1978

**I Swear That I'm Guilty, So Help Me God: The Oath in Rule 11 Proceedings**

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**Recommended Citation**

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I SWEAR THAT I'M GUILTY, SO HELP ME GOD: THE OATH IN RULE 11 PROCEEDINGS

I. INTRODUCTION

The manner of accepting guilty pleas in the federal courts is governed by rule 11 of the Federal Rules of Criminal Procedure.1 In 1975, pursuant to a proposal by the Supreme Court,2 Congress extensively amended that rule.3 While the amended version of rule 11 is "[s]ymptomatic of the change"4 from the neglect that nontrial adjudication had previously received from the legislature and the judiciary, it is not free from all problems.

Most of the controversial provisions of rule 11 have received extensive analysis, both critical and supportive, from legislators and commentators.5 The related provisions of rules 11(c)(5)6 and 11(e)(6),7 however, have not been subjected to scrutiny, although they have been recognized to be troublesome.8 These provisions merit attention because their implementation may effectively

6. Rule 11(c)(5) provides that the court must advise the defendant "that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement." Fed. R. Crim. P. 11(c)(5).
7. Rule 11(e)(6) provides: "Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel." Fed. R. Crim. P. 11(e)(6).
8. See Plea Bargaining, supra note 4, at 1025-27.
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thwart the very purposes of the amendments to rule 11, by discouraging the disposition of criminal cases by guilty plea.10

This Note will examine the perjury sanction provided by rule 11(e)(6) and its counterpart, rule 11(c)(5), in order to determine whether these provisions are necessary and/or desirable. It will scrutinize the practice of placing the defendant under oath during the rule 11 proceeding in order to determine whether that procedure is justified in light of the policies and practices involved in pleading guilty. In addition, it will examine the nature of the rule 11 colloquy in order to ascertain whether Congress and the courts, in their attempts to protect the rights of the uninformed defendant, have not, in effect, curtailed some rights of the counseled and intelligent defendant who desires to enter an advantageous plea of guilty without being subjected to extensive personal inquisition by the court.

II. GUILTY PLEAS AND RULE 11 GENERALLY

In recent years guilty pleas have become an increasingly more common means of disposing of criminal cases.14 In federal courts, the vast majority of defendants against whom indictments or informations are filed plead guilty, and it is generally acknowledged that these defendants are entitled to know the consequences and ramifications of their admissions of guilt.15

A guilty plea carries many advantages for both the defendant and the Government. However, it also entails a waiver by the defendant of impor-

