely to proffer, thereby reducing the amount of information available to the prosecution and potentially hampering the government's holistic understanding of the facts when making charging decisions. Defendants will also be less forthcoming with their admissions to the government and their own lawyers. Defense counsel will be less willing to advocate zealously for their clients for fear of violating the provisions of the Queen for a Day agreement. Considerations of legislative intent, the reasoning of *Mezzanatto*, and the relative bargaining strengths of the parties involved also underscore the importance of clearly limiting the scope of waiver of the plea-statement Rules.

At a time of continued strengthening of the Sentencing Guidelines and reduction of the authority of judges to individualize sentences, a uniform and equitable stance regarding the scope of permissible waiver that balances the interests of the defendant and government ought to be sharply articulated. Whatever the end result, the Court has an obligation to revisit this issue, as there is little doubt that the government has transcended the bounds set by *Mezzanatto*. The defendant should be dealt a hand that sufficiently ensures that the trial is a proceeding of substance. The interests of society, generally, and the law, specifically, demand it. Queen for a Day agreements that allow the use of proffer statements in the government's case-in-chief risk reducing the trial to a "fantasy" — the dire result foretold by Justice

Souter's dissent in *Mezzanatto*.²⁵⁹ By clearly limiting the extent to which the plea-statement Rules may be waived, the proffer process will “permit the unrestrained candor which produces effective plea discussions”²⁶⁰ — ensuring a just result for all.

259. *Mezzanatto*, 513 U.S. at 218 (Souter, J., dissenting).

260. FED. R. CRIM. P. 11(e)(6) (repealed 2002) advisory committee's notes to 1979 Amendments.