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## **“Make Him an Offer He Can’t Refuse” – Mezzanatto Waivers as Lynchpin of Prosecutorial Overreach**

*Christopher B. Mueller\**

### ABSTRACT

*Plea bargaining is the dominant means of disposing of criminal charges in the United States, in both state and federal courts. This administrative mechanism has become a system that is grossly abusive of individual rights, leading to many well-known maladies of the criminal justice system, which include overcharging, overincarceration, convictions on charges that would likely fail at trial, and even conviction of “factually innocent” persons. Instrumental in the abuses of plea bargaining is the so-called Mezzanatto waiver, which takes its name from a 1995 Supreme Court decision that approved the practice of getting defendants to agree that anything they say in negotiations with prosecutors can be admitted against them if a trial ensues, despite Evidence Rule 410, which provides that such statements are inadmissible. These waivers, which are largely overlooked in the vast literature that criticizes plea bargaining, are in fact lynchpins in a system that is horrifying to contemplate.*

*These waivers mean that the very act of negotiation almost guarantees conviction of something, imposing one-sided risks on defendants that can only benefit prosecutors. They amount to a kind of palpable unfairness that the system tolerates. They not only contribute to the maladies described above, but they produce rulings (if a trial goes forward) that admit unreliable statements. There are many reasons why these waivers should be disapproved, including policy arguments (they are unfair, produce bad results and unreliable statements) and arguments based on contract law, on Rule 410 itself, on a widely-recognized but seldom enforced “unitary” principle, and – finally – on the “Mezzanatto proviso” (a widely ignored term in the decision itself).*

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*This Article explores the origins and operation of Mezzanatto waivers, examines and expounds the reasons for disapproving them and taking a new direction, and offers a reply to standard arguments that prosecutors need them (they really do not and have other means to hold defendants to their bargains).*

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## I. INTRODUCTION

It is inherently unfair for the government to engage in [plea bargaining], only to use it as a weapon against the defendant when negotiations fail.

United States v. Ross, 493 F.2d 771, 775 (5th Cir. 1974)

Everyone who saw *The Godfather* in theaters or on television remembers what Michael Corleone told Kay Adams in explaining how Michael's father persuaded a Hollywood agent to release Johnny Fontane from an iron-clad contract. The agent agreed to release Fontane because he was led to understand that either his signature or his brains would be on the paper – that was the offer he couldn't refuse.

Federal prosecutors (and some state prosecutors) enjoy similar powers, allowing them to exert as much muscle over defendants as Vito Corleone (Michael's father) exerted over the agent. Here is how it happens: Before sitting down to talk, the prosecutor asks the defendant (usually with his lawyer present) to sign a waiver as part of a proffer agreement, under which he promises to speak truthfully and agrees that everything he says can be offered in evidence against him if a trial should eventuate. What we have is often called a “proffer waiver” or “advance waiver” that is signed before the prosecutor offers a plea agreement or even suggests that a plea agreement might be acceptable and before the defendant makes the statements covered by his waiver. If ensuing discussions fail to bear fruit, or if they lead to a plea agreement but one of the parties backs out (even if the defendant does so with the court's permission after entering a plea), the waiver is usually enforceable anyway.

Alternatively, the prosecutor and defendant (with counsel) sit down to talk, and the conversation leads to a plea agreement that includes a waiver, this time covering everything that the defendant *has said* in the conversations (and sometimes what he says thereafter too), and often stipulations of fact, allowing the use of all this material in evidence against him if a trial should eventuate. What we have here is often called a “plea bargain waiver,” obtained as part of a plea agreement.

Perhaps it is an exaggeration to say that the cost of talking to the prosecutor, or at least the cost of reaching a deal in this system, is that the defendant will certainly be convicted of something – but it is not much of an exaggeration. A defendant who wants a deal – and all of them do – knows he must incriminate himself in order to enter a plea. He must do so because a court will not accept a plea unless it is satisfied on the basis of statements by the defendant in court – plea “allocutions,” as they are called (the defendant is not subject to cross), that repeat what he told the prosecutor and show his guilt. The reason prosecutors insist on a waiver is to force the defendant to make a plea or to nail him to the plea that he agrees to make. Without the waiver, what the defendant says to the prosecutor would be excludable as

plea bargaining statements under Rule 410 of the Federal Rules of Evidence.<sup>1</sup> So the defendant signs a waiver and speaks his piece (or speaks his piece, then signs a waiver), knowing he is incriminating himself but hoping that he will get a good deal or that the one he has struck will prove good and win the court's approval.

If this system sounds unfair, there is a good reason: It *is* unfair, as the *Ross* case quoted at the beginning of this article recognized in 1974. Of course we cannot aspire to create “market conditions” in which the prosecutor and defense have “equal bargaining power.” The state (both federal and state governments) has a monopoly on police power, courts, and the prosecutorial function, and the risks to the defendant (incarceration or even death) are incommensurable with the risks to the prosecutor (failing to represent the public interest adequately, or perhaps frustration of political ambitions or even loss of a job). But we can aspire to a system in which the state cannot mercilessly exploit this imbalance in the extreme way that the waiver doctrine invites. And we can aspire to a system in which the mere act of trying to reach a compromise does not prejudice one of the two parties and in which the mechanism for determining guilt or innocence when bargaining fails is not corrupted by the bargaining itself.

Bargaining in the setting of defense waivers, as described above, goes forward across the country every day, particularly in the federal system (in some states too), probably thousands of times a year. Prosecutors had begun to get defendants to sign waivers before the decision in *Mezzanatto*, but that decision so strongly reinforced this technique that it quickly became commonplace in the federal system and spread to many states as well. Plea bargaining has generated a vast literature, much of it critical, and *Mezzanatto* too has been dissected from several perspectives,<sup>2</sup> but its pivotal role in a system that is operating badly has never been adequately examined.

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1. FED. R. EVID. 410(a)(4) [hereinafter “FRE”] (providing that evidence of “a statement made during plea discussions with an attorney for the prosecuting authority” is excludable in civil and criminal cases “if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea”).

2. See David P. Leonard, *Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After Mezzanatto*, 23 CRIM. JUST. 8 (2008) (outlining defense strategies for dealing with *Mezzanatto* waivers); Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541 (1998) (analyzing waivers from law and economics perspective); Christopher P. Siegle, Note, *United States v. Mezzanatto: Effectively Denying Yet Another Procedural Safeguard to “Innocent” Defendants*, 32 TULSA L.J. 119 (1996) (analyzing issues of contract and fairness in *Mezzanatto* waivers); Pamela Bennett Louis, Note, *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, 271 (1996) (concluding that *Mezzanatto* eviscerated Rule 410 and ignored legislative intent); Jason A. Manekas, Case Comment, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995), 29 SUFFOLK U. L. REV. 338 (1995) (arguing that *Mezzanatto* ignored legislative intent behind Rule 410).

In what follows, this Article begins by looking at the decision in *Mezzanatto*. This Article then describes the settings and manner in which *Mezzanatto* waivers operate and sets out the reasons why current law works badly and needs reform. *Mezzanatto* waivers make the plea bargaining process unfair and exacerbate its dysfunctions (overcharging, over-convicting, and overincarceration). These waivers produce untrustworthy statements that are then offered against the rare defendant who dares go to trial, including the defendant whose bargain has broken down for any reason. Often these waivers rest on nonexistent or illusory consideration and should not be enforceable as contracts. Finally, they violate Evidence Rule 410, and it is here that the unfairness described above becomes most visible. Under what this Article calls the “unitary principle,” recognized by the Supreme Court ninety years ago and still invoked in modern opinions (but often ignored), and under what this Article calls the “*Mezzanatto* proviso,” there is room to take a new direction.

This Article concludes by outlining a better way: *Mezzanatto* waivers should be unenforceable whenever bargaining or a plea deal breaks down, whether the reason is that the parties cannot reach a deal, or that the prosecutor or defendant withdraws, or that the court rejects the plea. Under the unitary principle, the waiver should be inoperative in all these situations, and the *Mezzanatto* proviso leaves room to render the waiver inoperative whenever a defendant justifiably withdraws from a deal or plea or the court refuses to honor a deal. Equally important, prosecutors do not need waivers to ensure cooperation by defendants in the trials of others (a common condition in such arrangements), and refusing to enforce waivers would contribute significantly to repairing a system that works badly.

## II. HOW DID WE GET HERE?

### A. *The Mezzanatto Case*

#### 1. The Holding

The critical point is the *Mezzanatto* case, decided in 1995.<sup>3</sup> There the Supreme Court reviewed a federal drug conviction and concluded that defendants can waive their right under Evidence Rule 410 to exclude statements they make to government lawyers during plea negotiations and can do so in advance, on the threshold of conversations. Actually, the issue was narrower: The government insisted only that defendants can waive their right to exclude such statements if they later testify and say something inconsistent with what they said before (the Court dealt only with the impeaching use of plea bargaining statements).

Seven Justices signed the majority opinion by Justice Thomas concluding that defendants can waive this right, but five Justices wrote separately.

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

Three of them (Justices Ginsburg, O'Connor, and Breyer) concurred in Justice Thomas' opinion but stressed that they were not agreeing to a broader waiver that would let the government use such statements during its case-in-chief. Two others (Justices Souter and Stevens) dissented and would not even agree to the narrow holding allowing the impeaching use of plea bargaining statements.

*Mezzanatto* was not the first decision approving waivers of the protection of Rule 410. As early as 1987, cases took this direction.<sup>4</sup> But *Mezzanatto* is the decisive case, and it reduced Rule 410 to a default provision – in federal courts, really a dead letter. Rule 410 had been enacted twenty years earlier, along with Rule 408 covering civil settlement negotiations, with the idea of encouraging both sides to sit down and talk by making such negotiations risk free, so that if the parties could not agree on a deal they would be placed back on square one – as though nothing had happened. Now, thanks to *Mezzanatto*, federal courts in many follow-up opinions have done what the three concurring Justices feared – broadening waivers to cover use of the defendant's statements during the prosecutor's case-in-chief.<sup>5</sup> Other federal courts have approved use of the defendant's statements to rebut any kind of defense evidence.<sup>6</sup> Not surprisingly, many federal decisions follow *Mezzanatto* in approving use of the defendant's statements for the purpose of impeachment.<sup>7</sup>

Some states not only follow *Mezzanatto* but adopt the broadest possible interpretation of the decision in allowing even the use of the defendant's plea bargaining statements as substantive evidence,<sup>8</sup> but others disapprove *Mezzanatto* waivers or at least limit their operation in various ways (often allowing

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4. *United States v. Nemetz*, Crim. A. No. 87-196-C, 1987 WL 17543, at \*3 (D. Mass. Sept. 21, 1987) (finding that proffer letter waived right to exclude plea bargaining statements for impeachment on cross); *see also* *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that plea agreements “commonly contain” waivers of right to use plea bargaining statements to impeach); *United States v. Wood*, 879 F.2d 927, 937 (D.C. Cir. 1989) (noting claimed waiver).

5. The author has found reported decisions by courts in the U.S. Court of Appeals for the District of Columbia and the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits allowing waivers covering substantive use of the defendant's statements. *See* Appendix 1, *infra*.

6. The author has found reported decisions by courts in the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits approving waivers covering use of the defendant's statements to rebut the prosecutor's evidence. *See* Appendix 2, *infra*.

7. The author has found reported decisions by courts in the First, Second, Third, and Seventh Circuits approving waivers covering the impeaching use of the defendant's statements. *See* Appendix 3, *infra*.

8. The author has found reported decisions approving waivers allowing substantive use of the defendant's statements in the following ten states: Arizona, California, Kentucky, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania, South Carolina, and South Dakota. *See* Appendix 4, *infra*.

only impeaching use of plea bargaining statements),<sup>9</sup> and yet others appear not to have confronted the question.<sup>10</sup>

## 2. The Case Itself

It is important to take a closer look at the opinion that became a modern Pandora's Box. To begin with, *Mezzanatto* was a drug prosecution, which in today's world puts it in the largest single category of federal criminal cases (accounting for almost one third of prosecutions).<sup>11</sup> And the case began with a proffer session aimed at plea bargaining, which in today's world resolves almost all criminal cases in both state and federal courts. While it could once be said that plea bargaining is “an important part” of the criminal justice system, now it is closer to the truth to say that plea bargaining *is* the criminal justice system.<sup>12</sup> Law students and the general public watch and study and marvel at the protections that our Bill of Rights accords to criminal defendants, but these rights have little room to operate in today's plea bargaining system.

As wonderfully described by Christopher Slobogin,<sup>13</sup> the *Mezzanatto* case began when a federal task force, acting in pursuit of one Gordon Shuster, wound up negotiating both with Shuster and later with Gary Mezzanatto, each of whom pointed his finger at the other in order to improve his own chances for release or at least favorable treatment. Shuster was living in a trailer in rural California near San Diego. When arrested in a raid, he decided to help himself by arranging, with the cooperation of federal agents, for Mezzanatto to deliver methamphetamine in a set-up designed to lead to his arrest. At the time, as Slobogin recounts the story, Mezzanatto was a married but

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9. The author has found reported decisions approving waivers covering the impeaching use of the defendant's statements in three states: Colorado, Maryland, and New Jersey. See Appendix 5, *infra*.

10. The author could not find reported opinions addressing these issues in the following states: Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

11. UNITED STATES SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2016 at 2 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf) (finding drug cases account for 31.6% of federal criminal cases; immigration cases were second at 29.6%, and firearms offenses were third at 10.8%).

12. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 909, 912 (1992) (arguing that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system”).

13. Christopher Slobogin, *The Story of Rule 410 and United States v. Mezzanatto: Using Plea Statements at Trial*, in EVIDENCE STORIES 103, 103–26 (Richard Lempert ed., 2006).



unemployed Vietnam combat veteran who had started working in some fashion for Shuster. When it came his turn to talk to the prosecutor, Mezzanatto claimed to be doing handyman jobs and said he thought Shuster was involved in making explosives and that the package Mezzanatto agreed to deliver contained explosives and not drugs. Surprisingly, the government broke off its conversations with Mezzanatto when it concluded that he was lying on what seems a fairly minor point: Mezzanatto said he had not been to Shuster's trailer in the prior week, but one of the agents had seen his car there the day before his arrest.

At the beginning of their conversation, Mezzanatto agreed orally to the waiver that the decision bearing his name has made famous. In today's world, the procedure is elaborate, and the Justice Department has detailed written guidelines and forms of written agreements that defendants are effectively required to sign if they desire a resolution.<sup>14</sup> In attendance at these proffer sessions are the defendant, his lawyer, the prosecutor (in the federal system, typically an Assistant U.S. Attorney, as in *Mezzanatto* itself), and investigating agents.

At the urging of his public defender, Mezzanatto was interested in a deal, apparently in the mistaken belief that he was facing a maximum sentence of five years.<sup>15</sup> Then Mezzanatto learned that the maximum was ten years, and he received jailhouse advice that he needed a "real lawyer" to represent him. He changed his mind about a plea, hired a different lawyer, and went to trial. He took the stand and presented his version of events, including claims that he worked for Shuster as a handyman, that he knew nothing about Shuster's involvement in drugs, and that he thought Shuster was a shipbuilder and explosives expert working for the CIA! Further, Mezzanatto testified that his involvement in drugs was personal, not commercial, and that he believed his deliveries to be explosives, not drugs. On cross, the government attacked on multiple fronts. Included were questions asking about statements during his proffer session: There he said he had gotten the package from "Uncle Bob" (the man who had introduced Mezzanatto to Shuster), and – more importantly – there he admitted knowing the package contained methamphetamine. Mezzanatto also admitted that during the proffer session he had said nothing about explosives. The jury, as Slobogin reports, returned with a conviction in less than an hour.

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14. See *Principles of Federal Prosecution*, U.S. DEP'T OF JUST. (Aug. 16, 2016), [www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.420](http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.420) (it is "particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him or her later to proclaim lack of culpability or even complete innocence").

15. Slobogin, *supra* note 13, at 111–17.

### 3. The *Mezzanatto* Appeal; The *Mezzanatto* Proviso

Mezzanatto appealed. The Ninth Circuit invalidated the waiver and reversed. The court stressed the clarity of congressional intent to block the impeaching use of plea bargaining statements under Rule 410 and argued that the purpose of encouraging plea bargaining would be frustrated if either side could be forced to bear the risk that anything said in a failed bargaining session could be offered in evidence.<sup>16</sup> But the case went to the Supreme Court, which reinstated Mezzanatto's conviction.

The Court began with an unexceptionable point: Important constitutional rights are waivable. It went on to a more remarkable argument, which began with the proposition that prosecutors may be reluctant to enter into plea bargaining unless they can obtain waivers of the right of the defendant to exclude what he says (they face “painfully delicate” choices in deciding who should be charged and who should get deals). Then switching to the defense side, the Court said it “makes no sense” to limit what defendants can offer: “[I]f the prosecutor is interested in ‘buying’ the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains.”

In an important passage at the end of its opinion, the *Mezzanatto* majority rejected the argument that the “mere potential” for prosecutorial abuse invalidates waivers. Instead, the Court said, most prosecutors are “faithful to their duty,” and the possibility of a waiver being unknowing or involuntary should not invalidate all waivers. The appropriate response, said the Court, is to permit “case-by-case inquiries into whether waiver agreements are the product of fraud or coercion.” Waivers are “valid and enforceable” in the absence of some “affirmative indication” that they were entered into “unknowingly or involuntarily.”<sup>17</sup>

These terms suggest the constitutional standard<sup>18</sup> adopted in the *Henderson* case in 1976, under which a guilty plea must be “voluntary in a constitutional sense.”<sup>19</sup> *Henderson* involved a plea of guilty to second-degree murder, and the opinion held that the plea must constitute “an intelligent admission” that defendant committed the offense, meaning that the defendant must understand the required element of intent in the charge and must admit that he intended to cause the death of the victim. Six years earlier the Court had held in *Brady* that pleas (and plea agreements) can be voluntary if the defendant is represented by counsel even if he acts in fear of the death penalty, in the belief that the judge will be more lenient than a jury, or because he wants to get

16. *United States v. Mezzanatto*, 998 F.2d 1452, 1454–56 (9th Cir. 1993), *rev'd*, 513 U.S. 196 (1995).

17. *United States v. Mezzanatto*, 513 U.S. 196, 207–11 (1995).

18. The Court does not cite constitutional decisions. Instead it cites *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (plurality opinion construing 42 U.S.C. § 1983); *United States v. Chem. Found., Inc.*, 272 U.S. 1 (1926) (construing Trading with the Enemy Act).

19. *Henderson v. Morgan*, 426 U.S. 637, 644–45 (1976).

other charges dropped.<sup>20</sup> *Brady* stopped short of endorsing an escalation of charges where a defendant declines to plead, but the Court addressed this tactic eight years later in *Bordenkircher*. In *Bordenkircher*, the Court affirmed a conviction carrying a life sentence after the defendant declined to plead guilty to a charge carrying a ten-year maximum.<sup>21</sup> More recently, the sentencing guidelines in effect invite prosecutors to use this tactic – to tell defendants, “take this offer or I will use every resource at the government’s disposal to deprive you of your liberty for as long as possible.”<sup>22</sup> In effect, prosecutors have been given a green light to browbeat defendants who have the courage to reject an offer by suggesting that the price of refusal is even more criminal liability. It is hard to view this tactic as anything less than official vindictiveness.

*Brady* and *Bordenkircher* both contain language suggesting limits to what prosecutors can do in trying to get defendants to accept a bargain. *Brady* comments that neither the prosecutor nor the judge “deliberately [employed] their charging and sentencing powers to induce a particular defendant to tender a plea.”<sup>23</sup> *Brady* adds that the prosecutor cannot induce a plea by “threats” or “promises to discontinue improper harassment,” or “misrepresentation” (like “unfulfilled or unfulfillable promises”) or “promises that are by their nature improper,” such as inviting “bribes” in exchange for dropping or reducing charges.<sup>24</sup> *Bordenkircher* also offers some limiting language. The Court noted that the prosecutor did not bring “an additional and more serious charge” without notice after negotiations “relating only to the original indictment,” implying that new charges brought by surprise might constitute an improper tactic.<sup>25</sup>

Still, *Bordenkircher* is justifiably viewed as an abomination. The reason is not that “charge bargaining” (as it is called) should be barred completely but that upping the punishment from ten years to life cannot be “justified even remotely,” as Professor Albert Alschuler said, as a proportional response to a refusal to save the State the cost of going to trial.<sup>26</sup> How to deal

20. *Brady v. United States*, 397 U.S. 742, 751–52, 751 n.8 (1970) (commenting that there is no indication that judge or prosecutor “deliberately employ their charging and sentencing powers” to persuade defendant to plead).

21. *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 365 (1978) (5–4 decision).

22. *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 425 (E.D.N.Y. 2002) (discussed more fully at text following note 198, *infra*); *see also* U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 cmt. (U.S. SENTENCING COMM’N 2016) (contemplating “dismissal of charges or agreement not to pursue potential charges” if defendant enters and court accepts plea agreement).

23. *Brady*, 397 U.S. at 751 n.8.

24. *Id.* at 755 (citing *Shelton v. United States*, 242 F.2d 571, 572 n.2 (5th Cir. 1957), *rev’d on other grounds*, *Shelton v. United States*, 356 U.S. 26 (1958) (per curiam)).

25. *Bordenkircher*, 434 U.S. at 360.

26. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 680–81 (1981).

with such an abuse has attracted attention, but countermeasures bring difficulties of their own: Absolutely prohibiting charge bargaining would encourage prosecutors to maximize charges at the outset, and scrutinizing prosecutorial motives seems impractical. More plausible are measures like examining sentences for fairness in light of the underlying facts and trying to define some outer limit on permissible degree of escalation, but there is little indication that courts are exercising such supervision.<sup>27</sup> Such measures would enshrine in Criminal Rule 11 a requirement that the court examine the bargaining process itself and the facts underlying the plea. In order to make such an examination plausible, the Rule would have to provide that the prosecutor cannot, in the event the proposed deal is found to be unfair, pile on additional charges or seek higher penalties than those suggested in the deal.

*Mezzanatto*'s reference to the voluntariness standard can be labeled the “*Mezzanatto* proviso,” and there are two important points to bear in mind: One is that we are closer here to dictum than to holding because the parties did not enter a plea agreement, and *Mezzanatto* did not argue that his waiver was coerced or unknowing.<sup>28</sup> Second and perhaps more important, this proviso is in the nature of an anchor to windward – a worst case scenario in which judicial intervention is required. Thus it should not be understood as describing the *only* situation in which *Mezzanatto* waivers should be rendered inoperative. In the end, then, *Mezzanatto* says that a defendant is stuck with the statements he makes in trying to bargain a plea (at least to the extent that he changes his position in testimony at trial), but there is a small “out.” A defendant is not stuck with his statements if they are adduced in a bargaining process that becomes so coercive that the proposed plea is involuntary.<sup>29</sup> Moreover, this proviso is in the nature of dictum, which suggests there may be other concerns that would also free defendants from this consequence, and these might include changes of heart due to new developments in the evidentiary picture or new advice from a lawyer.

It is likely that a criminal defendant has an absolute right to withdraw from a plea agreement before entering a plea that the court accepts,<sup>30</sup> although it is not clear whether he can withdraw a plea after the court indicates its acceptance but before sentencing the defendant in the manner contemplated by the plea agreement. Courts, moreover, have broad authority to reject pleas or plea agreements on fairness grounds and can do so for reasons that would not come even close to a finding of involuntariness in the constitutional sense. Under Criminal Rule 11, a court can allow a defendant to withdraw a guilty plea for any “fair and just reason.”<sup>31</sup> Indeed, there are many circum-

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27. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.2(b) (4th ed. 2015) (describing these approaches and finding problems with each).

28. See *United States v. Mezzanatto*, 513 U.S. 196 (1995).

29. See *id.* at 210.

30. *United States v. Alvarez-Tautimez*, 160 F.3d 573, 576 (9th Cir. 1998) (not reaching question whether defense counsel was deficient because defendant had “the absolute right to withdraw his plea before it was accepted” by the court).

31. FED R. CRIM. P. 11(d)(2)(B).

stances that differ from *Mezzanatto* in material ways that cast doubt on the wisdom of enforcing waivers. This Article develops reasons why waivers should not be enforced. Some of these reasons conflict with the views of the majority in *Mezzanatto*, and the arguments developed in this Article suggest that *Mezzanatto* was wrongly decided. But even with *Mezzanatto* in place, there is room for these views to operate and for courts to render waivers inoperative.

### B. Plea Bargaining Waivers Expand

Our plea bargaining system can operate only if defendants waive important rights. (The *Mezzanatto* majority was right on this point.<sup>32</sup>) Criminal Rule 11 has long required the judge to tell a defendant that he has the right to plead not guilty, to have a jury trial, to have legal representation, to call witnesses on his behalf, to confront and cross-examine witnesses called by the prosecutor, to testify, and to be protected against self-incrimination.<sup>33</sup> The judge is to ensure that in entering his plea the defendant understands that he is waiving these rights. And, since an amendment adopted in 1999, the court is specifically to ensure that the defendant understands that his waiver affects his right “to appeal or to collaterally attack the sentence.”<sup>34</sup>

The *Mezzanatto* majority referred to many of these waivable rights (jury trial, confrontation, protection against self-incrimination), by way of supporting its conclusion that the defendant can also waive his right to exclude what he says during plea bargaining. The dissenting Justices understood this point as well, but they thought that adding another right to the list of waivable ones would lead to still more extensive waivers. Indeed it has: Courts enforce waivers of the right to obtain records of investigation, the right to exclude documents, the right to discovery, as well as waivers authorizing prosecutors to use evidence unearthed on account of plea bargaining statements (so-called derivative use of those statements).<sup>35</sup> Until 2010, the Justice Department

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32. See *Mezzanatto*, 513 U.S. at 209–10 (plea bargaining process “necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights”).

33. FED R. CRIM. P. 11(b)(1)(B)–(E).

34. FED R. CRIM. P. 11(b)(1)(N); see also *State v. Makinson*, 665 P.2d 1376, 1377 (Wash. Ct. App. 1983) (McInturff, J., dissenting) (describing waivers).

35. *United States v. Seleznev*, No. CR 11-70 RAJ, 2016 WL 1720762, at \*1 (W.D. Wash. Apr. 29, 2016) (derivative use waiver); *Robinson v. DEA*, No. 1:15CV251-HSO-JCG, 2016 WL 1448858, at \*1 (S.D. Miss. Apr. 12, 2016) (waiver of right to records of investigation); *United States v. Fazio*, 795 F.3d 421, 425 (3d Cir. 2015) (collateral attack waiver); *Wosotowsky v. United States*, Nos. 13–1613 & 2:11–203, 2014 WL 1572413, at \*6 (W.D. Pa. Apr. 17, 2014) (waiver of right seek to vacate sentence); *United States v. Morris*, No. 12-253, 2013 WL 6185165, at \*1 (W.D. Pa. Nov. 26, 2013) (waiver allowing hearsay report and covering “documents or physical or electronic evidence furnished by [Defendant]” (alteration in original));

asked defendants to waive their right to seek post-conviction DNA testing under the Innocence Protection Act, but in the same year the Attorney General reversed that policy.<sup>36</sup>

Among the more controversial are waivers of the right to appeal. In *Vanderwerff*, a 2012 Colorado case, Judge Kane had had enough. Complaining that plea bargaining has led to “the pandemic waiver” of important rights making trial by jury “an inconvenient artifact,” and that “the push is to relegate [judges] to approving or disapproving” bargains, he refused to accept a plea bargain because it included a waiver of the right to appeal.<sup>37</sup> He was reversed,<sup>38</sup> however, and authoritative decisions uphold such waivers.<sup>39</sup> Other judges have expressed similar doubts as Judge Kane, and they occasionally balk at what seem to be overbroad waivers. Whether the right to receive exculpatory evidence can be waived is a matter still in doubt.<sup>40</sup>

In its 2012 decisions in *Frye* and *Lafler*,<sup>41</sup> the Supreme Court extended modest constitutional protections against inadequate legal representation during plea bargaining. Not surprisingly, prosecutors reacted by asking defendants to sign advance waivers relinquishing these rights too. So, for every new right we get a new waiver; is that what we should be doing? Whack-A-Mole, anyone? Again, we see signs that courts have had enough. In 2014, the Supreme Court of Kentucky ruled that federal prosecutors cannot ethically ask defense lawyers to approve such waivers,<sup>42</sup> and state legal ethics authorities elsewhere have reached similar conclusions.<sup>43</sup>

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Porter v. Commonwealth, 394 S.W.3d 382, 388 (Ky. 2011) (waiver of right to discovery, including name of informant).

36. Memorandum from Eric H. Holder, Jr., Attorney Gen., Dep’t of Justice, to All Federal Prosecutors, Guidance Regarding Use of DNA Waivers in Plea Agreements (Nov. 19, 2010), [www.justice.gov/sites/default/files/ag/legacy/2010/11/19/ag-memo-dna-waivers111810.pdf](http://www.justice.gov/sites/default/files/ag/legacy/2010/11/19/ag-memo-dna-waivers111810.pdf).

37. *United States v. Vanderwerff*, No. 12–cr–00069, 2012 WL 2514933, at \*4–\*5 (D. Colo. June 28, 2012) (appellate waivers undermine ability “to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing”), *rev’d*, 788 F.3d 1266 (10th Cir. 2015).

38. *United States v. Vanderwerff*, 788 F.3d 1266 (10th Cir. 2015).

39. *See Fazio*, 795 F.3d at 421; *United States v. Grimes*, 739 F.3d 125 (3d Cir. 2014).

40. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2060–85 (2000) (arguing that contract law, constitutional law, and property law make such waivers void); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 *CARDOZO L. REV.* 949, 956–63 (2008) (reporting practice of prosecutors in seeking waivers of right of disclosure for evidence or information that negates guilt or mitigates offense and arguing for ethical duty to make such disclosure during bargaining).

41. *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012) are described further at notes 141–46, *infra*.

42. *United States v. Ky. Bar Ass’n*, 439 S.W.3d 136, 156–57 (Ky. 2014).

43. *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 *AM. CRIM. L. REV.*

### III. DIFFERENT ROADS, SAME DESTINATION: THE WAIVER IN OPERATION

#### A. *Beginning Point – The Parties Talk*

In one sense, the proffer session in *Mezzanatto* was typical. Early in the game, shortly after the defendant's apprehension, the two sides meet and talk. The prosecutor wants to find out what the defendant knows and can testify to, and the defense wants to find out what the prosecutor is thinking and what evidence she has. Images from the TV series *Law and Order*, now looping endlessly on cable channels, are fictional: There, prosecutor Jack McCoy could expect Chief Detective Anita Van Buren to send out Lennie Briscoe and Ed Green to interview witnesses and gather statements.<sup>44</sup> In reality, little investigation goes forward apart from initial police reports, and the proffer session is a discovery mechanism.<sup>45</sup> For the defense, the session also provides clues about the attitude of the prosecutor and hints about possible charges. For prosecutors, often the main question is whether the defendant can be useful in other cases and whether his own culpability is of such a nature that a deal would be palatable if the matter catches the public eye.

In another sense, the proffer session in *Mezzanatto* was not typical because it was broken off early and did not lead to serious plea discussions. In contrast to *Mezzanatto*, serious plea bargaining usually follows proffer sessions. Indeed, the parties sometimes go straight to bargaining because it is clear to all from the beginning that the defendant has nothing to offer that will aid in prosecuting others, and what is left is a possible deal on some charge. Sometimes everything happens in one meeting; sometimes there are more

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73 (2014) (arguing that courts should refuse to enforce such waivers); Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103, 2124 (2014) (showing that ethics boards in ten states have reached this conclusion); Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance – Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 668–69 (2013) (arguing that courts should not enforce such waivers); see also 28 U.S.C. § 530B(a) (2012) (government attorneys are subject to state laws and rules governing attorneys).

44. *Law and Order* starred Sam Waterson (“Jack McCoy”), S. Epatha Merkerson (“Anita Van Buren”), Jerry Orbach (“Lennie Briscoe”), and Jesse L. Martin (“Ed Green”). The series ran for twenty years (1990–2010) and is still omnipresent as reruns on cable channels in many different iterations. *Law and Order*, IMDb, <http://www.imdb.com/title/tt0098844/> (last visited Dec. 21, 2017).

45. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 553–558 (1999); LAFAVE ET AL., *supra* note 27, at §21.3(c) (stating that in plea bargaining, prosecutors provide the amount of discovery that they are constitutionally required to permit). *But see* United States v. Ruiz, 536 U.S. 622, 633 (2002) (noting that the plea agreement may waive right to receive information relating to affirmative defense).

meetings. Almost always, however, both sides are thinking about a deal from the very beginning.

Because of the connection and overlap of proffer sessions and plea bargaining, it is actually hard to tell them apart. Since Rule 410 speaks of statements by the defendant “during plea discussions,” it would be at least somewhat plausible to take the view that “proffer sessions” are not covered. But courts are realistic in applying Rule 410 to both proffer and plea bargaining sessions, since the possibility of a deal is always on the minds of the negotiating parties, and a real line between one and the other kind of conversation cannot be reliably drawn.<sup>46</sup> In *Mezzanatto*, no one argued that Rule 410 did not apply to the conversation between the two sides, even though the conversation had not reached the point of actually talking about a plea bargain, and the two sides were in the initial phases of what might have led to a proffer and/or a bargain.<sup>47</sup> And no one argued that Rule 410 does not reach plea allocutions made when the defendant explains his guilty plea to the judge – these too would be excludable under the Rule unless the waiver were enforced.<sup>48</sup>

As suggested in the opening pages of this Article, the defendant is expected to talk in person during these sessions (proffer and plea bargaining), and law enforcement agents in attendance know at least some of the facts, whether from surveillance activities, personal observation, or talks with others. Hence they may know whether the defendant is telling the truth and whether he is leaving things out.

Where the focus is on whether and how the defendant could help convict others, the prosecutor requires a *Mezzanatto* waiver at the outset – an advance waiver that covers whatever the defendant says thereafter in the conversation or in ensuing conversations.<sup>49</sup> Waiver in hand, the prosecutor stresses the importance of being truthful and warns that what the defendant says can be used at a later trial. The waiver is part of the “price of talking,” and the defendant pays the price before he knows where the conversation is going or what might emerge in it. As *Mezzanatto* argued before the Supreme Court, “[T]he government’s agreement here did not obligate the government to perform on any promise, nor did it impose any duty upon the govern-

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46. *United States v. Ross*, 588 F. Supp. 2d 777, 783, 786 (E.D. Mich. 2008) (absent proffer letter with waiver, defendant’s statements were not admissible and stating, “[I]f a line can be drawn between [proffer meetings and plea bargaining], it is not bold enough to withstand Rule 410’s effect”); *United States v. Stein* CR. 04-269-9, 2005 WL 1377851, at \*1 (E.D. Pa. June 8, 2005) (finding proffer sessions gave rise to “statements made in the course of plea discussions” under Rule 410).

47. See Brief for the United States at 10–11, *United States v. Mezzanatto*, 513 U.S. 196 (1995) (No. 93-1340).

48. See *SEC v. Payton*, 176 F. Supp. 3d 346, 351 (S.D.N.Y. 2016).

49. *United States v. Sitzmann*, 853 F. Supp. 2d 127, 132 & n.5 (D.D.C. Cir. 2012) (“debriefing agreement” waived objection to use of statements given then or later).



ment.”<sup>50</sup> But for any defendant, the situation is coercive and fraught with risk. Usually he concedes, as he must if he hopes for a deal, facts suggesting guilt of an offense, and each concession increases the pressure on him to make a deal. The waiver paves the way to use everything he says and subjects him to an almost certain conviction of something.

If the conversation turns explicitly to bargaining, and the defendant has not yet waived his rights under Rule 410, a waiver is sometimes folded into the plea agreement itself. A waiver that is part of the agreement can cover statements made in the conversation leading up to the agreement (and later conversations too) and also factual stipulations set forth in the agreement itself.<sup>51</sup> After the conversations that produce a *Mezzanatto* waiver, the course of events varies. The one near-constant element is the waiver, which in a way dominates the picture because it is almost always given effect in any later trial.

### B. End Point – No Deal, As Negotiations Fail

Sometimes proffer or bargaining sessions end without agreement, as in *Mezzanatto* itself. One might think that where the conversation is unproductive, the parties would return to their prior condition – no harm, no foul, so to speak. But the waiver gets separated from failed conversations, treated as a binding contract, and enforced by courts. What would otherwise be excludable under Rule 410 as statements “made during plea discussions with an attorney for the prosecuting authority” that “did not result in a guilty plea” are admitted in a later trial, sometimes only to impeach the defendant’s testimony,<sup>52</sup> sometimes to rebut defense evidence,<sup>53</sup> and often as substantive evidence during the prosecutor’s case-in-chief.<sup>54</sup>

50. Brief for Respondent at 31, *Mezzanatto*, 513 U.S. 196 (No. 93-1340).

51. *United States v. Washburn*, 728 F.3d 775, 779–82 (8th Cir. 2013) (plea agreement waived right to exclude stipulation of facts after defendant declined to enter plea); *United States v. Stevens*, No. 2:09-cr-00222-11, 2010 WL 5343189, at \*3 (S.D.W. Va. Dec. 21, 2010) (admitting stipulation of facts in plea agreement; can be used in government’s case-in-chief).

52. FRE 410(a)(4); *Mezzanatto*, 513 U.S. at 198 (prosecutor told defendant at “the beginning” that he “would have to agree that any statements he made . . . could be used to impeach any contradictory testimony he might give”).

53. *See United States v. Shannon*, 803 F.3d 778, 783–85 (6th Cir. 2015) (proffer could refute testimony defendant adduced from government witness); *United States v. Roberts*, 660 F.3d 149, 168 (2d Cir. 2011) (proffer could rebut facts “implied by documentary evidence”); *United States v. Velez*, 354 F.3d 190, 196–97 (2d Cir. 2004) (proffer could “rebut contra[dictory] evidence or arguments”).

54. *United States v. Sylvester*, 583 F.3d 285, 288–89 (5th Cir. 2009) (allowing use of proffer statements in government’s case-in-chief); *United States v. Hardwick*, 544 F.3d 565, 569–70 (3d Cir. 2008) (enforcing waiver in proffer agreement allowing use of defendant’s statements in government’s case-in-chief); *United States v. Bloate*, 534 F.3d 893, 901–02 (8th Cir. 2008) (waiver reached proffer statements), *rev’d on other grounds*, *Bloate v. United States*, 559 U.S. 196 (2010).

*C. End Point – Deal Reached; One Party or Another Withdraws*

It happens with some frequency that the parties enter into a plea agreement but one side or the other backs out. Often it is the defendant who does so, deciding that it is better to renege on the deal than to go forward, breaching the agreement and insisting on trial. Behind such a decision may be any number of reasons. Sometimes the defendant finds a new lawyer because he thinks his assigned counsel is not motivated enough, or is too insistent in urging a plea to avoid trial. Particularly in offices of public defenders, case-loads are often so heavy that lawyers feel that they must dispose quickly of many of their cases because they simply lack resources to mount any real defense.<sup>55</sup> Sometimes the defendant finds a lawyer who takes a different view of the case, and sometimes evidence comes to light that improves the chance of acquittal.<sup>56</sup> Sometimes there is no articulated reason – just a change of mind.<sup>57</sup>

Even before *Mezzanatto*, courts sometimes admitted the defendant's bargaining statements in this setting,<sup>58</sup> and modern decisions usually enforce

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55. Anderson Cooper, *Inside NOLA Public Defenders' Decision to Refuse Felony Cases*, CBS NEWS (Apr. 16, 2017), <http://www.cbsnews.com/news/inside-new-orleans-public-defenders-decision-to-refuse-felony-cases/> (Derwyn Bunton, chief public defender in New Orleans, stated that he has a fifty-two-lawyer staff handling more than 20,000 defendants and that in those conditions “you can't provide the kind of representation that the Constitution, our code of ethics and professional standards” require.).

56. *United States v. Brooks*, CR 14-382 (RMB), 2015 WL 6509016, at \*2–3 (D.N.J. Oct. 27, 2015) (defendant did not understand he was waiving rights to block use of statements to rebut evidence he might offer; waiver unenforceable); *United States v. Nelson*, 732 F.3d 504, 513, 517 (5th Cir. 2013) (when defendant changed lawyers and decided not to plead guilty, waiver was enforceable); *United States v. Newbert*, 504 F.3d 180, 184–85 (1st Cir. 2007) (when defendant withdrew plea on basis of “post-plea” evidence supporting innocence, waiver unenforceable); *Sylvester*, 583 F.3d at 287–88 (when defendant hired a new lawyer and decided to go to trial, waiver was enforceable).

57. *United States v. Washburn*, 728 F.3d 775, 780–82 (8th Cir. 2013) (no reason given for refusal to plead as agreed; waiver enforceable); *Quiroga v. United States*, Nos. C 10–3019–MWB & CR 06–3009–MWB, 2011 WL 2118811, at \*1, \*10–11 (N.D. Iowa May 25, 2011) (defendant moved to withdraw plea, expressing “belated misgivings” but without making claim of innocence; waiver enforceable); *United States v. Stevens*, No. 2:09–cr–00222–11, 2010 WL 5343189, at \*1, \*3 (S.D.W. Va. Dec. 21, 2010) (when defendant declined to plead, stipulation in plea agreement was usable in government's case-in-chief).

58. *United States v. Stirling*, 571 F.2d 708, 730–31 (2d Cir. 1978) (court admitted statements to grand jury under plea agreement that defendant abrogated; trial court said he “lost the protection of the plea agreement” when he didn't plead; reviewing court doubted Rule 410 applies to grand jury testimony after plea agreement).

waivers.<sup>59</sup> A few cases, however, conclude that a defendant who justifiably withdraws from a plea agreement is not in breach and that the waiver does not take effect.<sup>60</sup> Judges occasionally remark that the defendant deserves flexibility in making what, for him, is a momentous decision with huge life-altering consequences.<sup>61</sup>

Sometimes the prosecutor withdraws. Typically she explains that the defendant engaged in misconduct after signing the agreement, usually lying or withholding evidence that he agreed to provide.<sup>62</sup> Here courts generally enforce waivers,<sup>63</sup> although some decisions conclude that prosecutors who fail to perform their duties under a plea agreement lose their right to enforce those waivers.<sup>64</sup>

Recall now the *Mezzanatto* proviso, under which a waiver is invalid if the plea itself is constitutionally unknowing or involuntary.<sup>65</sup> It follows that a waiver is invalid if it is part of a plea agreement that is itself “unknowing or involuntary.”<sup>66</sup> Again it is important to note that the *Mezzanatto* proviso is not a holding – it should not be read to mean that *only* such factors render a waiver inoperative. Importantly, we can also see in this circumstance – in which one party or another withdraws from an agreement – a situation that

59. *United States v. Jim*, 786 F.3d 802, 806–07 (10th Cir. 2015) (when the judge let the defendant withdraw the plea because the defendant still thought he would have a trial on guilt or innocence, the court correctly enforced *Mezzanatto* waiver).

60. *Newbert*, 504 F.3d at 183 (defendant withdrew plea on basis of “new plausible evidence of innocence”; not in violation).