9. The rule 11 amendments were designed to: (1) ensure that guilty pleas are intelligently entered, Proposed Amendments, supra note 2, at 277 (Advisory Committee Note); (2) officially recognize plea bargaining and grant it some judicial supervision, id.; and, (3) facilitate and finalize the disposition of criminal cases by guilty plea, H.R. Rep. No. 247, 94th Cong., 1st Sess. 37, reprinted in [1975] U.S. Code Cong. & Ad. News 674, 708 (separate views of Representatives Holtzman and Drinan).
10. See notes 96, 102 infra and accompanying text.
11. The custom of placing a defendant under oath when he enters a guilty plea has been tacitly accepted as an appropriate procedure. See, e.g., Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976), cert. denied, 431 U.S. 958 (1977); Bryan v. United States, 492 F.2d 775 (5th Cir.), cert. denied, 419 U.S. 1079 (1974). This implied sanction notwithstanding, the practice has never been thoroughly analyzed. Its propriety, however, is suspect, particularly in light of the nature of the plea proceedings conducted in the federal courts under rule 11.
12. Under rule 11, a plea hearing must be conducted before a guilty plea may be accepted. Fed. R. Crim. P. 11.
13. See Fed. R. Crim. P. 11(c), (d), (f).
14. Surveys indicate that 80-95% of all criminal cases are disposed of by guilty pleas. See Pugh, Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System, 36 La. L. Rev. 947, 948 (1976); Note, The Guilty Plea as a Waiver of “Present but Unknowable” Constitutional Rights: The Aftermath of the Brady Trilogy, 74 Colum. L. Rev. 1435, 1435 n.1 (1974) [hereinafter cited as Guilty Plea as Waiver]; Plea Bargaining, supra note 4, at 1010 n.2; Pleading Guilty, supra note 5, at 117.
15. Hoffman, supra note 3, at 12.
16. Id.
17. Blackledge v. Allison, 431 U.S. 63, 71 (1973); United States v. Bambulas, 571 F.2d 525,
tant constitutional rights “including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.”18 Not insensitive to the precarious position of a defendant who indicates willingness to admit his guilt, Congress, in 1966, revised the original version of rule 11 of the Federal Rules of Criminal Procedure.19 This revised version required that a court, in accepting a plea of guilty, personally address the defendant to determine whether the plea is “made voluntarily with understanding of the nature of the charge and the consequences of the plea.”20 Subsequently, the Supreme Court rendered two major decisions,21 in which it expressed its concern that plea proceedings be conducted in a manner that ensures the protection of the defendant’s rights. In Boykin v. Alabama,22 the Court set out minimum constitutional standards for plea proceedings in all jurisdictions.23 In McCarthy v. United States,24 the Court held that strict compliance with rule 11, as it then stood,25 was mandatory in the federal courts. In these decisions, the Supreme Court expressly acknowledged that a defendant, by pleading guilty, waives fundamental constitutional rights,26 and it directed that the record of the plea proceeding show that the defendant was aware of his rights and that he waived them intelligently and voluntarily.27 McCarthy and Boykin demonstrate the duty of the courts to protect the

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19. Prior to 1966, rule 11 provided: “A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.” Fed. R. Crim. P. 11, 18 U.S.C. app. at 3748 (1964) (amended 1966, 1975).


23. In Boykin, the Supreme Court refused to presume a waiver of a defendant’s constitutional rights. It required an affirmative showing, on the record, that the defendant had voluntarily and intelligently waived his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. Id. at 243-44.


25. See note 20 supra and accompanying text.

26. See note 18 supra and accompanying text.

27. “We cannot presume a waiver of these . . . important federal rights from a silent record.” Boykin v. Alabama, 395 U.S. at 243.
defendant who is disposed to admit his guilt against infringement of his constitutional and statutory rights. 28

In a series of later decisions, however, the Supreme Court appeared to shift its emphasis from the protection of basic constitutional rights to the “orderly conduct of the judicial system and the maintenance of any plea bargain that [may have] been struck.”29 It expressly sanctioned the plea bargaining process and afforded it some judicial supervision.30 The Court further manifested its approval and concern for the proper administration of plea negotiations in its proposals to amend rule 11 of the Federal Rules of Criminal Procedure.31

In response to these developments, Congress substantially revised rule 11.32 The amendments were intended to legitimize plea bargaining, to ensure its proper administration,33 and to codify the constitutional requirements for taking guilty pleas set out in Boykin.34

Rule 11, as amended, expands the personal discussion which must take place between the presiding judge and the defendant.35 Under the rule, the judge must not only determine that the defendant understands the nature of the charges against him and the penalties provided by law, but he must also expressly inform the defendant of them.36 The rule also requires that the court make “such inquiry as shall satisfy it that there is a factual basis for the plea.”37 Although there is no explicit requirement that the judge address the defendant personally in order to establish the requisite factual basis,38 post-