61. *E.g., id.* at 185 (there should be some “protection for defendants from pleas gone awry” to encourage “openness and honesty during plea negotiations”); *United States v. Mayer*, 748 F. Supp. 2d 1022, 1029–30 (N.D. Iowa 2010) (wishing that 8th Circuit would “relax the showing required to overcome the purported voluntariness of a waiver of Rule 410 rights in a plea agreement, or narrow the circumstances in which such a waiver is enforceable” because consequences on defendant who “balks” at plea for legitimate reasons are “unduly harsh”), *aff’d*, 674 F.3d 942 (8th Cir. 2012).

62. *See Pitt v. State*, 832 A.2d 267, 277 (Md. Ct. Spec. App. 2003) (state withdrew on ground that defendant was withholding evidence and giving false testimony; in rescinding, state “gave up all rights to use [defendant’s] statements at trial,” regardless whether he breached and regardless whether state was justified).

63. *See, e.g., State v. Willis*, 700 S.E.2d 266, 267, 269 (S.C. Ct. App. 2010) (per curiam) (defendant signed waiver and entered plea discussions leading to lie detector test that he failed; prosecutor broke off negotiations; case went to trial; waiver enforceable).

64. *Pitt*, 832 A.2d at 277 (when state rescinded plea agreement, statements obtained under it lost voluntary status and became inadmissible); *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992) (defendant failed lie detector test; government voided agreement to “restore the status quo ante” but introducing confession gave government benefits of bargain while denying them to defendant) (reversing).

65. *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

66. *United States v. Morrison*, 515 F. Supp. 2d 340, 350–52 (E.D.N.Y. 2007) (proffer agreement “was largely driven by [defendant’s] belief, created by the detectives’ comments, that, as a practical matter, he had no choice”) (agreement unenforceable; waiver invalid).

should be governed by a principle that we can usefully call the “unitary principle.” Under this principle, the plea, the plea agreement, *and* the *Mezzanatto* waiver succeed or fail together. In its fullest expression, this principle holds that they are of a piece, connected parts of one transaction, and if any part of the arrangement fails, the whole transaction is set aside. The principle finds expression in the *Kercheval* case in 1927, as we will see, and finds expression in modern cases as well.<sup>67</sup>

#### D. End Point – Deal Reached, but Court Rejects It

Plea agreements are subject to court approval.<sup>68</sup> If the court does not approve and the parties cannot work out something different and persuade the court to accept another deal, the waiver question can arise during trial. Usually the waiver is not by its terms contingent on judicial acceptance of a plea, and courts enforce it as written.<sup>69</sup> Occasionally the language does make an agreement contingent on judicial acceptance of a plea, and rejection of the plea means the waiver is inoperative too.<sup>70</sup>

Under the *Mezzanatto* proviso, a waiver is invalid if the plea or agreement is constitutionally unknowing or involuntary, as later decisions recognize.<sup>71</sup> This proviso does not address, and does not cover, the full range of situations in which a court might refuse to accept a plea: A court can reject a proposed plea because it lacks a factual basis, because the proposed sentence (or range of sentences) does not comport with the Sentencing Guidelines, and for other reasons as well.<sup>72</sup> Since the *Mezzanatto* proviso does not purport to exhaust the situations where a waiver should fail, here too a court has room to hold a waiver inoperative in the event of a later trial, and the unitary principle

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67. *Kercheval v. United States*, 274 U.S. 220, 224 (1927) (discussed further at text accompanying notes 231–33, *infra*).

68. FED. R. CRIM. P. 11.

69. *See State v. Bennett*, 370 S.E.2d 120, 126 (W. Va. 1988).

70. *See United States v. Escobedo*, 757 F.3d 229, 232–34 (5th Cir. 2014) (agreement was ambiguous on question whether defendant waived rights “contemporaneously with his signing” or only on “acceptance and activation” of plea; defense could withdraw plea before it was accepted, which did not waive right to exclude his statements); *United States v. Kowalewski*, No. 2:13–CR–00045–RWS, 2014 WL 6667127, at \*12 (N.D. Ga. Nov. 24, 2014) (magistrate judge recommends granting motion to suppress statements made in the course of plea agreement due to ambiguous nature of waiver provision).

71. *See United States v. Ventura-Cruel*, 356 F.3d 55, 63–64 (1st Cir. 2003) (after rejecting plea, court should not have admitted defendant’s statements; he was “deprived of the benefit” of his bargain); *Alesi v. Craven*, 440 F.2d 975, 977 (9th Cir. 1971) (when plea was withdrawn as involuntary, statements are inadmissible, even to impeach; plea and statements are “inextricably intertwined”).

72. *See LAFAYETTE ET AL.*, *supra* note 27, at §§ 21.1(h), 21.4(f).

indicates that indeed the plea, agreement, and waiver ought to succeed or fail together.<sup>73</sup>

### *E. End Point – Defendant Enters Plea, but Withdraws It*

A defendant who enters a plea under a bargain may withdraw it with the court's permission. As noted above, the Rule says the court may permit a defendant to withdraw a guilty plea for any "fair and just reason."<sup>74</sup> Not surprisingly, a defendant may entertain second thoughts about a plea for much the same reasons that he regrets entering into an agreement in the first place: He may think his lawyer did not put forth enough effort or pushed him too hard to make a deal, or he may think new evidence will turn the case around. In this setting, the system indulges the defendant at least to the extent of letting him withdraw the plea, and *Kercheval* remains strong on the point that the withdrawn plea is not admissible. There, the Court said a withdrawn plea has "ceased to be evidence," and allowing its use against a defendant who goes to trial would put him in "a dilemma utterly inconsistent" with the decision allowing withdrawal of the plea.<sup>75</sup>

This small indulgence, however, is largely nullified by the fact that courts usually enforce *Mezzanatto* waivers by admitting the defendant's bargaining statements in the ensuing trial.<sup>76</sup> This practice violates the unitary principle, which would exclude the underlying statements whenever the plea is excluded. Some courts still limit their use to impeachment, meaning that they are admissible only if the defendant testifies and says something inconsistent with what he said before.<sup>77</sup> Most modern courts now admit them as

73. See the discussion at notes 194–99, *infra*.

74. FED. R. CRIM. P. 11(d)(2)(B); *United States v. Yazzie*, No. CR 10–1761 JB, 2014 WL 1946880, at \*10 (D.N.M. May 6, 2014) (courts have broad discretion; decision should turn on whether (a) defendant asserts innocence, (b) the government would suffer prejudice, (c) defendant delayed, (d) withdrawal would inconvenience the court, (e) defendant had "close assistance" of counsel, (f) the plea was knowing and voluntary, and (g) withdrawal would waste judicial resources) (likelihood of conviction also counts).

75. *Kercheval v. United States*, 274 U.S. 220, 224 (1927) (discussed in more detail in text accompanying notes 231–33, *infra*).

76. *United States v. Jim*, 786 F.3d 802, 806–11 (10th Cir. 2015) (when defendant withdrew plea but failed to show at trial plea and agreement were "unknowing or involuntary," waiver was enforceable); *United States v. Mitchell*, 633 F.3d 997, 1002, 1005 (10th Cir. 2011) (enforcing waiver and admitting plea bargaining statements in government's case-in-chief; plea was voluntary; court allowed withdrawal because of undue influence by counsel); *United States v. Quiroga*, 554 F.3d 1150, 1155–57 (8th Cir. 2009) (defendant withdrew plea because lawyer wrongly told him he could not be sentenced as career offender; defendant argued that allowing him to withdraw was inconsistent with ruling admitting statements; court replied that "we are not bound to reconcile the district court's orders," noting that order allowing defendant to withdraw his plea was not appealable).

77. See *People v. Crow*, 28 Cal. App. 4th 440, 452 (Cal. Ct. App. 1994).

substantive evidence, so they can be offered during the prosecutor's case-in-chief and can be used to counter evidence of any sort offered by the defense or suggestions arising in defense arguments for acquittal.<sup>78</sup> Before *Mezzanatto* waivers became commonplace, such statements were usually excludable.<sup>79</sup>

In rare instances, modern courts reject waivers in this setting on the ground that the facts of the case before them introduce concerns that were not present in *Mezzanatto*.<sup>80</sup> In the *Newbert* case, for example, Judge Woodcock of the United States District Court for the District of Maine allowed the defendant to withdraw a plea on the ground that new information had come into the defendant's possession that “significantly affected” his assessment of the government's case against him.<sup>81</sup> And the judge went further in recognizing and sympathizing with the dilemma of defendants who have entered guilty pleas:

Once the plea agreement has been signed and the guilty plea accepted, it is “human nature for defendants to wonder what would have happened if they had put the Government to its proof and later to rue their decisions to plead guilty.” *United States v. Leland*, 370 F. Supp. 2d 337, 343 (D. Me. 2005). But, not all motions are created equal. Some, even though successful, may reflect the court's reluctance to sentence someone who insists he is innocent, albeit belatedly. *See* [*United States v. Burch*, 156 F.3d 1315 at 1319 (D.C. Cir. 1998)] (“Implausible as Mr. Burch's belated claim of innocence may seem, the Court will give Mr. Burch his day in court.”). Others, such as this case, present at least a plausible claim of actual innocence from evidence obtained after the guilty plea. If the latter is the case, the defendant cannot have breached the plea agreement by filing the motion to withdraw, since this new evidence would likely have substantially affected his decision to enter the plea agreement in the first place. *See* *United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998) (“Occasionally, however, through no fault of either party, a reasonably unforeseeable event intervenes, destroying the basis of the contract and creating a situation where performance by one party will no longer

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78. *See* *United States v. Alazzam*, No. 1:08CR101 (JCC), 2009 WL 3245392, at \*4 (E.D. Va. Sept. 29, 2009) (granting government's motion to introduce defendant's signed statements in its case-in-chief after defendant withdrew plea); *see also* *United States v. Burch*, 156 F.3d 1315, 1321–22 (D.C. Cir. 1998) (court could “discern no reason not to uphold the trial judge's ruling . . . that a defendant can waive his rights under [Fed. R. Crim. P. 11(e)(6)] and [FRE 410] to the extent of allowing statements made in the plea proceeding itself and in a subsequent debriefing to be used as part of the prosecution's case-in-chief”).

79. *See* *Mann v. State*, 605 P.2d 209, 209–11 (Nev. 1980) (when defendant pled guilty but withdrew plea, plea bargaining statement could not be used to impeach).

80. *E.g.*, *State v. Pitt*, 891 A. 2d 312, 322 (Md. 2006) (waiver was invalid where state repudiates, regardless of good faith belief that defendant breached plea agreement).

81. *United States v. Newbert*, 477 F. Supp. 2d 287, 293 (D. Me. 2007).

give the receiving party what induced him to enter into the contract in the first place.”<sup>82</sup>

Beyond advancing a “fair and just reason” to withdraw a plea, the defendant is entitled to withdraw a plea if it was unknowing or involuntarily in the constitutional sense.<sup>83</sup> The *Mezzanatto* proviso indicates that the waiver too is inoperative.<sup>84</sup> Again we recall that the proviso is not a holding and should not be understood as listing all the factors that should make a waiver inoperative, and again we should recognize that the unitary principle, quite independently, suggests the waiver should not operate (agreement, plea, and waiver should succeed or fail together).<sup>85</sup> The constitutional standard (“voluntary and knowing”) and the Rules standard (“fair and just reason”) seem to overlap, and prosecutorial pressures on defendants bear on proper application of both standards.<sup>86</sup> A decision allowing the defendant to withdraw a plea on the basis of either standard can justify rendering the waiver inoperative as well.<sup>87</sup>

#### IV. *MEZZANATTO* WAIVERS SHOULD BE UNLAWFUL

*Mezzanatto* waivers should be unlawful for four reasons. First, they make the plea bargaining process even more unfair than it already is, and magnify its dysfunctionality (its worst externalities) for four reasons that are examined in detail in this section. Second, these waivers produce untrustworthy statements that should not be used to convict their maker. Third, these waivers are invalid contracts, often unsupported by consideration and almost invariably unconscionable. Fourth, these waivers undermine the congressional purpose in enacting Rule 410 and violate its very terms.

##### A. *They Make Plea Bargaining Unfair and Magnify Its Dysfunctionality*

###### 1. Unfairness

A policy objective of the criminal justice system should include fairness in the plea bargaining process, and that is the specific policy of Rule 410 as well. Unfortunately *Mezzanatto* had the opposite effect, making the process

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82. *Id.* at 291 (citing *United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998)).

83. *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

84. *Id.*

85. *See the discussion at notes 194–99, infra.*

86. *United States v. Garcia*, 401 F.3d 1008, 1012 (9th Cir. 2005) (involuntary, unintelligent, or uninformed pleas are invalid; “invalidity qualifies as a ‘fair and just reason’ for permitting withdrawal”).

87. *See United States v. Manigan*, 592 F.3d 621, 627–28 (4th Cir. 2010).

less fair and undermining the specific purpose of Rule 410. *Mezzanatto* considered this policy objective but adopted an unrealistic view of plea bargaining that turned on its head the congressional rationale for enacting Rule 410. As the Court saw it, prosecutors may be unwilling to engage in plea bargaining unless they can get defendants to waive the right to exclude what they thereafter say. With this starting point, and this prosecutorial perspective, the Court reasoned as follows: Without a waiver, prosecutors might “decline to enter into cooperation discussions in the first place.” And enforcing a waiver will encourage defendants to enter into plea bargaining: “A defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.” So enforcing waivers will not “bring plea bargaining to a grinding halt,” and “may well have the opposite effect.”<sup>88</sup> In sum, it is better to enforce a waiver – or to put it the other way around, better to refuse to enforce the exclusionary doctrine in Rule 410 – in order to encourage bargaining.

Those comments are unrealistic because they wrongly suppose the parties have some actual choice in the matter of bargaining and that sometimes bargaining is a good bet and sometimes refusing to bargain is the better choice. In fact, however, neither side can afford not to bargain. On the side of the prosecution and the system, there are not enough resources to bring to trial, or for courts to conduct trials, in anything more than a tiny fraction of cases. And quite apart from the adequacy of resources, plea bargaining serves the interests of both prosecutors and courts: Prosecutors get the benefit of high conviction rates with less expenditure of time and little risk of reversal, and courts get an important tool that helps keep their dockets moving, again with little risk of reversal. On the defense side, there is a similar resource problem because public defenders cannot try more than a tiny fraction of the cases to which they are assigned.<sup>89</sup> O.J. Simpson, Kobe Bryant, and “Skinny Joey” Merlino may be able to afford good defense lawyers, but the vast majority of persons charged with crimes cannot.<sup>90</sup> Defendants have an-

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88. *Mezzanatto*, 513 U.S. at 207–209.

89. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 208, 212–13 (2003) (explaining that “a bargain saves time for both the judge and the prosecutor” and that early analysis and drafters of Sentencing Guidelines wrongly thought judges would reduce plea bargaining).

90. Famously, O.J. Simpson hired Robert Shapiro initially, and later Johnnie Cochran (who died in 2005), F. Lee Bailey, Alan Dershowitz, and Robert Kardashian, ultimately winning acquittal on all charges. See ABC News, *O.J. Simpson Trial: Where Are They Now?*, ABC NEWS (June 12, 2014), <http://abcnews.go.com/US/oj-simpson-trial-now/story?id=17377772>. Kobe Bryant retained the Denver firm of Haddon Morgan Foreman. That firm’s Pamela Mackey became his lawyer and got the case dismissed. See *Pamela Robillard Mackey*, HADDON MORGAN FOREMAN, <http://www.hmflaw.com/attorney-pamela-robillard-mackey.html> (last visited Dec. 27, 2017); Kirk Johnson, *Prosecutors Drop Kobe Bryant Rape Case*, N.Y. TIMES (Sept. 2, 2004), <http://www.nytimes.com/2004/09/02/us/prosecutors-drop-kobe-bryant-rape-case.html?mcubz=3>. In August 2016, police arrested reputed Philadelphia mob boss Joey Merlino for alleged racketeering. In the past, Merlino has been represented by



other motivation to bargain – the threat of serious charges for even relatively minor offenses, a point to which we shall return.

For these reasons, supposing that the amount of plea bargaining is responsive to a rule that either admits or excludes what the defendant says is like supposing that the number of people who will buy groceries turns on whether a store is located within ten blocks of where they live. It would be a gross misunderstanding to attribute to *Mezzanatto* the fact that the practice of plea bargaining has grown in the closing decades of the twentieth century.<sup>91</sup> The decision itself did not require courts to use waivers to justify the substantive use of statements by defendants – indeed five Justices went on record *in opposition* to this move. And *Mezzanatto* did not foreclose the development of robust defenses to the enforcement of waivers, which this Article attempts to lay out.<sup>92</sup> In short, the right way to understand *Mezzanatto* involves recognizing that excluding or admitting the defendant’s statements has no impact on the rate of plea bargaining.

So what does one make of the policy objective of Rule 410? That Congress was wrong to think that excluding statements would encourage plea bargaining? No, Congress was not wrong, but looking for causal connections is not the point. Saying Rule 410 seeks to encourage plea bargaining is shorthand for a larger idea: What we want, and where the exclusionary principle in Rule 410 helps, is a plea bargaining process that is fair to both sides. *Mezzanatto*’s evisceration of Rule 410 has the opposite impact.

Similar misconceived arguments swirl around privilege law. John Henry Wigmore notoriously claimed that any benefit conferred by the attorney-client privilege is “indirect and speculative” (its obstructive effects being “plain and concrete”),<sup>93</sup> and Charles McCormick and others followed Wigmore to this dead end.<sup>94</sup> *Of course* persons with legal problems would still

New Jersey lawyer Edwin Jacobs. See David Gambacorta, *Bada-Bing! Joey Merlino Arrested by Feds in Massive Mob Bust*, PHILA. MAG. (Aug. 5, 2016, 8:00 AM), <http://www.phillymag.com/news/2016/08/05/bada-bing-joey-merlino-indictment/>.

91. In 1975 (when the Evidence Rules took effect in the federal system, quickly followed by state adoptions), guilty pleas accounted for at least 86% of criminal dispositions in state courts in selected urban centers. See Pasqual A. DonVito, *An Experiment in the Use of Court Statistics*, 56 JUDICATURE 56, 61–62 (1972) (presenting table indicating felony dispositions in state courts in twelve metropolitan areas, showing a range of 53–97% guilty pleas in selected urban areas, with an average above 78%). The percentage is higher in federal courts today (closer to 97%), and plea bargaining in state systems has kept pace (about 94% today, with regional variation). See Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html>.

92. See *Mezzanatto*, 513 U.S. at 204.

93. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2291 (McNaughton rev. 1961).

94. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 87 (3rd ed. 1984); see also KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 87 (6th ed. 2006) (privilege has only “marginal” impact on client behavior and is not adequately supported by reason).

talk to lawyers if the privilege were eliminated, but abolishing it would force a lawyer to feel bound as a matter of decency and conscience to advise her client that what he says might have to be disclosed. This warning would be poisonous, casting a pall of mistrust over a relationship that is already difficult and that depends on the lawyer's loyalty and zeal in protecting the client's interests. Putting a lawyer in the position of being a witness against her client has, as Justice Jackson remarked in a related contest, a “demoralizing” impact on the profession and casts the lawyer in a role completely “out of professional character.”<sup>95</sup> And as the late David Louisell remarked years later, it “pervert[s] the function of counseling.”<sup>96</sup> In short, the purpose of the privilege is not to make sure that those who need lawyers will consult them but to protect a relationship that can only operate honorably and humanely if it is confidential.

Much the same argument persists about the spousal confidences privilege. Why have it? The usual answer is to protect and foster a relationship valued by society – the “best solace of human existence,” as it is called.<sup>97</sup> Does the privilege depend on the proposition that people would less likely marry if we did not protect their confidences? Or that they would still marry but be less candid with one another? Of course not. But the privilege is important in a culture that values and protects privacy in one of life's critical relationships. As Professor Charles Black argued in attacking the 1975 proposal by the Rules Advisory Committee virtually to eliminate the privilege, the result would be that a court could force disclosure of any fact, “however intimate, however private, however embarrassing,” and such a rule “could easily – even often – force any decent person – anybody any of us would want to associate with – either to lie or to go to jail.” A rule cannot be a good one, he concluded, if it “compels the decent and honorable to evade or to disobey it.”<sup>98</sup>

*Mezzanatto's* approach to Rule 410 makes the same mistake as these approaches that disfavor privilege law, expressing purpose simplistically and missing the main point. Plea bargaining continues, but under *Mezzanatto* as expanded by later decisions, it is more than ever a rigged game. The defendant who signs a proffer or advance waiver gives up a right with no assurance that he will benefit, and finds himself in two double binds. First, to entertain hope of a deal he must incriminate himself, but doing so already assures conviction of something if no agreement is reached and brought to fruition.<sup>99</sup>

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95. *Hickman v. Taylor*, 329 U.S. 495, 516–17 (1947) (Jackson, J., concurring).

96. David W. Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) (compelling lawyer to testify against his client would be “perverting the function of counseling”).

97. *Stein v. Bowman*, 38 U.S. 209, 221–23 (1839) (expounding on spousal testimonial privilege).

98. Charles L. Black, Jr., *Marital and Physician Privileges – A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48 (1975).

99. See Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment*, 46 S. TEX. L. REV.

Second, he must cover the points that may be relevant to some charge (but he may not know what charge) because leaving out anything exposes him to being accused of lying if he says something at trial that he could have said before, and yet trying to say everything incriminates him even further, broadening the array of charges that the prosecutor could plausibly bring.