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29. Id. at 85; see Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). The rule that emerged from these companion cases appeared to be that a defendant's admission in open court that he has committed the crime charged would sustain a waiver of present, although unknowable, constitutional rights. In these cases the Court demonstrated its reluctance to upset guilty pleas. Recent dictum reveals the Court's persistence in its interest in the finality of convictions. See Blackledge v. Allison, 431 U.S. 63, 71 (1977).
31. Proposed Amendments, supra note 2, at 275-77.
32. See note 3 supra and accompanying text. For a general discussion of the amendments to rule 11, see Plea Bargaining, supra note 4.
33. See 121 Cong. Rec. 23321 (1975); Plea Bargaining, supra note 4, at 1011.
35. Fed. R. Crim. P. 11(c), (d), (f). The 1966 version of the rule required merely that the judge personally address the defendant to ascertain that the plea was voluntarily entered. See note 20 supra and accompanying text.
36. Fed. R. Crim. P. 11(a). This provision lists a number of specific items of which the court must personally advise the defendant and secure his understanding, including the maximum and minimum penalties for the crime charged, his right to be represented by counsel, and the fact that by pleading guilty he waives his right to trial and the rights he would have at such a trial. Id.
38. The Advisory Committee has suggested that a factual basis for the plea may be estab-
McCarthy cases have required demonstration, on the record, that the judge has satisfied himself as to the existence of a factual basis for the plea, and most concerned district judges now seek to address the defendant personally on this issue before making their determinations.

In view of McCarthy, it has been forecast that the Supreme Court will probably require strict compliance by the district courts with rule 11, as amended. In anticipation of such a mandate, several circuit courts of appeals have held that federal plea proceedings must now conform literally to the provisions of the new rule. These cases are the logical consequence of the dictates of the Supreme Court and of Congress, which specifically enumerated the rights and waivers of which the defendant must be apprised. However, this strict standard, particularly with respect to rule

lished by extrinsic evidence. "An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presence report when one is available, or by whatever means is appropriate in a specific case." Proposed Amendments, supra note 2, at 286 (Advisory Committee Note). See also United States v. Navedo, 516 F.2d 293, 298 n.10 (2d Cir. 1975); Commentary to ABA Standards Relating to Pleas of Guilt § 1.6 (Approved Draft 1968).

39. Santobello v. New York, 404 U.S. 257, 261 (1971); Irizarry v. United States, 508 F.2d 960, 967 (2d Cir. 1974). "It would seem likely that the new language is meant to clarify the point that the judge's satisfaction as to factual basis cannot be based on facts privately known or subjectively believed by him, but must be founded on an objective factual inquiry developed on the record." Plea Bargaining, supra note 4, at 1022.

40. See Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas but Innocent Defendants?, 126 U. Pa. L. Rev. 88, 119 n.200, 135-36 (1977). The technique of "having the accused describe the conduct that gave rise to the charge" has been specifically recommended by the Supreme Court. Santobello v. New York, 404 U.S. 257, 261 (1971). Similarly, it has been suggested that a court's "inquir[y] into a defendant's understanding of the nature of the charge against him . . . requires an explanation of the basic acts that must be proved in order to establish guilt." United States v. Brogan, 519 F.2d 28, 30 (6th Cir.) (McCree, J., dissenting), cert. denied, 423 U.S. 1035 (1975).

41. The decision in McCarthy v. United States turned on statutory, rather than on constitutional, grounds. 394 U.S. at 464. It indicates the Court's willingness to honor and abide by legislative commands that may afford more than minimum constitutional protection.

42. Pleading Guilty, supra note 5, at 131.

43. United States v. Journet, 544 F.2d 633 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976); cf. United States v. Scharf, 551 F.2d 1124, 1129 (8th Cir.), cert. denied, 98 S. Ct. 70 (1977) (requirement of strict compliance with rule 11(c) implied in dictum, where court stated that rule 11(e) "is a salutary rule, and district courts are required to act in substantial compliance with it although, as in the case of other subdivisions of Rule 11 [e.g., rule 11(e)], ritualistic compliance is not required").

44. Fed. R. Crim. P. 11(c); see H.R. Conf. Rep. No 414, 94th Cong., 1st Sess. 9, reprinted in [1975] U.S. Code Cong. & Ad. News 713, 714. The Advisory Committee had proposed a more permissive approach to certain provisions of rule 11(c). It suggested that, after advising the defendant of his right to plead not guilty, the district court "may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify," but that the scope of the warnings "required, in this respect . . . is left to future case-law development." Proposed Amendments, supra note 2, at 280 (Advisory Committee Note). Congress, however, rejected this approach in favor of a mandatory one. United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976).
11(c)(5),\(^45\) has proven difficult to apply as a practical matter.\(^46\) The courts, especially those in which a guilty pleader is not customarily placed under oath, have had to strain to reach a fair and just result without undermining the generally accepted standard of strict compliance with rule 11.\(^47\) These difficulties raise serious questions as to the expediency of rule 11(c)(5).

III. ANOMALOUS RULE 11(c)(5)

Congress considered it "only fair that the defendant be warned that his . . . statements made in connection with [a plea of guilty, later withdrawn, or an offer to plead guilty] could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel."\(^48\) Therefore, it included that warning in the litany of admonitions which must be given every defendant under rule 11(c).\(^49\)

Rule 11 does not require that the defendant be placed under oath when he enters a plea of guilty.\(^50\) Rule 11(c), however, is phrased in mandatory terms,\(^51\) and nowhere does the legislative history of the rule express an intention to exclude the rule 11(c)(5)\(^52\) warning in those cases in which the defendant is not, in fact, placed under oath during the course of the plea proceeding. This poses no procedural problems when the defendant is actually sworn. There the mandate is clear. Unless the defendant is advised that he

\(^{45}\) See note 6 supra and accompanying text.

\(^{46}\) The problems in enforcing a strict standard of literal compliance with rule 11 are evidenced by the shift in standards applied by the courts. Preamendment pleas were governed by a standard of substantial compliance. See, e.g., Klener v. United States, 535 F.2d 730, 733-34 (2d Cir.), cert. denied, 429 U.S. 942 (1976) (totality of circumstances test). Following the adoption of the amendments to rule 11, courts announced the applicability of a strict standard of literal compliance, see, e.g., United States v. Journet, 544 F.2d 633 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976), but in response to various challenges to pleas on the basis that the strict standard was not met, courts have tended to find that a lesser standard, by which a defendant may be found to have been aware of his rights despite the fact that he was not specifically informed of them by the judge, is permissible, see, e.g., United States v. Hamilton, 568 F.2d 1302, 1306-07 (9th Cir. 1978) (per curiam); United States v. Saff, 558 F.2d 1073, 1078-79 (2d Cir. 1977). It appears from the most recent decisions on the issue that the applicable standard may be developing from one of literal compliance to one of "substantive compliance." See United States v. Alejandro, 559 F.2d 1200, 1202 (2d Cir. 1978) (per curiam).

\(^{47}\) See notes 70-74 infra and accompanying text.


\(^{49}\) Fed. R. Crim. P. 11(c)(5); see note 6 supra.

\(^{50}\) The Committee on the Judiciary has stated that it "does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement." H.R. Rep. No. 247, 94th Cong., 1st Sess. 7 n.9, reprinted in [1975] U.S. Code Cong. & Ad. News 674, 680 n.9.

\(^{51}\) Rule 11(c) provides that "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following . . . ." Fed. R. Crim. P. 11(c) (emphasis supplied).

\(^{52}\) See note 6 supra.
may be subjected to a perjury prosecution if he testifies falsely, his plea will be invalid. 53

Many district courts, however, do not customarily place a defendant under oath when he enters a guilty plea. Nevertheless, appellate courts in such jurisdictions have felt constrained, by the mandatory nature of rule 11(c), to hold that the defendant must be advised of each and every provision of the rule, including 11(c)(5). 54 This firm stand, taken shortly after the amendments to rule 11 became effective, 55 has posed a serious dilemma for reviewing courts, when the only deficiency in the record is the district court's failure to advise the defendant in accordance with rule 11(c)(5). The problem is aptly illustrated by several decisions of the Second Circuit.