The situation cannot help but make defendants and defense counsel mistrustful of prosecutors. It cannot help but make defendants mistrustful of their own lawyers, who find themselves obliged to urge their clients to participate in this unsavory process. And it cannot help but make defense lawyers at best uncomfortable at being backed into a position in which they must recommend entering pleas to charged crimes that their clients probably did not commit because the alternative is a risk that is simply too horrendous to contemplate.<sup>100</sup>

And it gets worse. Having encouraged or persuaded her client to engage in plea discussions that did not succeed – either no deal was reached, or someone withdrew from it, or the court did not accept it, or the defendant withdrew his plea – the defense lawyer must now try a case that she has almost no chance of winning, on account of having recommended or acquiesced in the strategy that failed. Even if the waiver is narrow, and permits only the impeaching use of defendant’s plea bargaining statements if he testifies (an unusual limit nowadays), it will be a very “iffy” tactical choice to put him on the stand. It will be hard for him to back away from what he said before when he went overboard in hope of reaching a deal by incriminating himself. It is worth remembering that the idea of “inconsistency” is determined by a loose and generous standard: If what was said before “might lead to any relevant conclusion different from any other relevant conclusion,” then it is inconsistent and can be admitted.<sup>101</sup> If the waiver allows full use of plea bargaining statements as substantive evidence, or more limited substantive use of such statements to refute (contradict) other defense evidence, defense counsel is even more constrained. All that remains in her arsenal are arguments that the government must prove guilt beyond a reasonable doubt on every element of the offense, because any argument suggesting “factual innocence” triggers the waiver.<sup>102</sup>

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661, 683 (2005) (“[I]t behooves the defendant to make a sufficient offering in the form of incriminating evidence and cooperation information.”).

100. See Alice Woolley, *Hard Questions and Innocent Clients: The Normative Framework of the Three Hardest Questions, and the Plea Bargaining Problem*, 44 HOFSTRA L. REV. 1179, 1181–82 (2016) (describing a plea that is “substantively unjust” because the client is “factually or legally innocent,” but that the defense lawyer must nevertheless recommend the plea “even if it means participating in an injustice”).

101. *United States v. Jasin*, 215 F. Supp. 2d 552, 589–91 (E.D. Pa. 2002) (quoting JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 613.04[1] (2d ed. 2002)) (admitting proffer statements).

102. *United States v. Duffy*, 133 F. Supp. 2d 213, 215 (E.D.N.Y. 2001) (striking blanket waiver, which “operates effectively as a waiver of trial,” leaving defense “few

Contrast for a moment the handling of failed negotiations on the civil side of the docket: Under Rule 408, statements made in this context are excludable from any later trial, and the parties are put in the status quo ante. Thus Rule 408 even blocks the impeaching use of statements made during civil settlement negotiations, and waivers of these protections are unheard of.<sup>103</sup> In short, we provide far more protection to the process of resolving claims for money damages than we provide to the process of resolving criminal charges. There is no real explanation for this difference, except that our system is biased in favor of aiding prosecutors in their efforts to punish criminal offenders.

## 2. Dysfunctionality

Plea bargaining was initially forbidden and frowned upon, basically as a matter of principle (there can be no compromise with criminal misconduct or issues of guilt).<sup>104</sup> But as George Fisher recounts in his wonderful modern study, plea bargaining came into its own in the early twentieth century in an environment of optimism that the process could achieve justice through compromise while saving society and both sides from the expenses and inefficiencies of trial.<sup>105</sup> In the last fifty years the picture has again changed, and again plea bargaining is controversial. This time objections reflect not so much matters of principle but a growing view that the process is seriously dysfunctional. In this new understanding of plea bargaining, *Mezzanatto* waivers are the lynchpin in the most damaging externalities of the system – overcharging, over-convicting (and convicting the innocent), and overincarceration.

There is, of course, a countervailing and optimistic strain of thought in which plea bargaining is seen as a two-sided conversation in which each side has something to offer, and the outcome of negotiations can be a socially useful compromise. The *Mezzanatto* majority took this view, describing plea bargaining as a matter of “cooperation” and saying that enforceable waivers help the defendant by enabling him to “‘maximize’ what he has to ‘sell’ only

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options” except “generally [to] attack the credibility” of government witnesses and make “general statement” that defendant is innocent; any “factual assertion that directly contradicts the proffer” makes defendant’s statements admissible); *United States v. Ford*, No. 04–0562 (JBS), 2005 WL 1129497, at \*5–6 (D.N.J. May 11, 2005) (explaining that, without triggering waiver, a defense can point out “gaps” in government proof, and argue that it “must prove its case, or has failed,” but “if factual innocence is implied” in questioning government witnesses or by “argument,” waiver is triggered).

103. FRE 408(a) (specifying that statements during settlement negotiations cannot be used as “prior inconsistent statement[s]” or “contradiction”).

104. FISHER, *supra* note 89, at 6–7.

105. *Id.* (stating that the “1920s and early 1930s[] marked the true age of plea bargaining’s discovery”).

if he is permitted to offer what the prosecutor is most interested in buying.”<sup>106</sup> Earlier decisions describe bargaining as conferring a “mutuality of advantage”<sup>107</sup> in a process involving parties with presumptively equal bargaining power.<sup>108</sup> Some modern commentators appear to agree with this picture.<sup>109</sup>

Most commentators are not so sanguine: Professors Alschuler and Stephen Schulhofer, for example, would abolish plea bargaining altogether. Such critics see plea bargaining as a one-sided conversation where prosecutors hold all the cards.<sup>110</sup> The Court confronted arguments based on coercion in the 1970s and rejected them. In the *Brady* case in 1970, for example, the Court said that a plea of guilty entered in fear that the trial would result in the death penalty was nonetheless a voluntary plea, noting in passing that the state “encourages pleas of guilty at every important step” and is limited only by the notion that it may not “produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.”<sup>111</sup> And in the *Bordenkircher* case in 1978, the Court approved a plea entered after the prosecutor told the defendant that if he did not plead to uttering a forged instrument (punishable by two to ten years), the prosecutor would indict him under the Habitual Criminal Act (subjecting him to a mandatory life sentence because of two prior convictions). The Court asserted that there was no coercion so long as the defendant is “free to accept or reject” the offer.<sup>112</sup>

For Alschuler and his former colleague John Langbein, a critical point favoring abolition is that plea bargaining has replaced trials, which have become so costly and complex that they are seldom possible: Our system, he argues, is “absurd both in the complexity of its trial processes and in the

106. *United States v. Mezzanatto*, 513 U.S. 196, 206–08 (1995).

107. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970) (plea bargaining “flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with . . . reasons for wanting to avoid trial” (quoting *Brady*, 397 U.S. at 752))).

108. *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting) (referring to “the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power”); *Bordenkircher*, 434 U.S. at 362–63 (citing *Parker*, 397 U.S. at 809 (Brennan, J., dissenting)).

109. See Frank H. Easterbrook, *Plea Bargaining Is a Shadow Market*, 51 DUQ. L. REV. 551, 552 (2013); Alexander Farsaad, *The Use of Plea Statement Waivers in Pretrial Agreements*, 217 MIL. L. REV. 141, 165 (2013) (arguing that waivers encourage trust, which encourages settlement); Rasmusen, *supra* note 2, at 1569 (arguing that waivers incentivize defendants to cooperate and increase reliability of information provided).

110. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

111. *Brady*, 397 U.S. at 750.

112. *Bordenkircher*, 434 U.S. at 358–59, 363, 365.

summary manner in which it avoids trial" through plea bargaining.<sup>113</sup> Our jury system has become more democratic but less and less available to those who might benefit from it.<sup>114</sup> In capital cases, the system is peculiarly awful, leading to executions, as Alschuler puts it, "not only for the crime of committing an aggravated murder but also for the crime of standing trial."<sup>115</sup> In his study of plea bargaining in Middlesex County in Massachusetts, Fisher found at least some support for the proposition advanced by Langbein and Alschuler that longer trials lead to more plea bargaining.<sup>116</sup> Schulhofer comes at it from a slightly different perspective, arguing that the problem with plea bargaining has to do with agency costs in a system in which prosecutors are politically motivated to seek excessive punishments and defense lawyers are economically motivated to avoid trial. He argues, on the basis of studies of felony cases in Philadelphia, that summary trials to judges could be implemented for all cases and would represent a significant improvement over the plea bargaining system.<sup>117</sup>

In a pathbreaking article, Professors Robert Scott and William Stuntz analyze plea bargaining as a special form of contract negotiation and advance the theory that this mechanism in its present form cannot succeed in setting the right penalty for the offense because the prosecutor does not know all the facts and cannot accurately appraise a claim of innocence.<sup>118</sup> Scott and Stuntz propose three reforms: Mandatory minimum sentences should be abolished; judges should be empowered to impose lower sentences (lesser penalties) than the parties agreed to; judges should be blocked from imposing higher sentences (greater penalties) than the parties agreed to. Scott and

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113. Alschuler, *supra* note 110, at 40–42 ("the more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination"); *see also* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978) ("[W]e have moved from an adjudicatory to a concessionary system."); Benjamin Weiser, *Trial by Jury, A Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> (showing that federal judges in New York City say criminal jury trials are disappearing).

114. Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 672 (2009); Langbein, *supra* note 113, at 12 ("we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial").

115. Alschuler *supra* note 114, at 672.

116. FISHER, *supra* note 89, at 118 (evidence is uncertain, but "increasing trial length may have played a part in the surge of plea bargaining in murder cases in the 1890s" in Middlesex County, Massachusetts).

117. Schulhofer, *supra* note 110, at 2001, 2006.

118. Scott & Stuntz, *supra* note 12, at 1943, 1948 (stating that plea contract is "inefficient because it fails to exploit the risk reduction potential of defendants' private knowledge," and inefficiency is worse than appears because innocent defendants are "risk averse" and "impact of conviction is so great" that they "might well avoid that risk even at the cost of accepting a deal that treats them as if they were certain to be convicted at trial").

Stuntz do not think these changes would fix everything, calling them “adjustment[s]” of a “second-best” nature that would help “at the margin,” but they also think abolishing plea bargaining would be worse.<sup>119</sup> Schulhofer thinks these reforms “nibble at the edges” of the problem.<sup>120</sup> Others have advanced similar proposals for judicial supervision constraining prosecutors at the trial stage<sup>121</sup> and proposals to involve judges in the bargaining process itself.<sup>122</sup>

Despite barrages of modern criticism, plea bargaining persists. The only effort toward complete abolition occurred in Alaska in 1975, but Alaska returned to plea bargaining in 1980, and the experience did not yield a clear picture of impact on the system.<sup>123</sup> In 2016, Alaska instituted a second reform effort, limiting plea bargaining without trying to eliminate it altogether.<sup>124</sup>

As critics of the present system, abolitionists and reformers usually make four points, three of which deal with what can be called “inputs,” and one of which deals with what we might call “outputs.” On the input side are the legislative tendency to overcriminalize, the prosecutorial tendency to overcharge, and the effect of mandatory sentencing law in taking power from judges to achieve individual justice. On the output side is overconviction and overincarceration.

(1) *Overcriminalization.* There is a legislative tendency to overcriminalize. In the modern era, this tendency is encouraged by the ongoing attempt to deal with the drug problem by expanding the criminal sanction and increasing punishments. Manufacturing, importing, and selling (not use or recreational possession) are all crimes, and criminalizing conduct involved in these matters invites broad statutes with vague contours. But the tendency to overcriminalize is embedded more deeply in our system because legislative

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119. *Id.* at 1947, 1950, 1952; see also FISHER, *supra* note 89, at 213 (arguing that balance of power between prosecutor and judge would improve by letting judge impose more lenient terms than prosecutor prefers).

120. Schulhofer, *supra* note 110, at 1979.

121. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008) (making the case that courts should limit difference between trial outcome and sentence to which defendant had agreed).

122. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667 (2013) (arguing for participation of judges in plea bargaining process).

123. Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 774–77 (1998).

124. See Jill Burke, *Will Alaska’s Plea Bargain Plan Serve Justice, or Cause It to Grind to a Halt?*, ANCHORAGE DAILY NEWS (Sept. 27, 2016), <https://www.adn.com/alaska-news/article/will-alaskas-plea-bargain-plan-serve-justice-or-cause-it-grind-halt/2013/08/14/>.

bodies are “more concerned with capturing all the behavior that they wish to punish than with excluding all the behavior that they wish to leave alone.”<sup>125</sup>

(2) *Overcharging*. A prosecutorial tendency to overcharge is also built into our system. Prosecutors are more likely to face criticism for undercharging than for overcharging, so the political incentives point in only one direction. Concerns to catch and try and punish criminals seem always to catch the eye of voters far more than concerns over the treatment of persons accused of crime. In a world preoccupied by shootings in public places, by startling and troubling incidents of sexual assault, and by violence against police and by police, these voter concerns are even more salient. The prevalence of plea bargaining and scarcity of trial magnify this incentive. If the prosecutor knows that defense counsel does not want to try the case, indeed cannot do so and keep her workload under control, the prosecutor has more reason to overcharge – both “horizontally” by fragmenting criminal conduct into as many different offenses as possible and “vertically” by charging offenses at the highest level that the facts can be stretched to suggest.<sup>126</sup> One commentator describes the phenomenon thus:

If our criminal justice system were trial-centered, prosecutors would only have reason to file charges on which they would likely secure a conviction. However, because most criminal convictions are secured through plea negotiations, prosecutors have an incentive to file more serious charges than those supported by the evidence with the “hope that a defendant will be risk averse.” Furthermore, prosecutors lack any political incentive to refrain from overcharging because most communities want the state to be tough on crime.<sup>127</sup>

Prosecutors not only overcharge (particularly in the federal system, where much of the war on drugs is waged), but they can hold out the incentive to defendants of making a motion to reduce the resultant sentence if the defendant proves useful in the prosecution of others. In other words, prosecutors can obtain a distinct benefit from overcharging by entering into a deal that includes a plea to the overcharged offense, using the promised motion to reduce the sentence as an incentive to ensure the defendant is helpful in putting others behind bars.<sup>128</sup>

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125. Scott & Stuntz, *supra* note 12, at 1962.

126. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–87 (1968); *see also* Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703 (2014) (suggesting on basis of empirical study that some federal charging patterns “raise yellow, if not red, flags regarding systemic overcharging”).

127. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84 (2011) (quoting Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 85 (2002)).

128. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(1) (U.S. SENTENCING COMM'N 1989) (authorizing reduction in sentence because of “the significance and



This problem has begun to creep into public consciousness, as is illustrated by two modern examples involving white middle-class women. The novel *Orange Is the New Black* (Piper Kerman) tells of a woman who graduated from Smith College in 1993, and made bad decisions that led to her carrying laundered money for a drug dealer, which in turn led to her arrest and conviction eleven years later (she had taken a job as a freelance producer in New York and was living with her boyfriend). She spent a year in prison in Danbury, Connecticut. The book spawned a successful award-winning TV series on Netflix.<sup>129</sup> A second example is the *60 Minutes* broadcast in April 2016, which told the story of an Ohio mother who turned in her adult daughter Jenna Morrison for stealing cash and credit cards from the mother's purse because Jenna had a drug problem and her mother thought this step would get her attention. She anticipated that Jenna would be charged with a misdemeanor and spend a short time in jail. Instead she was charged with nine felony counts for drug trafficking and was posted as a drug offender on a law enforcement website. Hardin County prosecutor Bradford Bailey said Jenna got what she deserved (“[e]verything she’s done she’s chosen to do”).<sup>130</sup> Another *60 Minutes* broadcast, this one airing in April 2017, explored the decision of a public defender’s office in New Orleans to refuse to handle felony cases in which the charges could lead to life in prison. Interviewed by Anderson Cooper, a group of nine lawyers from that office agreed they had all helped clients plead guilty to charges of which they were factually innocent.<sup>131</sup>

Other examples involving child pornography suggest serious overapplication of criminal sanctions. Even minor offenses, such as exchanging nude photographs between a seventeen-year-old boyfriend and his seventeen-year-old girlfriend, led to felony charges in North Carolina, where the age of consent is sixteen years.<sup>132</sup> In an unrelated case arising in New York, an extraordinary federal judge wrote a detailed critique of the treatment of such offend-

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usefulness of the defendant’s assistance”), *invalidated by* United States v. Detwiler, 338 F. Supp. 2d 1166 (D. Or. 2004).

129. See PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN’S PRISON* (2010); see also *Orange Is the New Black* (Netflix 2013) (starring Taylor Schilling as Piper Chapman, the show began its fifth season in 2017).

130. Bill Whitaker, *Heroin Epidemic Kills at Least 23 Ohioans Each Week*, CBS NEWS (Apr. 24, 2016), <https://www.cbsnews.com/news/60-minutes-heroin-epidemic-ohio-bill-whitaker/> (Ohio now has ninety-one drug courts designed to enable addicts to avoid criminality, yet Attorney General DeWine said, “we’re not gonna arrest our way out of this problem”).

131. Cooper, *supra* note 55. Derwyn Bunton, chief public defender in New Orleans, states that he has a fifty-two-lawyer staff handling more than 20,000 defendants and that in those conditions “you can’t provide the kind of representation that the Constitution, our code of ethics and professional standards” require. *Id.*

132. See Jacob Sullum, *The Unjust, Irrational, and Unconstitutional Consequences of Pedophilia Panic*, REASON (Apr. 2017), <https://reason.com/archives/2017/03/15/sex-and-kids>.

ers, concluding that several categories in Federal Sentencing Guidelines “tend to apply indiscriminately to all” such offenders, “greatly increasing the recommended punishment range without necessarily reflecting an individual’s heightened level of culpability.” Judge Weinstein declined to order incarceration for eight years (possible under the Guidelines) and imposed a much lighter sentence: The fifty-two-year-old Puerto Rican man who had downloaded pornography from the internet was not shown to have had “inappropriate physical sexual contact with a minor” or to be a danger to children, and the judge sentenced him to seven years of supervised release plus payment of \$2000 in restitution.<sup>133</sup>

To make the point another way, the kinds of market forces that offer assurance of fair pricing cannot be had here: When Jenna Morrison faced a prosecutor bringing nine felony charges after her mother had turned her in for the theft of cash and credit cards, she could not go to neighboring Hancock County, which has a drug court and a different attitude toward drug abuse. An alternative approach to this problem of incentivizing prosecutors to bargain responsibly suggests the possibility of financial rewards for a prosecutor who obtains an outcome at trial that matches her earliest offer.<sup>134</sup>

(3) *Mandatory Sentencing.* The coming of mandatory sentencing, a tribute to the quest for equality over individual justice, contributes considerably to the power of the prosecutor in plea bargaining. In today’s world, in the federal system especially, the range of punishment is mostly set by the prosecutor in the charging decision and not by the court.<sup>135</sup> Although the Guidelines provide courts with some tools to moderate the sentence imposed (considering all relevant conduct by the defendant and rejecting bargains that would “undermine” the Guidelines), they have not operated effectively as checks on prosecutorial power because judges lack incentive to intervene.<sup>136</sup> In reality, the judge is relegated to the role of assuring that a bargain is “knowing and voluntary,” which words sound eerily out of place in a system in which defendants waive rights in advance (so much for knowing) and have

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133. *United States v. R.V.*, 157 F. Supp. 3d 207, 211–12, 265–67 (E.D.N.Y. 2016) (describing history of child pornography, sentencing guidelines, treatment options, dangers and damages to children, and also describing other instances of severe sentences for less serious offenses in an exhaustive opinion by Judge Weinstein).

134. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 852 (1995).

135. See Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 191, 192 (2015); Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 *J.L. ECON. & POL’Y* 645, 653 (2011).

136. FISHER, *supra* note 89, at 213 (arguing that there is no reason to suppose that a trial judge would want “to frustrate a prosecutorial deal in the average case by demanding harsher terms than the prosecutor thinks right”).

no realistic choice but to accept a plea (so much for voluntary). A sitting federal judge puts it this way:

In most cases, in most American jurisdictions, the actual system of justice is not the one we read about in civics books and thrill to in the occasional real or fictional courtroom drama. In our real justice system, the prosecutor is the effective adjudicator of guilt or innocence and the de facto sentencing authority.<sup>137</sup>

(4) *Overconviction; Overincarceration.* In a system that tolerates overcharging, it is not surprising to find overconviction, meaning people convicted on guilty pleas for crimes that are more serious than the facts would warrant, and even to find that factually innocent defendants are convicted on guilty pleas. These outcomes are part of what is now recognized as a problem of overincarceration.

That plea bargaining leads to defendants pleading guilty to crimes they could not be convicted of, and even to convictions of the innocent, is aptly explained in these words by a former criminal defense lawyer, who has experience in both private practice and the Federal Public Defender's Office:

Brutal, all-or-nothing choices between the uncertainty of trial, with its massive sentencing penalty, and complete surrender by guilty plea increase the likelihood that innocent defendants will plead guilty. Left to the choice between, for example, a two- or three-year sentence on a simple felon-in-possession charge or a 30-to-life guideline range after trial, very few rational defendants will reject the offer. Guilt or innocence becomes largely immaterial and the effective burden of proof for the prosecution is little more than probable cause.<sup>138</sup>

The view that plea bargaining in fact results in convicting the innocent finds at least anecdotal support and some support in empirical findings based on experiments in which innocent participants charged with wrongdoing were willing to admit to minor offenses to avoid larger stigmas.<sup>139</sup> Numerous commentators agree that this problem exists.<sup>140</sup>

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137. See Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 39 (2012).

138. Gregory M. Gilchrist, *Bargaining for More Trials*, 60 CHAMPION 20, 20–21 (2016); accord Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 632–33 (2016) (arguing that plea bargaining can reduce the effective burden of proof); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (attributing problem to “unfortunate maldistribution of resources” rather than “any intrinsic difference between bargained or administered justice” and trial system).