In United States v. Journet, 56 the Second Circuit reversed a conviction predicated upon a plea of guilty because of the district court's failure to comply literally with rule 11, as amended. The court held that "unless the defendant is specifically informed of each and every element enumerated in Rule 11 the plea must be vacated." 57 It then proceeded to list the items which the district judge had failed to bring to the defendant's attention. Among other things, the court found that the examining judge had neglected to advise the defendant "that if he should decide to plead guilty the court would have the right to ask him questions under oath about the offense, in which event, if he should give untrue answers, his statements under oath could be used against him in a prosecution for perjury." 58 Despite its acknowledgement that the district courts within the Second Circuit do not usually swear a defendant in during plea proceedings, 59 the court concluded that rule 11(c)(5) clearly entitled the defendant to be advised of the above matters before pleading

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53. Although the warning may not be necessary constitutionally, it would clearly be required under the strict compliance standard adopted in McCarthy v. United States, 394 U.S. 459 (1969).

54. See United States v. Journet, 544 F.2d 633 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). In both cases, guilty pleas that were accepted shortly after the amendments to rule 11 became effective were struck down. The district courts in both instances had failed to inform the defendants of several elements of rule 11(c), including the possible perjury sanction. The courts found the rule 11(c)(5) advice to be required at the plea proceeding. Nevertheless, both courts expressed reservations about vacating an otherwise valid guilty plea solely for noncompliance with rule 11(c)(5). 544 F.2d at 637 n.6; 543 F.2d at 1092 n.2.


56. 544 F.2d 633 (2d Cir. 1976).

57. Id. at 634. In even more emphatic terms, the court reiterated its holding as follows: "We now hold that, as a minimum, before accepting a guilty plea each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11. Otherwise the plea must be treated as a nullity." Id. at 636.

58. Id. at 636-37. The additional warnings that the district judge had failed to give were "that the 'maximum possible penalty' included a possible life-time parole, that if he should go to trial upon his not guilty plea [the defendant] would have the right to assistance of counsel at the trial, that his guilty plea would waive his right against self-incrimination, [and] that if his guilty plea was accepted no further trial of any kind would be held." Id. at 636 (footnotes omitted).

59. Id. at 637 n.6.
The court based its decision on the ground that Congress, by mandating a specific procedure to be followed in the acceptance of guilty pleas, clearly intended that the courts comply strictly with the adopted standards, and that deviations should not be tolerated.

The *Journet* decision caused understandable concern within the Second Circuit. In view of the firm language of that opinion, the validity of numerous guilty pleas entered between the effective date of rule 11(c) and the date on which *Journet* was decided were conceivably jeopardized merely because district judges had neglected to inform defendants of an inapplicable perjury sanction.

The panel that decided *Journet* apparently recognized the potential effect of its decision. Although it continued to insist that strict compliance with rule 11(c) was essential, it supplemented its opinion as originally filed with a footnote, in which it acknowledged that the district courts within its jurisdiction do not customarily place a defendant under oath when he pleads guilty, but nevertheless deemed it "advisable" to give the rule 11(c)(5) warning in all cases, in order to ensure full compliance with the congressional mandate.

This apparent afterthought intimated that the court might bend the literal compliance standard, at least with respect to rule 11(c)(5). In fact, the court subsequently relied upon this footnote to uphold a guilty plea in *United States v. Michaelson*. Michaelson appealed from a denial of his motion to withdraw a guilty plea entered during the course of a trial and prior to the decision in *Journet*. He alleged several grounds of error, including the district court's noncompliance with the technical requirements of rule 11 in accepting his plea. In that case the defendant was neither advised of his privilege against self-incrimination nor informed that his answers to the court's questions could