139. See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 926 (describing innocent man convicted of charge to which he had pled guilty); Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 616 (2013) (citing statistics that

There are signs the Court is taking another look at plea bargaining, although not with any idea of abolishing it or even instituting major reforms. Instead, the focus seems to be adding another checking mechanism on the system. This new departure was signaled in the 2012 *Frye* and *Lafler* decisions, which extended some constitutional protection to the accused against inadequate lawyer performance in plea bargaining. In *Frye*, defense counsel failed to communicate an offer in timely fashion to the defendant, and the offer expired, leading to a plea of guilty to a felony (and a sentence of three years in prison) instead of the offered misdemeanor plea.<sup>141</sup> In *Lafler*, defense counsel told his client he could not be convicted of assault with intent to commit murder in a case involving four gunshots because they struck the victim below the waist. The defendant turned down a plea carrying a sentence that was one third of what he received on being convicted (51–85 months was offered; the sentence was 185–360 months).<sup>142</sup>

These decisions are breakthroughs in the sense that they bring some standards to bear on a critical part of the process that has largely escaped judicial scrutiny.<sup>143</sup> But they promise only the slightest impact on the system.<sup>144</sup> Alschuler calls them “a tiny step” in the right direction to fix a system that has “gone off the tracks, and the rails themselves have disappeared,” leaving only a hope that the system can be made “less awful.”<sup>145</sup> Consistent with that modest aspiration, commentators building on *Frye* and *Lafler* have advanced proposals for broader judicial oversight, which include holding defense lawyers to professional standards not only in advising clients (the

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indicate that nine percent of defendants ultimately exonerated had pled guilty); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34–35 (2013) (in an experiment comparing students who cheated in staged exercise with students who did not, nine out of ten “guilty” ones and six out of ten “innocent” ones accepted a pretend deal).

140. See Alschuler & Deiss, *supra* note 139, at 927; Guidorizzi, *supra* note 123, at 771 (serious concern with plea bargaining is “the increased risk of innocent defendants pleading guilty”); Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 389–90 (2015) (recounting the story of a former defense attorney who “would rather see his innocent clients plead guilty than to experience the degradation, humiliation, and systemic violence that would accrue by seeking an acquittal at trial”).

141. *Missouri v. Frye*, 566 U.S. 134, 139 (2012).

142. *Lafler v. Cooper*, 566 U.S. 156, 161, 174 (2012).

143. See Lynch, *supra* note 137, at 42.

144. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2665–69 (2013) (suggesting standards to measure adequacy of counsel during bargaining); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 487 (2013) (suggesting best practices).

145. Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706–07 (2013).

focus in *Frye* and *Lafler*) but in conducting the back-and-forth with prosecutors too.<sup>146</sup>

It has been suggested that prosecutors should be barred from taking prior arrests into consideration in making offers during plea bargaining.<sup>147</sup> In the article already cited, Alschuler argues that reforms should aim toward making trials more available (he adds that they should also aim to avoid over-criminalization, avoid expansion of federal criminal law and severe punishments, and provide funding for indigent defense). Before being appointed in 2017 to the U.S. Court of Appeals for the Third Circuit, Judge Stephanos Bibas drew an analogy between plea bargaining and ordinary consumer contracts, suggesting that plea bargaining should be regulated in analogous ways.<sup>148</sup> With a similar end in sight, Professor Rishi Raj Batra suggests designating a judge other than the sentencing judge to supervise the plea bargaining process.<sup>149</sup>

Missing from this extended conversation is any recognition of the role of *Mezzanatto* waivers. If prosecutors could not force defendants to give up their right to exclude plea bargaining statements, they would be less able to push defendants into pleading guilty when they are innocent of any crime or when they could not be convicted of the crime covered by the plea. And abolishing *Mezzanatto* waivers would fit well with some of the suggested reforms, such as sending someone from the prosecutor's office who will not handle the negotiation to explain the situation to the defendant and listen to what he has to say about what happened and why he has decided to enter a plea.<sup>150</sup> Doing away with these waivers would allow a conversation to go forward that does not shape the outcome simply because it happened.

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146. See Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377, 407 (2016).

147. Besiki Luka Kutateladze & Victoria Z. Lawson, *How Bad Arrests Lead to Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining*, 37 CARDOZO L. REV. 973, 992–93 (2016).

148. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1153 (2011).

149. Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 587–89 (2015); see also Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 65 (2015) (defendants should be allowed to request from the court a guilty plea sentence and a post-trial sentence, thus allowing the court to assess in sentencing factors such as the strength of the prosecutor's case and the potential for "undue coerciveness").

150. See Rinat Kitai-Sangero, *Plea Bargaining as Dialogue*, 49 AKRON L. REV. 63, 66 (2016) (the process "should not only give defendants fair treatment, but it should also make them feel that they received fair treatment," which has "therapeutic effect," making defendants "willing more readily to accept responsibility").

### B. *They Produce Untrustworthy Statements*

Statements made by defendants to prosecutors during plea bargaining are hearsay if offered at a later trial to prove the matters asserted,<sup>151</sup> but the hearsay doctrine does not block the use of the defendant's own statements against him.<sup>152</sup> They are the defendant's admissions and can be used against him unless they are excludable under some other principle. And the admissions doctrine is not limited by a reliability criterion.<sup>153</sup>

When we speak of the defendant's plea bargaining statements, however, we encounter reliability issues that are unusually acute. To start with, what a defendant says during plea bargaining is unreliable because of the two double binds that affect him: He must incriminate himself to make a deal, even though doing so closes him in a trap from which he has no retreat, and he must say everything that might be relevant to some charge or risk impeachment in the event of trial if he leaves something out and says it later. Such admissions should not be usable against defendants because the usual reasons we exempt admissions from any reliability requirement do not hold up. We usually say a party can take the stand and explain himself, and he has no basis to complain that he was not under oath or subject to cross when he spoke.<sup>154</sup> But it will be impossible for a defendant to explain to a jury how the dynamics of conversations with the prosecutor led the defendant to say what he said, and that he was incriminating himself in fear of more severe charges or punishments, and that his lawyer encouraged him to do so. These explanations will sound incredible, and they expose the defendant to suggestions of having committed other crimes.

In analogous situations, statutes block resort to the admissions doctrine – statutes not unlike Rule 410.<sup>155</sup> Thus, for example, statutes commonly bar the use in civil damage suits of pleas to traffic offenses, enabling violators to pay traffic tickets without fearing that doing so concedes civil liability to an injured party.<sup>156</sup> And statutes in many states bar the use against a person of statements he makes to insurance adjusters shortly after accidents.<sup>157</sup> There are other policy bases that result in excluding statements that might otherwise qualify as admissions: Thus some statutes exclude statements of apology on

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151. See FRE 801(c).

152. FRE 801(d)(2)(A).

153. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8:44 (4th ed. 2017) (for admissions there “is no requirement that statements offered as individual admissions satisfy any standard of reliability”).

154. See BROUN ET AL., *supra* note 94, at § 254.

155. FRE 410(a)(4).

156. FLA. STAT. ANN. § 318.14(4)(b) (West 2017) (paying noncriminal traffic fine constitutes admission of infraction, which “shall not be used as evidence in any other proceedings”).

157. See, e.g., MINN. STAT. ANN. § 602.01 (West 2017) (“statement secured from an injured person” within thirty days is “presumably fraudulent” in any trial for damages).

the theory that wronged and injured parties may want and benefit from such an acknowledgement, and it is socially useful to encourage wrongdoers to express sympathy and regret for what they have done.<sup>158</sup> There is also the rule blocking the use of evidence of insurance when offered to prove either wrongdoing or due care.<sup>159</sup> And there is the rule blocking proof of payment of medical expenses (or commitments to do so) when offered against the party who provides or commits to do so.<sup>160</sup>

Indeed, implicit in Rule 410 is the notion that giving defendants a chance at trial to explain the things they conceded in an attempt to bargain a plea is not good enough, even though this rationale differs from the reasons found in legislative and rulemaking history behind the provision.

It was the difficulties brought by the use against one defendant of statements to officials made by another defendant that led to the revolution in confrontation jurisprudence that came with the *Crawford* case in 2004.<sup>161</sup> Pre-*Crawford* cases expanded the against-interest exception<sup>162</sup> to embrace plea bargaining statements, and *Crawford* cites and dismisses several of these decisions in its embrace of the proposition that the confrontation clause applies to “testimonial” hearsay.<sup>163</sup> *Crawford* effectively put an end to any argument that what a defendant says to officials – both police and prosecutors – in any attempt to deal with criminal charges in plea bargaining can be admitted against some other defendant in another case. Even if the statement satisfies the against-interest exception, it is testimonial and cannot be admitted unless the new defendant had an opportunity to cross-examine the declarant before trial (as might happen at a preliminary hearing). It is in just such circumstances, when a defendant seeks to “curry favor” with authorities, as we

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158. CAL. EVID. CODE § 1160(a) (West 2017) (excluding in civil actions “statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident”).

159. FRE 411 (fact of insurance is inadmissible to prove that insured person “acted negligently or otherwise wrongfully”).

160. FRE 409 (furnishing or promising to pay medical or similar expenses is not admissible to prove liability for injury).

161. *Crawford v. Washington*, 541 U.S. 36 (2004).

162. See FRE 804(b)(3)(A)–(B) (paving the way to admit a statement by an unavailable declarant if it has “so great a tendency” to expose the speaker to “criminal liability,” that the statement would only have been made if the declarant “believed it to be true,” and if there are “corroborating circumstances” where the statement is offered against the defendant in a criminal case).

163. See *Crawford*, 541 U.S. at 63–64 (including the following two cases as examples of the “unpardonable vice” of a system in which confrontation jurisprudence turned on reliability: *United States v. Aguilar*, 295 F.3d 1018, 1021–23 (9th Cir. 2002) and *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999) (both admitting against one defendant the guilty plea allocutions of another)).

saw Shuster and Mezzanatto doing, that appraisals of trustworthiness or reliability become difficult or impossible.<sup>164</sup>

In a 1978 decision, Justice Jim Carrigan of the Colorado Supreme Court put his finger on the problem, and in the process explained why plea bargaining statements should not be admitted, even against their maker:

No matter what the real reason for a bargained guilty plea may be in any particular case, whether or not the trial court will accept that plea generally depends on its determination that the plea has a “factual basis.” Such a determination, in turn, requires the defendant or his counsel to satisfy the court that the defendant’s conduct giving rise to the more serious charges provides an adequate factual predicate to support a finding that he is guilty of the crime to which he wants to plead. Therefore, regardless of his reasons for negotiating a plea bargain, a defendant is placed in the inherently coercive situation of either providing the court with that factual basis or having the court refuse to accept his plea and force him to trial on the more grave charges. In such circumstances, a defendant may feel constrained to state what all in the courtroom expect of him, [i]e., sufficient facts connecting him to the criminal incident to assure that his plea will be accepted. In my opinion, statements made under such compulsion, however subtle, cannot be viewed as “voluntary,” and therefore their trustworthiness is unreliable at best.<sup>165</sup>

Carrigan got it right.

Langbein got it right too, when he said, “Plea bargaining puts the accused under ferocious pressure to bear false witness against himself.”<sup>166</sup> As with the problem of overcharging, the common sense behind this proposition has begun to make its way into the popular consciousness. Again, we can draw on a *60 Minutes* broadcast, this one airing in May 2017, in which Mark Cleveland told correspondent Sharyn Alfonsi that he (Cleveland) had become part of a regular process of providing false information against others in the Orange County Jail in California in order to get time off his sentences.<sup>167</sup>

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164. See *Williamson v. United States*, 512 U.S. 594, 601–02 (1994) (for different reasons, nine Justices agree that statements by one co-offender to law enforcement cannot be admitted against another; such statements are self-interested in that the speaker carries favor for himself by promising to help convict another).

165. *People v. Cole*, 584 P.2d 71, 77 (Colo. 1978) (en banc) (Carrigan, J., concurring in part and dissenting in part) (citations omitted); see also *Rands v. State*, 818 P.2d 44, 52 (Wyo. 1991) (Urbigkit, C.J., dissenting) (quoting Justice Carrigan’s dissenting opinion in *Cole* at length).

166. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 124 (1992).

167. *Snitches*, CBS NEWS (May 21, 2017, 8:20 PM), <https://www.cbsnews.com/videos/snitches/> (jailhouse informant Mark Cleveland comments that “the propensity for unreliability is huge,” that snitches are willing to “say anything,” that if they “need to [lie], they will” because “it’s about getting [out



If plea bargaining continues, at least we should not be in the business of convicting defendants at trial when the process fails on account of what was said when defendants are put under pressure to incriminate themselves to minimize their punishments.

### C. *They Are Unenforceable Contracts*

A plea agreement is a contract, and cases without number invoke principles of contract law in dealing with the issues that arise.<sup>168</sup> But it is a contract of a special kind because it is negotiated in the absence of a crucial party – the court, which can affect the promises made on both sides. The court informs the defendant of his rights, ensures that a plea has a factual basis, reviews the recommended sentence, and ensures that it is legal and appropriate under statutes and Sentencing Guidelines. In the end, a court can reject an agreement if the sentence does not comport with the Sentencing Guidelines and can let a defendant withdraw a plea.<sup>169</sup> Judicial scrutiny has not been effective in curbing prosecutorial abuse of the plea bargaining system (particularly overcharging), but judges are supposed to serve the larger public interest, which includes scrutinizing and rejecting *Mezzanatto* waivers when they are improper and enforcing the formal requirements of the plea bargaining process. Judges have more freedom here to modify terms or decline enforcement than they have in applying typical commercial contracts.<sup>170</sup>

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of] jail”) (District Attorney Anthony Joseph Rackauckas, Jr., also interviewed, denied that his office acted improperly with Cleveland or others). Reportedly these matters are under investigation. See Frank Shyong, *O.C. Supervisor Todd Spitzer Calls for Federal Oversight of District Attorney’s Office*, L.A. TIMES (May 22, 2017, 7:00 PM), <http://www.latimes.com/local/lanow/la-me-oc-spitzer-rackauckas-20170522-story.html>. In April 2017, that program aired a segment on a public defender’s office in New Orleans that has begun to refuse to handle felony cases. Interviewed by Anderson Cooper, a group of nine lawyers all agreed that they had helped their clients plead guilty to charges of which they were factually innocent. Cooper, *supra* note 55.

168. See Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 173 (2008).

169. See generally *id.* (discussing instances of withdrawal).

170. See *United States v. Seleznev*, No. CR 11-70 RAJ, 2016 WL 1720762, at \*2 (W.D. Wash. Apr. 29, 2016) (plea agreements are “construed narrowly because they ‘are unique contracts in which special due process concerns for fairness and the adequacy for procedural safeguards obtain’” (quoting *United States v. Ready*, 82 F.3d 551, 558 (2d. Cir. 1996), *superseded on other grounds by United States v. Mergen*, 764 F.3d 199 (2d Cir. 2014))); *United States v. Lauersen*, No. 98CR1134(WHP), 2000 WL 1693538, at \*6 (S.D.N.Y. Nov. 13, 2000) (plea agreements are construed “strictly against the Government,” as the Government typically drafts the plea agreement and has advantages in bargaining power; courts also consider agreements against a “background understanding of legality” and apply “general fairness principles”); DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY* § 5.9.5 (Supp. 2018) (courts should “assess the enforceability of plea agreements, even in the face of defendant’s breach

When it comes to enforcing plea agreements against prosecutors, the remedy of specific performance is available: If a prosecutor tries to withdraw from or repudiate a plea agreement without justification, she can be forced to comply with its terms or the defendant is entitled to withdraw from the plea.<sup>171</sup> Invariably, a prosecutor who chooses this course argues that the defendant did not live up to his end of the deal, usually because the defendant lied, did not cooperate in another investigation, refused to testify in another trial, or testified in a manner inconsistent with what he said before. In sum, the question is whether the defendant's material breach excuses the prosecutor from performing and whether that breach paves the way for other charges or a more severe sentence.<sup>172</sup>

Probably a defendant cannot be compelled to perform a promise to plead guilty, and courts sometimes construe a plea agreement as an offer for a unilateral contract in which a guilty plea accepts the prosecutor's offer.<sup>173</sup> But a written plea agreement is usually a bilateral executory contract creating obligations on both sides – the prosecutor is to advance certain charges, the defendant is to enter a plea, and the prosecutor is to agree to the plea and recommend a certain sentence. Usually the agreement says the defendant's refusal to perform, or his withdrawal of a plea, releases the prosecutor from her commitments,<sup>174</sup> although it does not usually release the defendant from his *Mezzanatto* waiver. The defendant can commit to testify truthfully in other trials but not to testify in a certain manner or to strive to convict another.<sup>175</sup> Courts, however, manage to fudge the difference by approving commitments

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of their terms, by looking both to principles of contract interpretation and to the interests of justice”).

171. *See* State v. Saenz, 373 P.3d 220, 222 (Utah Ct. App. 2016) (district court, in effect, granted specific performance by resentencing defendant according to original agreement after breach of agreement); *see also* State v. Rivers, 931 A.2d 185, 196–98 (Conn. 2007) (ordering a lower court to grant specific performance of a plea agreement); United States v. Alexander, 869 F.2d 91, 94 (2d Cir. 1989) (when prosecutors breach, defendants are entitled to specific performance or a chance to withdraw their pleas).

172. *See, e.g.,* Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (defendant's breach of plea agreement excuses state from performing; defendant, who had pled guilty to second-degree murder, could now be tried for first-degree murder).

173. *See* Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986) (likening plea agreement to unilateral contract; when defendant performs, prosecutor cannot renege); Pichierra v. People, 58 V.I. 516, 526 (V.I. 2013) (plea agreements are “unilateral contracts,” and when a defendant performs by entering the plea, the government may not withdraw); State v. King, 721 S.E.2d 327, 330 (N.C. Ct. App. 2012) (quoting State v. Collins, 265 S.E.2d 172, 176 (N.C. 1980)) (finding same).

174. LAFAVE ET AL., *supra* note 27, at §21.2(e) (describing available remedies for breach).

175. *See* State v. Fisher, 859 P.2d 179, 182–83, 186–87 (Ariz. 1993) (trial court properly granted a new trial and declared unenforceable a plea agreement requiring defendant witness to testify in manner that would not “vary substantially” from prior statements).

to testify in a manner consistent with prior statements, at least if the agreement also commits the defendant to be truthful.<sup>176</sup> It is hard to imagine that many defendants can mistake the import of such agreements: If they do not testify as the prosecutor wants, they cannot count on her delivering on her promise when it comes to the disposition of their own cases.

Where the terms of an agreement are in issue, or performance by the parties, defendants have won little victories. The meaning of the agreements is for the judge to determine, as is the question of breach, and plea agreements are construed strictly against the prosecutor who drafts them.<sup>177</sup> It is usually said that *Mezzanatto* waivers can be set aside if they would cause a “miscarriage of justice” (a hard standard to meet)<sup>178</sup> and are narrowly construed against the government (inevitably the prosecutor’s office drafts these agreements). Sometimes the result is that the defendant’s statements are not admissible to contradict defense witnesses<sup>179</sup> or statements by defense counsel<sup>180</sup> because language in the agreement does not reach such uses. It seems that the prosecutor bears the burden of proving that a proffer agreement was signed knowingly and voluntarily,<sup>181</sup> although there is no unanimity on this

176. *People v. Bannister*, 923 N.E.2d 244, 253 (Ill. 2009) (approving conviction based on testimony secured pursuant to plea agreement obliging witness to testify truthfully but also promising to testify consistently with prior statements because the requirement to testify truthfully was “the overriding requirement of the agreement”).

177. *United States v. Rivera*, 117 F. Supp. 3d 172, 194 (E.D.N.Y. 2015) (proffers are “construed strictly against the government” and ambiguities resolved against it).

178. *United States v. Rosemond*, 841 F.3d 95, 108, 111 (2d Cir. 2016) (waiver let government use defendant’s statements to rebut evidence or factual assertions offered or elicited by or on his behalf; defendant should have been allowed to argue, “without triggering the proffer waiver,” that government failed to prove he intended to commit murder; defense challenges to sufficiency of the evidence, even if they “carry with them the inference that events did not actually occur” are not “factual assertions” because “they do not propose an alternate version of events”); *United States v. Fazio*, 795 F.3d 421, 426 (3d Cir. 2015) (plea agreement waivers are enforceable unless they work miscarriages of justice).

179. *See United States v. Jiménez-Bencevi*, 788 F.3d 7, 16 (1st Cir. 2015) (waiver covered use of proffer statements to cross-examine and impeach defendant if he testified, not the right to use them in cross-examining defense witnesses).

180. *See United States v. Seleznev*, No. CR 11-70 RAJ, 2016 WL 1720762, at \*3 (W.D. Wash. Apr. 29, 2016) (refusing to admit defendant’s statements to contradict arguments by his lawyer; defendant understood that “he, personally, could not testify inconsistently” with his statements but not that the same limit applied to his attorneys).

181. *Compare United States v. Escobedo*, 757 F.3d 229, 233 (5th Cir. 2014), *United States v. Riedman*, No. 11–CR–6083CJS, 2014 WL 713552, at \*26 (W.D.N.Y. Feb. 18, 2014), *and United States v. Paris*, No. 3:06–cr–0064 (CFD), 2007 WL 1158118, at \*4 (D. Conn. Apr. 18, 2007) (all saying government has burden of proof), *with United States v. Jim*, 786 F.3d 802, 810 (10th Cir. 2015) (defendant has the burden of proof), *and United States v. Conroy*, Nos. 14–1120 & 06–425, 2014 WL 5426255, at \*3 (W.D. Pa. Oct. 22, 2014) (defendant has the burden of presenting evidence).

point and some decisions put this burden on the defendant.<sup>182</sup> There are signs that judges are uncomfortable with *Mezzanatto* waivers because they are so complex that a defendant who lacks legal education is not likely to understand what he is giving up.<sup>183</sup>

These little victories are not enough. As a matter of contract law, *Mezzanatto* waivers should be unenforceable for two reasons.