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60. *Id.* at 637.
61. *Id.* at 635-36. Under the general language of the 1966 version of rule 11, the court of appeals had held that the record of the plea proceeding should be viewed in the totality of the surrounding circumstances in order to determine whether the guilty plea was voluntarily and intelligently entered. Enumeration of each and every right waived by the pleader was not required. At that time, however, the court did urge that the district courts adopt a set of instructions outlining the specific rights to be waived in each case as a means of ensuring compliance with the rule as it then existed. See Klener v. United States, 535 F.2d 730, 734 (2d Cir.), cert. denied, 429 U.S. 942 (1976). In *Journet*, the court construed the amendments to rule 11 as material, and found that the procedure instituted by Congress explicitly superseded the totality of the circumstances approach. 544 F.2d at 635-36.
62. Rule 11(c) became effective on December 1, 1975. See note 55 *supra*. *Journet* was decided on November 1, 1976. 544 F.2d at 633.
64. 544 F.2d at 637 n.6. The official version also includes some phraseological changes in the advice required by rule 11(c)(5). Compare *id.* at 636-37 with *United States v. Journet*, No. 76-1285, slip op. at 378 (2d Cir. Nov. 1, 1976). These alterations, however, are immaterial for the purposes of this Note.
65. 552 F.2d 472 (2d Cir. 1977).
66. *Id.* at 474.
67. *Id.* at 476.
later be used against him. 68 In dealing with the latter issue, the court of appeals relied entirely on the allusive footnote appended to the Journet opinion. 69 The court recognized that the defendant's arguments raised "substantial difficulties" in light of the position taken in Journet. 70 Nevertheless, it construed the Journet note in such a way as to overcome the difficulty posed by noncompliance with rule 11(c)(5), at least when the defendant is not placed under oath during the plea proceeding. 71 Without further explanation, the court simply stated that to vacate the defendant's guilty plea under the circumstances presented "would be a needlessly rigid reading of amended Rule 11 and of Journet." 72

The Michaelson decision is, at best, a strained attempt to reconcile a sensible result with authoritative language that tends to defeat that result. The decision, however, does not adequately deal with the precedent set by Journet, despite the court's closing deference to that case. 73 Although it did

68. Id.
69. Id. at 477. It may be noted that none of the circuit judges reviewing the appeal in Michaelson were members of the panel that had decided Journet. Compare 552 F.2d at 474 with 544 F.2d at 634.
70. 552 F.2d at 477.
71. Id. The court of appeals interpreted the footnote under discussion in the following manner: "Use of the phrase, 'it is advisable [sic].' indicated some leeway for assessing the failure to give this advice, at least when [the] defendant was not put under oath before questioning about his guilty plea." Id.
72. Id. The court's reasoning in this case is perplexing. In discussing the rule 11(c)(5) issue, the court rejected the Government's arguments that different standards apply when a plea is taken during, rather than before a trial, and that Journet should not be applied retroactively. The court stated: "It is unlikely that as a general rule different 'standards' apply under Rule 11 depending upon when a plea is taken. . . . And the argument for non-retroactivity must face the undeniable fact that Congress did prescribe December 1, 1975 . . . as the effective date of the amendments to Rule 11." Id. Yet, in upholding the guilty plea despite the district court's failure to advise the defendant of his privilege against self-incrimination under rule 11(c)(3), the court stated: "[W]e cannot ignore that the plea here was taken after the trial commenced and before Journet authoritatively construed the amendments to Rule 11." Id. The Michaelson court was apparently of the opinion that an automatic application of Journet would yield an unjust result. But its reluctance to criticize the sweeping language of Journet permits problems similar to those encountered in Michaelson to persist. Later cases indicate that the court of appeals has overcome this obstacle by simply declaring Journet inapplicable in circumstances in which it feels that vacation of a guilty plea would be inappropriate. See United States v. Saft, 558 F.2d 1073, 1081 (2d Cir. 1977), discussed notes 75-77 infra and accompanying text; cf. Del Vecchio v. United States, 556 F.2d 106, 108 (2d Cir. 1977) (strict standard of Journet not binding where guilty plea is collaterally attacked), discussed note 74 infra. See also United States v. Alejandro, 569 F.2d 1200, 1202-03 (2d Cir. 1978) (Hays, J., dissenting).
73. "Our decision therefore is not to be interpreted as overruling Journet in any respect." 552 F.2d at 477-78. This statement contributes nothing to the court's rationale or to the impact of its decision. Michaelson is clearly irreconcilable with the language of Journet, since Journet expressly rejected the argument that noncompliance with rule 11(c) may be held harmless. 544 F.2d at 636; see Fed. R. Crim. P. 52(a) (harmless error rule). The Michaelson court took cognizance of this holding, as it was applied to the facts in Journet, but appeared willing to view facts on a case-by-case basis in determining whether the concept of "harmless error" might be applied. See
not overrule Journet, the Michaelson court did substantially modify the express mandate of that decision.\(^{74}\)