The first reason applies to advance or proffer waivers. These should fail for want of consideration. The defendant promises to give up his right under Rule 410 to exclude whatever he thereafter says. No consideration supports enforcement of this promise because the prosecutor provides no benefit and gives up nothing: Taking advantage of the leverage that arrest provides, she offers no assurance that a deal can be had, that she will compromise in any way, or that she will abandon any contemplated charges that the facts might support. In effect, the prosecutor says, “If you’re willing to waive some rights to talk a deal, I am willing to talk too; let’s see what we can work out.” This supposed concession is not consideration. The Restatement Second of Contracts offers an apt example: *A* offers to deliver to *B* “at \$2 a bushel as many bushels of wheat, not exceeding 5,000, as *B* may choose to order within the next 30 days,” and *B* agrees “to buy at that price as much as he shall order from *A* within that time.” *B*’s acceptance, says the Restatement, “involves no promise by him, and is not consideration.”<sup>184</sup> The promise to buy from *A* at a certain price all the wheat that *B* might decide to buy from *A* is not consideration because *B* does not actually commit to buying anything at all from *A*. Similarly, the prosecutor’s agreement to talk does not actually commit the prosecutor to make any kind of deal at all with the defendant.

It might be suggested that agreeing to talk is itself consideration. If so, it is what the Restatement calls “illusory” consideration. It is true that courts routinely say that prosecutors have no duty to bargain with defendants,<sup>185</sup> but this proposition is best understood to mean that a prosecutor has discretion in

182. See *Jim*, 786 F.3d at 810 (it was defendant’s burden “to show that his guilty plea was not knowing or voluntary”).

183. *United States v. Brooks*, No. 14-382 (RMB), 2015 WL 6509016, at \*2–3 (D.N.J. Oct. 27, 2015) (refusing to enforce waiver allowing use of his statements on cross and to rebut defense evidence; court questioned whether defendant “actually comprehended the explanations,” concluding that he was “genuinely confused”).

184. RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, illus. 1 (AM. LAW INST. 1981); see also Robison, *supra* note 99, at 683–84 (waiver compels defendant to provide consideration “upfront, before he receives anything in return,” so he gives up his rights “merely for the opportunity to bargain,” leaving him with nothing; waiver is “an illusory contract”).

185. *Weatherford v. Bursley*, 429 U.S. 545, 561 (1977) (there is “no constitutional right to plea bargain”); see also *Britton v. Commonwealth*, No. 2014–SC–000659–TG, 2015 WL 3637486, at \*4 (Ky. June 11, 2015) (a prosecutor may engage in bargaining “in his sole discretion,” as “no duty to bargain exists”); *Gov’t of V.I. v. Scotland*, 614 F.2d 360, 365 (3d Cir. 1980) (prosecutor is “under no duty to plea bargain if no offer is made”).

deciding what charges are appropriate and whether there is any room for compromise and that a prosecutor can insist on going to trial on serious charges if the facts and circumstances warrant.

In fact, such comments about prosecutorial discretion simply do not settle the matter of duty. After all, duties arise out of circumstances, custom, and risks to human and social wellbeing.<sup>186</sup> The many duties of the prosecutor have been spelled out, and they include bringing only charges that she can support with evidence and seeking just outcomes – not simply convictions on the most serious possible charges. Given the pervasiveness of plea bargaining and the utter dependence of the system on this practice – and we are speaking now of prosecutors, courts, public defenders, and the entire criminal justice system – it is simply unconvincing and unrealistic to insist that prosecutors have discretion to refuse to bargain. Everyone understands that prosecutors can insist on bringing more serious charges than a defendant is willing to accept or even talk about.<sup>187</sup> But this proposition is too thin a reed on which to base the argument that prosecutors have no duty to talk.

For this same reason, one simply cannot say with a straight face that the prosecutor who does sit down to talk has given up some significant right, and that merely talking amounts to consideration that benefits the defendant. Such a proposition is just nonsense. Indeed, a more accurate account would hold that prosecutors have a professional duty to bargain, and the ABA Criminal Justice Standards take this position.<sup>188</sup> Courts have even disciplined prosecutors who refuse to bargain when facts come to light, suggesting that this refusal stems from improper motives. In these situations, the court can order prosecutors to sit down and talk.<sup>189</sup>

That prosecutors have this duty is enough to show that agreeing to talk is illusory consideration. The Restatement offers the following example: An award is offered to “whoever produces evidence leading to the arrest and conviction of the murderer of *B*,” and *C* “produces such evidence in the per-

186. See, e.g., *Henderson v. Romer*, 910 P.2d 48, 51 (Colo. App. 1995) (duty is “an obligation to conform to a legal standard of conduct that is reasonable in light of an apparent risk”).

187. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1701 (2000) (a prosecutor has “substantial responsibility as investigator” and is “in a real sense, arbiter of the accusation,” and her “virtually unilateral discretion . . . demands neutrality, the suspension of the partisan outlook, and at least until the case passes to the adversarial stage, dedication to interests that may prove antithetical to her ultimate position”).

188. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-5.6(a) (AM. BAR ASS’N 2015) (prosecutor “should be open, at every stage of a criminal matter, to discussions with defense counsel” on disposing of charges “by guilty plea or other negotiated disposition”).

189. See *In re Rook*, 556 P.2d 1351, 1356–57 (Or. 1976) (en banc) (per curiam) (disciplining prosecutor who refused to bargain with defendants represented by a particular lawyer); LAFAVE ET AL., *supra* note 27, at § 21.3(d) (judges can become involved in assessing the prosecutor’s refusal to bargain).

formance of his duty as a police officer.” What *C* has done, says the Restatement, “is not consideration for *A*’s promise” because it was done in the discharge of his professional duties, and it follows that *A*’s promise is unenforceable.<sup>190</sup> Prosecutors are similarly situated to the police officer and cannot claim that sitting down to talk supports the defendant’s *Mezzanatto* waiver because seeking to work things out is part of the prosecutor’s professional obligation. In the *Duffy* case, a federal trial judge struck a waiver from a proffer agreement for failure of consideration, which is the right thing to do.<sup>191</sup> It must be said, however, that most courts continue to reject this argument.<sup>192</sup>

The second reason *Mezzanatto* waivers should not be enforced as contractual commitments is that they are unconscionable. Here we speak both of advance waivers (entered at the beginning of proffer sessions and covering statements yet to come) and plea bargain waivers (entered as the parties reach agreement and covering statements already made and perhaps statements yet to come, as well as factual stipulations). The Restatement lists, as factors bearing on unconscionability, “gross disparity in the values exchanged” and “gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party” and indicates that the remedy in such situations can include “denial of specific performance.”<sup>193</sup>

The inequality factor hardly requires explanation: There is simply no match between the defendant and the prosecutor, who can call on the coercive machinery of government and who, after all, is dealing with a person who has been arrested and is subject to more charges and imprisonment if he flees.<sup>194</sup> There is a standard response: It is said that only the defendant’s guilt puts him in his present handicapped position.<sup>195</sup> To put it mildly, this argument is embarrassing in its naiveté (or could we call it a purposeful distortion of reali-

190. RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. b, illus. 1 (AM. LAW INST. 1981). *But see* United States v. Webb, No. 09–755–1, 2011 WL 1226120, at \*14 (E.D. Pa. Mar. 29, 2011) (rejecting argument that proffer agreement with waiver was “inherently illusory and unenforceable”).

191. United States v. Duffy, 133 F. Supp. 2d 213, 217–18 (E.D.N.Y. 2001) (“the only thing that a defendant is guaranteed is the chance to convince the prosecutor to enter a deal,” so defendant bears “all of the risk” and the government “is under no obligation” and “loses nothing by declining”).

192. *See Webb*, 2011 WL 1226120, at \*14–15 (finding that the contract was not illusory as the government obligated itself to hear what defendant had to say); United States v. Annette, No. 2:10–cr–131, 2012 WL 1890237, at \*3 (D. Vt. May 22, 2012) (noting that defendant “received an opportunity to negotiate a deal”).

193. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c–d, g (AM. LAW INST. 1981).

194. Siegle, *supra* note 2, at 130 (arguing that the disparity between post-trial sentences and reduced sentences following negotiated pleas can force defendant into a bargain so accepting a plea is “contrary to the requirement of a voluntary waiver of constitutional protections”).

195. United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) (disparity in positions is “attributable to the Government’s evidence of the defendant’s guilt”).

ty?), and it does not fit with the presumption of innocence which, if there is to be no trial, is effectively a dead letter. Behind Franz Kafka's chilling tale in *The Trial* is the insight that seems to inform this argument.<sup>196</sup> In the end, there is simply no justification for ignoring the fear and trepidation that a defendant experiences in sitting down with a prosecutor or for assuming that it stems from guilt rather than the obvious fact that the state has chosen to arrest him and is in the process of bringing charges.

As to gross disparity in the values exchanged, it is hard to imagine greater disparities than we see in *Mezzanatto* waivers. In the case of advance waivers, the defendant gives up the right to try for a deal without digging himself into a hole in exchange for the supposed privilege of sitting down to talk. In the case of plea bargain waivers, the defendant gives up that same right, even though formally the commitment is to tell the truth. Realistically, what the defendant shoulders is a considerable obligation to repeat on the witness stand what he has said in talking to the prosecutor. It is this obligation that the defendant takes on in exchange for the prosecutor's agreement to forego more serious charges and to recommend a certain sentence. The waiver, as defendant's commitment is called, is enforced even if the defendant's plea is not accepted or is withdrawn for just cause. Again, the *Duffy* decision offers an example of a holding that rightly sees the manifest imbalance in such arrangements.<sup>197</sup>

In the *Joyeros* case, an extraordinary judge addressed the unconscionability problem in connection with a plea bargain.<sup>198</sup> He did not speak of *Mezzanatto* waivers, but Judge Weinstein did take seriously the element of unconscionability and made downward modifications in the sentence to which the parties had agreed (reducing it from 33–41 months to 23 months followed by three years of supervised release). And his comments apply at least as much to *Mezzanatto* waivers as to overall plea agreements. “Some degree of

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196. As Kafka writes,

[T]hose who are experienced in such matters can pick out one after another all the accused men in the largest of crowds. How do they know them? you will ask . . . . They know them because accused men are always the most attractive. It cannot be guilt that makes them attractive, for – it behooves me to say this as an Advocate, at least – they aren't all guilty, and it cannot be the justice of the penance laid on them that makes them attractive in anticipation, for they aren't all going to be punished, so it must be the mere charge preferred against them that in some way enhances their attraction.

FRANZ KAFKA, *THE TRIAL* 231 (Willa & Edwin Muir trans., Alfred A. Knopf 1937) (1925).

197. *United States v. Duffy*, 133 F. Supp. 2d 213, 217 (E.D.N.Y. 2001) (government has awesome advantages enhanced by the fact that Sentencing Guidelines place a “premium on cooperation,” putting defendants “under more pressure than ever to proffer” in hope of lenient sentence; waiver “exploits this power imbalance”).

198. *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 423–26 (E.D.N.Y. 2002).

coercion," he acknowledged, is behind many admissible confessions, and coercion is "inherent" in contract negotiation, even in commercial settings. There, however, one party cannot induce another "to agree by threat of criminal prosecution," which makes plea bargaining different in its coercive impact. Unacceptable coercion or undue influence exists if "the stronger party influences the weaker party in a way that destroys the weaker party's free will," and a defendant engaging in plea bargaining may experience such fear that he might not have the state of mind necessary for contracting. Indeed, Judge Weinstein noted, the Sentencing Guidelines themselves invite prosecutors to threaten more serious charges unless the defendant accepts a deal. Thus, the question is whether the defendant can "rationally weigh the advantages and disadvantages" of the proffered deal and whether a reasonable person "might make the same decision." A judge must "try to be as fully cognizant as practicable of the circumstances leading to the plea and of the nature and the background of the particular defendant, including age, education, social class, family pressures, and other relevant factors." In the end, "coercion" (at least "within limits") does not invalidate a plea agreement, so long as it does not "shock the judicial conscience" or "depart substantially from commonly held beliefs of what is appropriate pressure."<sup>199</sup>

There is good reason to suspect that the very coercive effects that Judge Weinstein described in *Joyeros* actually do operate in plea bargaining, with the seriously distorting impact that he described.<sup>200</sup> Yet it must be said that most courts continue to reject challenges to terms in plea agreements based on unconscionability.<sup>201</sup> Perhaps things are changing. In 2016, a federal judge in the *Mutschler* case refused to enforce a plea bargain waiver and commented that "in perhaps no other context involving such unequal bargaining positions have the courts so fully abdicated their responsibility for evalu-

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199. *Id.* at 425–26 (first quoting E. ALLAN FARNSWORTH, CONTRACTS § 4.9 (1982) on coercion as a defense in contract cases; then citing *Jamestown Farmers Elevator, Inc. v. Gen. Mills, Inc.*, 552 F.2d 1285, 1291 (8th Cir. 1977), on proposition that private party cannot coerce citizen into contract through threat of prosecution or regulatory inquiry; then quoting *N. Am. Rayon Corp. v. Commissioner*, 12 F.3d 583, 589 (6th Cir. 1993), on proposition that undue influence exists where stronger party destroys weaker party's free will).

200. See Scott & Stuntz, *supra* note 12, at 1925–26 (citing "anchoring phenomenon," under which "the way choices are framed affects individuals' assessments," and commenting that defendants suffer this type of cognitive error "if the benefits from refusing a proposed plea bargain are anchored to the prospect of acquittal" that may seem remote, so anchoring the benefits of trial to the remote possibility of acquittal "may irredeemably impair the ability of criminal defendants to evaluate the choice correctly," leading defendants "both to overestimate the likelihood of conjunctive events, such as events leading to conviction, and to underestimate the likelihood of disjunctive events, such as acquittal after trial," to the end that "defendants may not be fully compensated for their guilty pleas").

201. *Linzy v. State*, No. 01-02-00387-CR, 2003 WL 22456106, at \*5 (Tex. Ct. App. Oct. 30, 2003) (declining to extend "contract view" of plea agreements to allow "affirmative defense of unconscionability").



ating the conscionability of the parties' agreement."<sup>202</sup> There are a few other decisions that take this notion seriously,<sup>203</sup> including a lower court decision that relieved a driver of a guilty plea to a traffic infraction on the ground that his plea would result in suspension of his license because it was already restricted (a point that apparently nobody had noticed), so his plea was unconscionable!<sup>204</sup>

#### D. They Violate Rule 410

##### 1. Rule 410 Regulates Plea Bargaining

Most rights can be waived. That was the insight that animated the majority opinion in *Mezzanatto*. Why not treat Rule 410 as creating waivable rights? The best reason is that Congress wanted to encourage plea bargaining and intended to regulate the process in this provision.

Surprisingly, the question whether to admit at trial a defendant's statements to prosecutors in proffer or bargaining sessions was not talked about when the Rules of Evidence were drafted in the 1960s and 1970s. Writing fifty years earlier, Wigmore had nothing to say on the topic,<sup>205</sup> and McCormick's treatment of the topic just before the period of Rule formation was short.<sup>206</sup> Both were writing in times when lawyers who wanted to settle cases (civil or criminal) had to walk on eggs, casting their conversations in hypothetical terms, like "just suppose, for the sake of conversation." The reason for such tiptoeing was that naked factual assertions, whether made by lawyers as spokespersons for their clients or by the clients themselves, were taken as admissions and could be offered in evidence in a trial, even if the setting was a negotiation seeking a civil settlement or a plea in a criminal case.<sup>207</sup>

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202. *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1333–34 (W.D. Wash. 2016) (striking waiver of right to appeal in opinion by Judge Zilly).

203. *See, e.g., State v. Hess*, 23 A.3d 373, 390–91 (N.J. 2011) (implying that provision in plea agreement preventing defense from "presenting or arguing mitigating evidence" was unenforceable, and deciding that defense lawyer's compliance with this provision proved ineffective assistance of counsel).

204. *See People v. Woodard*, 727 N.Y.S.2d 575, 579–80 (J. Ct. Nassau Cnty. 2001) (relieving motorist of guilty plea to traffic infraction) (defendant had a restricted license that was suspended as a result, a point overlooked by all in the process; the court invoked unconscionability and found defendant's plea involuntary).

205. *See* 4 J. WIGMORE, EVIDENCE §§ 1061, 1067 (Chadbourn rev. 1972).

206. *CLEARY ET AL., supra* note 94, at § 274 (offers to plead guilty seem to be within the policy of excluding offers to compromise; the trend is to expand exclusionary principle to reach statements during plea bargaining).

207. *See MUELLER & KIRKPATRICK, supra* note 153, at § 4:56 (stating that the common law "stopped short of excluding unqualified factual admissions" made in settlement talks, so lawyers "had to couch their conversations in 'hypothetical' or 'conditional' terms").

One accomplishment of the Rules was to remove the necessity of speaking in this convoluted manner. In both civil and criminal cases, the relevant provisions, as we now have them, exclude any “statement” made “during” settlement or plea bargaining, so even naked factual utterances are excludable.<sup>208</sup> But while the Rules were being written, plea bargaining statements were not on the mind of the framers, and the first draft of Rule 410 spoke of withdrawn pleas and “offer[s] to plead guilty or nolo contendere”<sup>209</sup> without mentioning “statements” at all. It is not that there was no precedent for excluding plea bargaining statements as a matter of common law. There was, but the authorities were few.<sup>210</sup>

The Rule took its present form in its second published iteration in 1971, when it was broadened to reach the withdrawn plea and offer and “statements made in connection with” such a plea or offer.<sup>211</sup> Between that time and the point of enactment in 1975, however, there was much drama and a pitched battle in Congress over an issue close to the one that arose twenty years later in *Mezzanatto*. The story is told elsewhere,<sup>212</sup> but here are the important points: Forces in the Senate (especially Senator James Eastland from Mississippi, Chair of the Judiciary Committee) were sympathetic to arguments by the Justice Department and wanted language approving the impeaching use of plea bargaining statements.<sup>213</sup> Forces in the House (particularly Representative Charles Wiggins of California) were determined to block all uses, including impeachment. On this point, there was disagreement in pre-Rules cases

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208. See FRE 408 (covering “a statement made during compromise negotiations,” when offered “to prove or disprove the validity or amount of a disputed claim” but *not* covering statements made in connection with claim “by a public office in the exercise of its regulatory, investigative, or enforcement authority” if offered later in a criminal case); FRE 410 (covering “statement[s]” in plea discussions with “an attorney for the prosecuting authority” if they do *not* result in guilty plea or lead to “later-withdrawn guilty plea”).

209. PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 226–27 (1969).

210. See, e.g., *State v. McGunn*, 294 N.W. 208, 209 (Minn. 1940) (a conditional offer to plead guilty should be treated the same as a withdrawn guilty plea, hence excluded from evidence); *Bennett v. Commonwealth*, 28 S.W.2d 24, 26 (Ky. Ct. App. 1930) (en banc) (“admissions made expressly for the purpose of effecting a compromise” cannot be proved against their maker) (reversing conviction).

211. REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315, 355 (1971); RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 228 (1973).

212. See MUELLER & KIRKPATRICK, *supra* note 153, at § 5:6 (discussing legislative history).

213. See S. REP. NO. 93-1277, at 7057 (1974) (setting out version of Rule 410 allowing use of voluntary and reliable “statements . . . made in court on the record, in connection with” withdrawn pleas or offers if offered for impeachment purposes or in prosecution for perjury or false statement).

too.<sup>214</sup> So contentious did the issue become that the effective date of Rule 410 was set for a month later than the date for the rest of the Rules, in anticipation that differences on this point would be worked out in a process going forward to amend Criminal Rule 11, which deals with entering guilty pleas in criminal cases.

The outcome of this struggle left no room for doubt on the meaning of Rule 410. In the six months that intervened between enactment of the Rules and their effective date, Congress took up and passed both Rule 410 and an amendment to Criminal Rule 11 that contained identical language covering withdrawn pleas and plea bargaining statements without an “impeachment exception.”<sup>215</sup> Representative Wiggins sought to drive the point home by use of an example that he offered in a colloquy on the floor of the House,<sup>216</sup> in which a defendant charged with bank robbery admits to a judge, in support of his guilty plea, that he did enter the bank with a gun and did take money. The defendant later withdraws the plea with the court’s permission. At trial, the defendant testifies that he was in a different state at the time and “had nothing to do with” the robbery. Can the prosecutor now “make use of the contradictory statements made earlier?” Wiggins asked. The answer is no: “The adoption of the rule will preclude the prosecutor from impeaching the credibility of the defendant by his prior inconsistent statements, and literally his confession in open court.”

Thus it is clear that Congress intended to block the impeaching use of plea bargaining statements against a defendant who ultimately testifies in a trial in a manner that conflicts with what he said before. *Mezzanatto* recognized this point, and prior appellate decisions were in accord,<sup>217</sup> although a

214. Compare *State v. Anonymous*, 307 A.2d 785, 786–87 (Conn. Super. Ct. 1973) (approving impeaching use of plea bargaining statements), with *Davis v. State*, 308 So. 2d 27, 29 (Fla. 1975) (when a court rejects a bargain, defendant can accept a different deal offered by the court or go to trial “without any of his admissions, statements, or other evidence given in the plea negotiations being used against him”), and *State ex rel. Young v. Warren*, 536 P.2d 965, 971 (Okla. Crim. App. 1975) (statements by defendants in failed plea negotiations are inadmissible “on their trial in chief, or as rebuttal testimony”), and *Moulder v. State*, 289 N.E.2d 522, 528 (Ind. Ct. App. 1972) (citing *McGunn*, 294 N.W. at 209) (plea bargaining statements are privileged and inadmissible).

215. See FED. R. CRIM. P. 11; FRE 410.

216. For the quoted passages set out here, see 121 CONG. REC. 17,492 (daily ed. June 6, 1975) (statement of Rep. Wiggins).

217. *United States v. Mezzanatto*, 513 U.S. 196, 200 n.2 (1995) (agreeing that Rule 410 “give[s] a defendant the right not to be impeached by statements made during plea discussions”); accord *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982) (Rule 410 blocks impeaching use of plea bargaining statements). State decisions agree. See, e.g., *Tyree v. State*, 518 N.E.2d 814, 818 & n.3 (Ind. Ct. App. 1988) (rejecting argument for impeachment exception); *State v. Mason*, 393 N.W.2d 102, 102, 104 (Wis. Ct. App. 1986) (statute says plea bargaining statements are “inadmissible,” which indicates intent to exclude even when offered to impeach); *Gillum v. State*, 681 P.2d 87, 89 (Okla. Crim. App. 1984) (recognizing no impeachment excep-

few went the other way,<sup>218</sup> and some states adopted versions of Rule 410 that allow impeachment.<sup>219</sup>

Something else is clear about Rule 410: Its purpose is instrumental. The framers thought an exclusionary principle was necessary to encourage plea bargaining. The rulemakers who drafted Rule 410 had this purpose in mind;<sup>220</sup> the Senate Report expresses this purpose;<sup>221</sup> modern decisions construing the provision recognize it too.<sup>222</sup> For reasons developed above, the right way to understand this purpose is to grasp that Congress sought to improve the process of plea bargaining by making it fairer. That is what it means to “encourage” plea bargaining, and the argument for achieving this purpose does not turn on proving that plea bargaining would become less frequent unless the defendant’s statements are excluded under Rule 410.

The waiver approved by *Mezzanatto* – and remember that *Mezzanatto* permitted the same impeaching use that Representative Wiggins addressed in his example – conflicts with this congressional purpose. Congress thought excluding plea bargaining statements from any trial would encourage plea negotiations. If prosecutors can exact waivers of the protection Congress provided, as a condition of opening talks or as part of a deal that ultimately falls through, the congressional purpose is frustrated. As a perceptive observer put it, “Congress would not have enacted Rule 410 if it intended the Rule to be circumvented so easily and frequently that circumvention became the norm, rather than the exception.”<sup>223</sup>

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tion); *State v. Trujillo*, 605 P.2d 232, 234–35 (N.M. 1980) (rejecting impeachment exception under state counterpart to Rule 410).

218. *See United States v. Gleason*, 766 F.2d 1239, 1245–46 (8th Cir. 1985) (appearing to accept idea of impeachment exception); *see also United States v. Tesack*, 538 F.2d 1068, 1070–71 (4th Cir. 1976) (finding that it was not error for the trial court to allow the jury to have a transcript of plea negotiations).

219. *State v. Hansen*, 633 P.2d 1202, 1204–07 (Mont. 1981) (applying state counterpart expressly permitting impeaching use of plea bargaining statements). *But see People v. Cole*, 584 P.2d 71, 76–78 (Colo. 1978) (en banc) (Carrigan, J., concurring in part and dissenting in part) (discussing FED. R. CRIM. P. 11 and the state’s equivalent rule).

220. FRE 410 advisory committee’s note to 1972 proposed rules (stating that the purpose is “promotion of disposition of criminal cases by compromise”).

221. S. REP. NO. 93-1277, at 7057 (1974) (stating that the exclusionary rule “is clearly justified as a means of encouraging pleading”).

222. *See, e.g., Rachlin v. United States*, 723 F.2d 1373, 1376 (8th Cir. 1983) (“goal of the rule is to promote active plea negotiations and to encourage frank discussions” (internal quotation marks omitted) (quoting *United States v. Grant*, 622 F.2d 308, 312 (1980)); *see also United States v. Davis*, 617 F.2d 677, 682–83 & n.13 (D.C. Cir. 1979) (noting that the reasoning of FRE 410 is to promote negotiated dispositions).

223. Julia A. Keck, Recent Development, *United States v. Sylvester: The Expansion of the Waiver of Federal Rule of Evidence 410 to Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 TUL. L. REV. 1385, 1399 (2010).

## 2. Rule 410 Is Not a Default Principle

There are more down-to-earth reasons why *Mezzanatto* waivers violate the Rules, turning on the language of Rule 410 itself and the mechanisms set up by the Rules for objecting or waiving objections to evidence.

When *Mezzanatto* reached the Court, Rule 410 said plea bargaining statements were excludable “except as otherwise provided” in the Rule itself.<sup>224</sup> Not surprisingly, the lawyers for Gary Mezzanatto made this point, casting it in terms of “plain meaning” and highlighting the many Civil and Criminal Rules that expressly provide for adjustments through stipulations and agreements. Rule 410 does contain “express” exceptions. These pave the way to prosecute for perjury or false statement in the case of some plea bargaining statements (those made “in court, on the record, in the presence of counsel”) and allow their introduction if “another statement” in the same plea bargaining has been introduced “if in fairness both statements ought to be considered together.”<sup>225</sup> And so the conclusion: The absence from Rule 410 of any reference to stipulations and agreements, and the inclusion of express exceptions, mean that stipulations and agreements cannot suspend the exclusionary principle.

*Mezzanatto* waivers also evade the mechanism set up in the Rules for admitting and excluding evidence. It is not the case that the rulemakers forgot to address the matter of waiving rights to exclude evidence. Under Rule 103, failing to object at trial waives that right,<sup>226</sup> and the Evidence Rules envision trials in which factfinders see and hear actual proof. It was with this point in mind that the Court held in the *Old Chief* case two years after *Mezzanatto* that defendants in criminal cases – and really the Court was speaking of all parties in all cases – cannot, generally speaking, confine or cabin the proof offered by the opposition by offering to stipulate to whatever that proof might show.<sup>227</sup> The Rules contemplate that evidence that could be excluded on objection may be considered for any purpose that is left open by the failure to object at trial (or by making only a limited objection), so statements excludable as hearsay may be considered, for example, as proof of whatever they

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224. This language was deleted in 2011 in the restyling project, but the restylers tell us that the changes were “intended to be stylistic only” and there was “no intent to change any result in any ruling on evidence admissibility.” FRE 410 advisory committee’s note to 2011 amendments.

225. Rule 410 still contains this exception in slightly changed language that now allows prosecutions for perjury or false statement “if the defendant made the statement under oath, on the record, and with counsel present.” FRE 410(b)(2).

226. See FRE 103(a). But see FRE 103(e) for the exception of “a plain error affecting a substantial right.”

227. *Old Chief v. United States*, 519 U.S. 172, 186–87 (1997).

assert.<sup>228</sup> In sum, it is at trial that the Evidence Rules are to be applied, and trials are not to be scripted by advance agreements.

One might argue that the exclusionary principle in Rule 410 is very like a privilege. If it were a privilege, it would be an exception to the general principle that objections are to be raised at trial.<sup>229</sup> A privilege would have to be claimed before trial in settings like depositions or hearings or even plea bargaining sessions, and there would be a fair argument that disclosure waived any claim of protection. But in fact the whole purpose of Rule 410 is to allow conversations that include disclosures. And in fact courts have considered the question whether Rule 410 creates a privilege and have concluded that it does not.<sup>230</sup> Hence plea bargaining statements may be subject to discovery, and disclosures to outsiders do not waive a defendant's right to exclude plea bargaining statements under Rule 410. In short, the protections offered by Rule 410 are intended to operate at trial and are not subject to an obligation to claim at the earliest opportunity.

## V. THERE IS A BETTER WAY

The better way is the one envisioned by Congress in enacting Rule 410, and it can be said simply. Plea bargaining statements by the accused should be excludable from trial if negotiations lead nowhere, produce a bargain from which either side withdraws, end when a court refuses to accept a proposed plea, or produce a plea from which the defendant withdraws with the court's permission. Negotiations should proceed under the recognition that the exclusion of plea bargaining statements should not be a mere default rule that is only enforceable absent a waiver. In sum, negotiation, agreement, plea, and waiver should be seen as being of a piece in accord with the unitary principle: If they do not succeed in resolving the case, whatever charges are brought should go forward as if nothing had happened.

### *A. If Plea and Agreement Fail to Resolve Case, Waiver Should Be Inoperative*

Almost a century ago, the Supreme Court offered a better vision of plea bargaining than we find in *Mezzanatto*. The question before the Court in 1927 in the *Kercheval* case was whether the prosecutor could use against the defendant a guilty plea that he had been allowed to withdraw because the prosecutor had promised him a three-month jail sentence (plus a \$1000 fine),

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228. MUELLER & KIRKPATRICK, *supra* note 153, at § 8:5 (When hearsay is admitted, it “may be considered by the trier in determining the facts and reaching a verdict or decision.”).

229. *Id.* at § 11:4.

230. *Doe No. 1 v. United States*, 749 F.3d 999, 1007–08 (11th Cir. 2014) (FRE 410 does not create a privilege.).

but the trial court had sentenced him to three years in federal prison.<sup>231</sup> The Supreme Court reversed the conviction and held that a plea of guilty withdrawn by permission is inadmissible at a later trial. Allowing withdrawal, said the Supreme Court, is “to adjudge that the plea of guilty be held for naught,” and a plea that was annulled has “ceased to be evidence.” Even more important is the Supreme Court’s observation that the withdrawn plea could not be admitted “without putting [the defendant] in a dilemma utterly inconsistent” with the decision allowing him to withdraw the plea, as its use in evidence at his later trial “may have turned the scale against him.”<sup>232</sup> We can note in passing that Rule 410 excludes a withdrawn plea of guilty from the later criminal trial, thus codifying the holding of *Kercheval*. Of course enforcing a *Mezzanatto* waiver produces very nearly the same evil that *Kercheval* sought to prevent.<sup>233</sup>

This early expression of what we have called the unitary principle holds that the various parts of a deal – agreement, plea, and now waiver – should be viewed as part of a single transaction whose aim on both sides is to resolve criminal matters without trial. When the effort fails, plea and agreement obviously fail and drop out of the picture. So too should the waiver.

This principle continues to be recognized in post-*Mezzanatto* opinions. One example is the decision in the *Jim* case in 2015.<sup>234</sup> There, a panel of the Tenth Circuit enforced a waiver after the trial court let the defendant withdraw the plea, which led to trial, conviction, and appeal. The reviewing court acknowledged that it was reaching an internally conflicted result (plea withdrawn, waiver enforced) but chalked it up to the peculiarities of the rules governing appeals: The court acknowledged that it was inconsistent to let a defendant withdraw his plea while enforcing his waiver, and “one of the two” rulings is wrong. But only the ruling on the waiver was before the court, as the decision allowing the defendant to withdraw the plea and go to trial was not an appealable order, and the review of the order enforcing the waiver was folded into the review of the conviction!

This conclusion involves something close to logic chopping (the court could surely have concluded that the waiver should not have been enforced), and elsewhere the court managed to engage in still more fancy footwork. A trial court can let the defendant withdraw a plea for any “fair and just” reason, the court said, but waivers are enforceable as long as they are part of a plea that is “knowing and voluntary.” This interpretation mistakenly reads the *Mezzanatto* proviso as stating the *only* ground for ignoring a waiver, and it drives a wedge between the “fair and just” standard that applies when the defendant seeks to withdraw his plea and the constitutional “knowing and

231. *Kercheval v. United States*, 274 U.S. 220, 221 (1927).

232. *Id.* at 224; see also *LAFAYETTE ET AL.*, *supra* note 27, at § 21.5(f) (reporting that “the more recent state decisions” agree with *Kercheval*).

233. Rule 410 provides that “a guilty plea that was later withdrawn” is inadmissible in later civil or criminal cases. FRE 410(a)(1).

234. *United States v. Jim*, 786 F.3d 802 (10th Cir. 2015).

voluntary” standard that entitles the defendant to do so. That is exactly what the decision in the *Jim* case succeeded in doing: Implicitly at least, it found the waiver valid because there was no constitutional violation even though the trial judge had found that fairness required the court to let the defendant withdraw the plea.<sup>235</sup> Other modern decisions embrace the idea that failing to terminate the case with an effective plea should mean that prior negotiations no longer have any impact on the case, whether the reason is that the defendant or the prosecutor withdraws from the agreement, the court refuses to accept the plea, or the defendant enters but later withdraws the plea.<sup>236</sup>

This vision informed by the unitary principle is the right one and is substantially better than the world we inhabit today. This vision treats plea bargaining very much the same way that we treat civil settlement negotiations today and honors the purpose and letter of Rule 410.

### *B. Both Substantive and Impeaching Uses Should Be Blocked*

Even if substantive use of the defendant’s plea bargaining statements should be disallowed for the reasons set forth in this Article, it might be thought that the impeaching use should be allowed. After all, important exclusionary principles give way to allow use of evidence to contradict or correct trial testimony, helping to prevent the trier of fact from being misled and shedding light on the credibility of witnesses. Thus statements that would otherwise be excluded as hearsay may be used to contradict and impeach, and the same is true of evidence that would otherwise be excluded under the rule

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235. *Id.* at 807–08, 813 & n.5 (the judge let the defendant withdraw a plea because he still thought he would have a trial on guilt or innocence, then correctly enforced *Mezzanatto* waiver).

236. *United States v. Newbert*, 504 F.3d 180, 182–83, 185 (1st Cir. 2007) (in withdrawing plea, defendant did not breach agreement; court erred in ruling his statements admissible; allowing withdrawal was proper, and negating that order “would not only harm the defendant’s rights, but would also undermine the conclusiveness” of the ruling) (“providing some protection for defendants from pleas gone awry fosters plea bargaining by encouraging openness and honesty during plea negotiations”); *United States v. Ventura-Cruel*, 356 F.3d 55, 63–64 (1st Cir. 2003) (court refused the plea and should have excluded statements; defendant was “deprived of the benefit of his plea bargain” but government used statements made in reliance on it; parties should be returned “status quo ante”); *State v. Amidon*, 967 A.2d 1126, 1135 (Vt. 2008) (it is error to admit statements made in connection with a plea agreement after defendant was allowed to withdraw) (statements and plea are to be treated as if they were never made if plea is withdrawn; both in-court and out-of-court proceedings are integral and cannot be separated); *People v. Alt*, 854 N.Y.S.2d 591, 592 (N.Y. App. Div. 2008) (“where a defendant’s plea is withdrawn, it is out of the case for all purposes and the People may not use the plea or the contents of the plea allocution” in case-in-chief or to impeach) (the court refused to accept plea because some of defendant’s statements raised doubt as to his guilt); *State v. Trujillo*, 605 P.2d 232, 235 (N.M. 1980) (if a plea is entered and later withdrawn, “at trial it is to appear as though the earlier plea and/or plea discussions never took place”).



barring use of character evidence, as well as evidence gathered in violation of the Fourth, Fifth, and Sixth Amendments to the Constitution.

Still, there are at least four reasons to shut the door even to the impeaching use of plea bargaining statements against criminal defendants.

First, even the limited impeaching use of plea bargaining statements approved in *Mezzanatto* puts up an obstacle that discourages a defendant from testifying at all, including one who plans to stick closely to the truth. For reasons described in this Article, the pressures on a defendant in plea bargaining ensure that some of what he says is purposefully cast in the direction of incriminating himself, even if achieving this purpose requires overstatement. Faced with the warning that a defendant may have to explain such statements, a defense lawyer is likely to advise his client that adequate explanation is impossible and that the very attempt to explain will likely uncover further details of criminality and reveal the very fact that the defendant tried to reach a deal, which itself suggests guilt to anyone not familiar with the process.

Second, for the defendant brave enough to testify, the impact of questions bringing out what he said during plea discussions is likely to extend well beyond casting doubt on his credibility. While the difference between impeaching and substantive uses of statements is basic to American evidence law, factfinders (particularly juries) are unlikely to maintain the distinction faithfully. A defendant who testifies to any point bearing on the charges against him may not only be disbelieved but also convicted by the very statements he made when he thought he was helping himself avoid trial. This use of out-of-court statements is viewed as nonhearsay and allowed, subject only to the power to exclude for undue prejudice under Rule 403.<sup>237</sup>

Third, the accommodation for impeachment that we find in other doctrines does not provide enlightenment on the question whether plea bargaining statements should be usable for that purpose. The hearsay doctrine would, after all, put no limits at all on the use of the defendant's own statements against him. The limited accommodation in the hearsay doctrine that allows the impeaching (but not substantive) use of nonparty witness statements applies to proof that is far less likely to be devastating to defendants, and the Court has recognized the uniquely damaging nature of the defendant's own statements. The rules on character evidence allow for refutation and testing, but they come into play only where a defendant opens up the subject by offering his own good character as proof of innocence.<sup>238</sup> This accommodation in no way restricts the defendant in testifying to the acts giving rise to the charges against him.<sup>239</sup> Finally, the use of evidence collected illegally under the Fourth, Fifth, or Sixth Amendments<sup>240</sup> for impeachment

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237. See MUELLER & KIRKPATRICK, *supra* note 153, at § 8:19.

238. See FRE 404(a).

239. MUELLER & KIRKPATRICK, *supra* note 153, at § 4:43.

240. *Michigan v. Harvey*, 494 U.S. 344, 345–46 (1990) (statements taken in violation of Sixth Amendment can be used to impeach); *United States v. Havens*, 446 U.S. 620, 627–28 (1980) (evidence gathered in violation of Fourth Amendment can be

purposes is designed to calibrate the incentives operating on police and prosecutors in the areas covered by those provisions, and this accommodation has little or nothing to do with the present subject – achieving fairness in the plea bargaining process.

Fourth, Congress addressed the matter at hand and decisively rejected the use of plea bargaining statements for impeachment purposes, as described above. If *Mezzanatto* waivers are not to be enforced – and this Article argues that they should not be enforced in most cases that go to trial – there is simply no room to argue that plea bargaining statements should be admitted to impeach. Congress reached the right solution: Excluding plea bargaining statements is critical to the integrity and fairness of the system, and the parties should return to the beginning point if negotiation fails to resolve the case. In short, barring even the impeaching use of plea bargaining statements is the right thing to do despite the clear utility more generally of allowing use of prior statements to impeach. Here is a place to depart from the more general approach to impeachment.

Now it is useful to pause and look at the decisions that not only follow *Mezzanatto* but also extend the decision by approving the *substantive* use of plea bargaining statements covered by waivers. The first authoritative decision to take this course was the *Burch* case in 1998, in an opinion by a distinguished panel of the District of Columbia Circuit.<sup>241</sup> Judge Wald wrote that *Mezzanatto* turned on three principles: First, waivers of statutory protections are “presumptively enforceable.” Second, Congress did not intend “to preclude or to limit” waiver of the protections of Rule 410 (and the corresponding Criminal Rule). Third, “public policy” points toward enforcing a broader waiver. Hence *Mezzanatto* does not support “drawing any distinction” between impeaching and substantive uses. Rule 410 (and the corresponding Criminal Rule) protects “personal” and “institutional” interests, but the institutional concern of encouraging “candid plea discussions” does not support a distinction between impeaching and substantive uses. Nor, the court asserted, have any reasons been advanced supporting the conclusion that waivers covering case-in-chief use of plea bargaining statements would have a “markedly greater impact” than impeachment waivers on the willingness of defendants to participate in plea discussions.<sup>242</sup> Most post-*Burch* decisions have approved extending waivers to the substantive (or case-in-chief) use of plea bargaining statements,<sup>243</sup> although a few appear to approve only waivers covering impeachment and at least cast doubt on substantive waivers.<sup>244</sup>

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admitted to impeach); *Harris v. New York*, 401 U.S. 222, 224–26 (1971) (statements gathered in violation of Fifth Amendment can be used to impeach).

241. *United States v. Burch*, 156 F.3d 1315, 1320–21 (D.C. Cir. 1998).

242. *Id.* at 1322 (opinion by Judge Wald with Judges Williams and Tatel on the panel).

243. *See United States v. Mitchell*, 633 F.3d 997, 1004 (10th Cir. 2011); *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009); *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008); *United States v. Mergen*, No. 06–CR–352 (NGG), 2010 WL 395974, at \*4 (E.D.N.Y. Feb. 3, 2010); *United States v. Nesbitt*, No. 2:08–CR–

In one sense, *Burch* was right. In trials where the defendant testifies, the damage done by allowing substantive use may not be much greater than the damage done by allowing only impeaching use. Still, *Burch* too is wrongly decided. It misstates the purpose of Rule 410, which is to encourage fairness in the plea bargaining process, not to increase the number of times when plea bargaining goes forward (which can hardly be increased beyond its already high level). *Burch* is also mistaken, just as *Mezzanatto* was mistaken, in concluding that Congress did not intend to “preclude or limit” waivers. *Burch* undervalues the difference between impeaching and substantive uses, a distinction that remains fundamental in American evidence law. To say that waiver doctrine does not support “drawing any distinction” between impeaching and substantive uses is another example of logic chopping. There are other reasons for drawing such a distinction, even if they do not constitute part of “waiver” doctrine: If the defendant does not plan to testify for some other reasons – a common one being prior convictions that can be used to impeach veracity – enforcing a substantive waiver means the prosecutor has positive evidence that can be used to convict. In contrast, limiting the waiver means the prosecutor cannot make any use of what the defendant conceded in plea bargaining. A moment’s reflection yields the conclusion that enforcing a limited waiver has less adverse impact on the quality of plea bargaining than enforcing a broad waiver.

Here a digression is in order: The waiver in *Mezzanatto* was oral, and the Court said it covered impeachment of the defendant if he testified inconsistently with his plea bargaining statements.<sup>245</sup> Today waivers are in writing. Sometimes they are limited to impeachment, but often waivers, even when they stop short of authorizing use during the prosecutor’s case-in-chief, reach

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1153–DCN, 2010 WL 3701337, at \*3–6 (D.S.C. Sept. 14, 2010); *United States v. Annette*, No. 2:10–cr–131, 2012 WL 1890237, at \*4 (D. Vt. May 22, 2012); *United States v. Stevens*, No. 2:09–cr–00222–11, 2010 WL 5343189, at \*1 (S.D.W. Va. Dec. 21, 2010); *People v. Stevens*, 610 N.W.2d 881, 886–87 (Mich. 2000); *State v. Wills*, 762 S.E.2d 3, 3 (S.C. 2014); *State v. Campoy*, 207 P.3d 792, 803 (Ariz. Ct. App. 2009); *State v. Rafferty*, No. 26724, 2015 WL 1932693, at \*12–14 (Ohio Ct. App. Apr. 29, 2015). *But see* *United States v. Kowalewski*, No. 2:13–CR–00045–RWS, 2014 WL 6667127, at \*12 (N.D. Ga. Nov. 24, 2014) (plea agreement at issue was ambiguous concerning waiver of FRE 410; therefore the court granted defendant’s motion to suppress evidence of the plea agreement); *United States v. Mitchell*, No. 4:10–CR–57, 2010 WL 5490771, at \*2 (E.D. Tex. Dec. 10, 2010) (preventing federal prosecutor from using plea agreement negotiated previously with state prosecutor in its case-in-chief).

244. *See, e.g., People v. Garcia*, 169 P.3d 223, 227–28 (Colo. App. 2007) (allowing impeaching use and labeling substantive use as “palpably unfair”).

245. *See United States v. Mezzanatto*, 513 U.S. 196, 198 (1995); *see also United States v. Jiménez-Bencevi*, 788 F.3d 7, 16 (1st Cir. 2015) (waiver covered only use of proffer statements to cross-examine and impeach defendant, not other witnesses for defense).

deeper into areas of rebuttal.<sup>246</sup> These waivers already authorize a kind of “substantive” use of what the defendant said before. It is one thing to use his statements to impeach his own testimony, where the theory is that differences between what he says now and what he says before show vacillation, hence the possibility of errors or lies in his testimony, without being taken as proof of what it asserts. It is another thing to use his statements to disprove whatever his lawyer argues or other witnesses say on the stand, where the statements tend to refute (hence “impeach”) other evidence given in the case. The Court has recognized this distinction in another context.<sup>247</sup> Courts construing waivers sometimes recognize this point too and conclude that a waiver that speaks of impeachment does not include a go-ahead to use defendant’s statements to contradict other witnesses.<sup>248</sup> But some decisions persist in approving the use of plea bargaining statements for this purpose of refutation, while purporting to observe the impeachment limit.<sup>249</sup> Once again, broader waivers cause more damage to plea bargaining than narrower waivers.

### C. Both Proffer and Plea Waivers Should Be Invalid

As between proffer waivers and plea bargain waivers, the former are the more egregious instance of prosecutorial overreach because they ask the defendant to give up something he cannot adequately appraise (he does not know what will be said, where the conversation will lead, or what charges are contemplated). But even plea bargain waivers (which often operate on statements yet to be made as well) amount to overreach and are damaging to defendants and the process. In both instances, the defendant assures his own conviction as the cost of making or trying to make a deal that is not final and may never become final. In the case of proffer waivers, the attempt to make a deal may fail. In the case of plea bargain waivers, the deal may not resolve the case because (a) one or the other party withdraws, (b) the court refuses to accept the plea, or (c) the defendant is allowed to withdraw the plea.

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246. *United States v. Shannon*, 803 F.3d 778, 780, 781, 784–85 (6th Cir. 2015) (allowing use of defendant’s statements “to rebut any evidence offered by your client that is inconsistent with the statements made during this discussion”); *United States v. Wainwright*, 89 F. Supp. 3d 950, 959 (S.D. Ohio 2015) (covering use of statements “for impeachment, cross-examination and rebuttal in any future proceedings,” and the latter “includes [i]n-court contradiction of an adverse party’s evidence” (alteration in original) (internal quotation marks omitted)). *But see* *United States v. Brooks*, No. 14-382 (RMB), 2015 WL 6509016, at \*1–3 (D.N.J. Oct. 27, 2015) (granting defendant’s motion to preclude statements made during proffer meeting).

247. *James v. Illinois*, 493 U.S. 307, 318 (1990) (refusing to allow expansion of impeachment exception to cover use of statements taken from defendant in violation of Fourth Amendment to impeach other witnesses because doing so would discourage defendants from offering their best defense).

248. *See, e.g., Jiménez-Bencevi*, 788 F.3d at 16 (impeachment waiver did not cover use of defendant’s statements in cross-examining other witnesses).

249. *E.g., United States v. Krilich*, 159 F.3d 1020, 1025 (7th Cir. 1998).

Thus, all four arguments advanced in this Article point to the conclusion that these waivers should not be honored: They make plea bargaining unfair and magnify its dysfunctionality; they produce untrustworthy statements; they amount to unenforceable contracts; they violate Rule 410.

Of course prosecutors object to this conclusion, if for no other reason that moving in this direction will substantially reduce their powers over defendants. They have a slightly more persuasive argument as well: They claim to need durable waivers to ensure that they get from the defendant information they can trust and stress the difficulties that they face in deciding whether to compromise in the larger interest of convicting more serious offenders (*Mezzanatto* recognized these difficulties).<sup>250</sup> It is true that if the prosecutor and the defendant reach an agreement that calls for cooperation by the defendant in the trials of other offenders, prosecutors need to be sure that the deal will do what it is supposed to do: If the court accepts the deal and the other trials have yet to go forward, the prosecutor has less leverage to obtain promised testimony.<sup>251</sup> The best way to achieve that goal, prosecutors argue, is to be sure that the defendant commits to whatever he discloses in proffer sessions, and the best way to ensure his commitment is to bind him to what he says so that waffling later becomes costly.<sup>252</sup>

But the prosecutor's argument fails for many reasons, which collectively demonstrate that the prosecutor does not need *Mezzanatto* waivers to secure her goal. For one thing, she can set up a plea deal with a cooperating defendant that contemplates deferred sentencing, so the defendant must testify in other proceedings before receiving his own sentence, and the sentence recommendation can be contingent on such cooperation.<sup>253</sup> Secondly, it is at least likely that the prosecutor can use against the defendant, in the event that a trial becomes necessary, any testimony that he gives in performing his obligations under the plea agreement.<sup>254</sup>

Thirdly, the prosecutor has a defense to her own performance of a plea agreement if the defendant is in material breach by failing to deliver promised

250. See *Mezzanatto*, 513 U.S. at 207.

251. For an excellent discussion of this matter, see generally Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992).

252. *United States v. Gomez*, 210 F. Supp. 2d 465, 475 (S.D.N.Y. 2002) (“prosecutors will be reluctant to enter into cooperation agreements” unless assured “that the defendant will tell the truth, and if a defendant knows that his statements cannot later be used against him (unless he testifies), he may be more likely to embellish and lie” in proffer sessions).

253. See *United States v. Blassingame*, 197 F.3d 271, 285 (7th Cir. 1999) (bribery statute does not require exclusion of testimony given under promise of criminal immunity or reduced sentence); *Gleason v. McKune*, No. 11-3110-SAC, 2012 WL 2952242, at \*9 (D. Kan. July 19, 2012) (plea agreements conditional on testifying “are not impermissible inducements to lie”).

254. *United States v. Stirling*, 571 F.2d 708, 731-32 (2d Cir. 1978) (defendant's prior testimony in grand jury proceedings pursuant to plea agreement that defendant later abrogated was admissible against him).

cooperation, and even a court's acceptance of a guilty plea can be rescinded if the defendant fails to perform the obligations created by the plea agreement. In this event, the prosecutor is released from her obligations under the plea agreement and can file new and additional charges or recommend more severe punishment.<sup>255</sup>

Fourth, the prosecutor's argument rests on the false premise that what the defendant says is truthful and reliable because he commits himself to it. In fact plea bargaining statements are not reliable for reasons developed in this Article – the defendant incriminates himself because he must in order to make a deal and signing the waiver is another step toward the deal, not an assurance that what has been said should be believed. Fifth and finally, it is (to put it mildly) unclear why the system should expect truthfulness from defendants when it does nothing to enforce truthfulness on the part of prosecutors.<sup>256</sup>

## VI. CONCLUSION

Prosecutors actually resemble those compelling figures that we remember from the Godfather movies for reasons other than their wielding of power over others. As portrayed by actors like Brando, De Niro, and Pacino, the Corleones are engaging and compelling figures because they are loyal and devoted to their wives and families and shrewd and persevering in dealing with cruel realities in the world.<sup>257</sup> So a natural response includes some grudging measure of admiration, however much we recoil from the underlying violence and criminality. To some extent, we expect prosecutors to care with similar perseverance for the public families they represent and protect.

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255. See *State v. Lewis*, 779 S.E.2d 643, 649 (Ga. 2015) (on defendant's material breach, court could set aside plea bargain, and court would be relieved of duty to sentence in accordance with prosecutor's recommendation); *Falero v. State*, 69 A.3d 1210, 1213 (Md. Ct. Spec. App. 2013) (defendant's breach by absconding entitled state to vacate plea agreement returned the case to “square one, as if the guilty plea had never been entered”); *State v. Armstrong*, 35 P.3d 397, 400–01 (Wash. Ct. App. 2001) (plea agreement allowed prosecutor to file other charges if defendant breached; defendant did breach, and prosecutor could file those charges).

256. See *United States v. Sylvester*, 583 F.3d 285, 294 (5th Cir. 2009) (upholding *Mezzanatto* waiver but noting possibility of “misrepresentations or manufactured evidence that overbear the will of the defendant”).

257. See *THE GODFATHER* (Alfran Productions 1972) (film directed by Francis Ford Coppola, with Marlon Brando as Don Vito Corleone and Al Pacino as Michael Corleone; winner of three Academy Awards, five Golden Globes, and one Grammy), followed by *THE GODFATHER PART II* (The Coppola Company 1974) (also directed by Coppola, with Robert De Niro as the younger Don Vito Corleone and Al Pacino as the older Michael Corleone; winner of six Academy Awards, including Best Picture), both based on MARIO PUZO, *THE GODFATHER* (1969), which was followed by MARIO PUZO, *THE SICILIAN* (1984), and then followed after Puzo's death by ED FALCO, *THE FAMILY CORLEONE* (2012).

Still, the naked power of the fictional Corleones is a big part of the take-away from Mario Puzo's compelling stories, and we ask of prosecutors more respect for fairness than we see in the bosses of Cosa Nostra that the novels and movies depict. The fairness that we expect cannot exist in an environment of *Mezzanatto* waivers that are part and parcel of modern plea bargaining. These waivers contribute significantly to major negative externalities of plea bargaining, including overcharging, over-convicting, and overincarceration; they also produce unreliable statements that are then used to justify guilty pleas; they rest on contracts that should not be enforceable; they violate the letter of Rule 410 and frustrate the underlying congressional purpose.

*Mezzanatto* acknowledged that waivers are not enforceable when they violate constitutional norms that require pleas and plea agreements to be knowing and voluntary, and the opinion leaves room to invalidate waivers for other reasons. Disappointingly, courts have mostly not taken advantage of this opening and have tended to enforce *Mezzanatto* waivers in all four of the situations in which they can operate – when bargaining fails to produce agreement, when agreement is reached but one side or the other withdraws, when courts do not accept pleas tendered pursuant to agreement, and when the defendant is allowed to withdraw a plea. *Mezzanatto* leaves room for things to change, and the situation would improve if these waivers were made inoperative across the board.

#### APPENDIX 1

##### *Federal Cases Approving Waivers Covering Use of Defendant's Statements in Prosecutor's Case-in-Chief*

*Court of Appeals for the District of Columbia:* United States v. Burch, 156 F.3d 1315, 1320–24 & n.5 (D.C. Cir. 1998) (approving use of plea bargaining statements in government's case-in-chief; waiver principles do not support distinction between impeaching and substantive uses).

*First Circuit:* United States v. DeLaurentiis, 638 F. Supp. 2d 76, 77–78 (D. Me. 2009) (enforcing waiver that covers all uses of defendant's plea bargaining statements).

*Second Circuit:* United States v. Mergen, No. 06–CR–352 (NGG), 2010 WL 395974, at \*4 (E.D.N.Y. Feb. 3, 2010) (enforcing waiver allowing use of defendant's plea bargaining statements in government's case-in-chief).

*Fourth Circuit:* United States v. Nesbitt, No. 2:08–CR–1153–DCN, 2010 WL 3701337, at \*5–6 (D.S.C. Sept. 14, 2010) (enforcing waiver and authorizing government to offer defendant's statements during its case-in-chief).

*Fifth Circuit:* United States v. Sylvester, 583 F.3d 285, 289–91 (5th Cir. 2009) (enforcing waiver allowing use against defendant of his plea bargaining statements during government's case-in-chief).

*Sixth Circuit:* United States v. Fifer, 206 F. App'x 502, 509–10 (6th Cir. 2006) (enforcing waiver in proffer letter allowing of defendant's statements during government's case-in-chief).

*Eighth Circuit:* United States v. Young, 223 F.3d 905, 909–11 (8th Cir. 2000) (entitling government to use defendant's plea bargaining statements “in its case against” defendant).

United States v. Stevens, No. 2:09-cr-00222-11, 2010 WL 5343189, at \*3 (S.D.W. Va. Dec. 21, 2010) (paving the way to allow use of stipulation of facts during government's case-in-chief).

United States v. Mayer, 748 F. Supp. 2d 1022, 1029–30 (N.D. Iowa 2010) (allowing all uses of stipulated facts during trial).

*Ninth Circuit:* United States v. Rubio, No. CR 08-954-PHX-JAT, 2009 WL 1186245, at \*2 (D. Ariz. Apr. 28, 2009) (covering substantive uses of statements).

*Tenth Circuit:* United States v. Jim, 786 F.3d 802, 813 & n.6 (10th Cir. 2015) (after defendant withdrew guilty plea with court's permission, prosecutor could introduce his plea bargaining statements; waiver did not limit government to impeachment, and allowed use during government's case-in-chief).

United States v. Mitchell, 633 F.3d 997, 1004 (10th Cir. 2011) (enforcing waiver allowing government to use defendant's statements during government's case-in-chief).

## APPENDIX 2

### *Federal Cases Approving Waivers Covering Refutation of Defense Evidence*

*Second Circuit:* United States v. Roberts, 660 F.3d 149, 163–64 (2d Cir. 2011) (enforcing waiver permitting government to use defendant's statements to rebut any evidence offered or elicited, or factual assertions made on behalf of defendant).

United States v. Rivera, 117 F. Supp. 3d 172, 179 (E.D.N.Y. 2015) (government promised not to use defendant's statements during its case-in-chief but reserved right to use them to cross-examine defendant and rebut evidence offered on his behalf).

United States v. Paris, No. 3:06-cr-0064 (CFD), 2007 WL 1158118, at \*5 (D. Conn. Apr. 18, 2007) (covering use in rebuttal of defendant's statements but not use during government's direct case).

*Third Circuit:* United States v. Hardwick, 544 F.3d 565, 568–70 (3d Cir. 2008) (under waiver covering impeachment and rebuttal, government could use defendant's proffer statements to refute evidence adduced by defendant in cross-examining government witnesses).

*Sixth Circuit:* United States v. Shannon, 803 F.3d 778, 781, 783 (6th Cir. 2015) (proffer agreement waived right to exclude statements “to rebut



any evidence offered by your client that is inconsistent with the statements made during this discussion”).

*United States v. Wainwright*, 89 F. Supp. 3d 950, 957–59 (S.D. Ohio 2015) (allowing government to use defendant’s statements for impeachment, on cross, and to rebut testimony by defense witnesses).

*Seventh Circuit: United States v. Krilich*, 159 F.3d 1020, 1025 (7th Cir. 1998) (proffer waiver entitled government to use defendant’s statements to refute evidence adduced by defense on cross-examination of government witnesses).

*Eighth Circuit: United States v. Yielding*, No. 4:08CR00213 BSM, 2009 WL 801780, at \*2–4 (E.D. Ark. Mar. 25, 2009) (covering use of defendant’s statements as rebuttal evidence and impeachment if he testifies).

*Ninth Circuit: United States v. Rebbe*, 314 F.3d 402, 407 (9th Cir. 2002) (allowing use of defendant’s statements in prosecutor’s case-in-rebuttal; not reaching question whether statements could have been used in case-in-chief).

### APPENDIX 3

#### *Federal Cases Approving Waivers Covering Impeachment of Defendant*

*First Circuit: U.S. Jiménez-Bencevi*, 788 F.3d 7, 16–17 (1st Cir. 2015) (language of the waiver covered use of proffer statements to cross-examine and impeach defendant if he testifies but not use of proffer statements in examining defense witnesses).

*Second Circuit: United States v. Barrow*, 400 F.3d 109, 118–19, 121 (2d Cir. 2005) (waiver reached use of defendant’s statements to rebut evidence offered or elicited, or factual assertions made, by or on behalf of defendant).

*United States v. Chan*, 185 F. Supp. 2d 305, 307–08 (S.D.N.Y. 2002) (enforcing waiver for proffer statements and allowing government agent to testify to what defendant said in proffer session; proffer statements could be used to impeach defendant).

*Third Circuit: United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (proffer agreement says information provided by defendant may not be used “directly against her, except for the purpose of cross-examination or impeachment should she be a witness”) (plea agreements “commonly contain” such a provision).

*United States v. Burnett*, No. 08–201–03, 2009 WL 2180373, at \*5 (E.D. Pa. July 17, 2009) (allowing use of plea bargaining statements to impeach defendant if he testifies but not to contradict other evidence offered on defendant’s behalf).

*United States v. Ford*, No. 04–0562 (JBS), 2005 WL 1129497, at \*5 (D.N.J. May 11, 2005) (allowing use of defendant’s statements on cross-examination and in rebuttal of defense evidence).

*Seventh Circuit:* United States v. Dortch, 5 F.3d 1056, 1067–68 (7th Cir. 1993) (enforcing waiver of objection to use of proffer statements if he testifies inconsistently at trial).

United States v. Goodapple, 958 F.2d 1402, 1409 (7th Cir. 1992) (enforcing waiver in proffer letter of right to exclude defendant's statements, offered to impeach).

#### APPENDIX 4

##### *States with Reported Cases Recognizing Waivers Covering Both Impeaching and Substantive Use*

*Arizona:* State v. Campoy, 207 P.3d 792, 803–04 (Ariz. App. 2009) (enforcing proffer waiver allowing use of statements during state's case-in-chief after state withdrew from agreement because defendant had lied).

*California:* People v Scheller, 39 Cal. Rptr. 3d 447, 453–54 (Cal. Ct. App. 2006) (suggesting in dictum that defendant's plea bargaining statements would be admissible after she withdrew her plea if agreement had so specified).

*Kentucky:* Porter v. Commonwealth, 394 S.W.3d 382, 391 (Ky. 2011) (noting in dictum decisions holding that defendant may waive right to exclude plea bargaining statements).

*Michigan:* People v. Stevens, 610 N.W.2d 881, 886–87 (Mich. 2000) (approving *Mezzanatto* waiver allowing prosecutor to use plea bargaining statements during case-in-chief).

*Minnesota:* State v. Blom, 682 N.W.2d 578, 617–18, 620 (Minn. 2004) (approving use, under *Mezzanatto* waiver, of defendant's plea bargaining statements for purposes of obtaining indictment; broad language approving waiver).

*Mississippi:* McGowan v. State, 706 So. 2d 231, 239–41 (Miss. 1997) (defendant pled guilty and was sentenced, but plea was vacated when he refused to testify against others; plea bargaining statements were admissible).

*Ohio:* State v. Rafferty, No. 26724, 2015 WL 1932693, at \*12–13 (Ohio Ct. App. Apr. 29, 2015) (plea agreement authorized use in prosecutor's case-in-chief of defendant's statements, after defendant declined to plead guilty as agreed).

*Pennsylvania:* Commonwealth v. Widmer, 120 A.3d 1023, 1028 (Pa. Super. Ct. 2015) (rights secured by Rule 410 are waivable; no indication that waiver was dependent on defendant taking the stand).

*South Carolina:* State v. Wills, 762 S.E.2d 3, 4 (S.C. 2014) (enforcing waiver when the prosecutor broke off negotiations after defendant failed a lie detector; defendant's statements were admissible in state's case-in-chief).

*South Dakota:* State v. Stevenson, 652 N.W.2d 735, 737, 742 (S.D. 2002) (where defendant breached plea agreement, waiver allowed use of his statements in trial on more serious charges).

APPENDIX 5

*States with Reported Cases Limiting or  
Restricting Use of Mezzanatto Waivers*

*Colorado*: *People v. Garcia*, 169 P.3d 223, 227–28 (Colo. App. 2007) (covering impeaching use) (penalizing defendant for his cooperation in taking lie detector test “by introducing his statements as substantive proof of guilt is palpably unfair and undermines the public policy of encouraging fair compromises”).

*Maryland*: *State v. Pitt*, 891 A.2d 312, 325–26 (Md. 2006) (*Mezzanatto* waivers are enforceable if defendant breaches plea agreement but not if the state does).

*New Jersey*: *State v. Williams*, 135 A.3d 157, 163–66 & n.7 (N.J. Super. Ct. App. Div. 2016) (*Mezzanatto* allows defendant to waive right to exclude plea bargaining statement when offered to impeach; noting but not reaching question whether waiver can authorize case-in-chief usage).