In its most recent decision dealing with this issue, the Court of Appeals for the Second Circuit again upheld a guilty plea despite the district court’s failure to advise the defendant pursuant to rule 11(c)(5).\(^{75}\) In fact, this omission was deemed “inconsequential” by both the court and the defense, and was dismissed without further discussion.\(^{76}\) At the same time, the court maintained that Journet retains its vitality, and it expressed the hope that stricter compliance with rule 11(c) would alleviate similar problems in the future.\(^{77}\)

It is evident that in future cases the Second Circuit will not vacate an otherwise valid guilty plea entered by an unsworn defendant merely because that defendant was not advised in accordance with the provision of rule 11(c)(5). This is obviously a correct and just result. However, the dubious
rationale which the court has been constrained to employ in order to reach that result raises a question as to the value of that provision. There appears to be no reason for couching rule 11(c)(5) in the same mandatory terms used for the other rule 11(c) warnings. The advice is wholly irrelevant unless the guilty plea is taken under oath. In addition, the problems faced in the Second Circuit may also arise in courts which do place the defendant under oath during the plea proceeding, if such a defendant should waive his right to counsel. 78

An even more fundamental problem, however, is posed by the wording of rule 11(c)(5). 79 The provision is misleading to the detriment of the defendant. A district judge who advises a defendant that his statements may be used against him in a perjury or false statement prosecution if they are made “under oath, on the record, and in the presence of counsel,” 80 would be acting in absolute compliance with the statutory mandate. This advice, however, erroneously implies that unsworn statements made during the plea proceeding may not be used at all.

Actually, a valid guilty plea and related statements may be introduced into evidence in both criminal 81 and civil 82 trials, and may be used for purposes of impeachment. 83 In addition, such evidence may be the basis of a false statement prosecution, whether or not the statements were made under oath. 84 The admissibility of such evidence is not restricted by rule 11(e)(6). 85

78. The perjury sanction is available only when the defendant has made his statement in the presence of counsel. Fed. R. Crim. P. 11(c)(5), (e)(6); see notes 6-7 supra.
79. See note 6 supra.
84. See note 137 infra and accompanying text.
85. The interpretation which will be given rule 11(e)(6), that is, whether the statute will actually preclude the use of withdrawn guilty pleas and related statements in any court proceeding, is, at present, an open question. The Supreme Court held, long before the enactment of rule 11, that a guilty plea withdrawn by leave of the court is not admissible into evidence in a subsequent federal court trial on the charge to which the defendant had previously pleaded guilty. See Kercheval v. United States, 274 U.S. 220 (1927). Rule 11(e)(6) apparently expands upon that holding by precluding the use of the plea entirely, and the use of related statements, except in perjury or false statement prosecutions. Fed. R. Crim. P. 11(e)(6); see H.R. Rep. No. 414, 94th Cong., 1st Sess. 10, reprinted in [1975] U.S. Code Cong. & Ad. News 713, 714.

It has been noted that the new rule is not merely a codification of prior case law, but rather, a congressional invention. Plea Bargaining, supra note 4, at 1926. This view and the belief that the statute will be interpreted to exclude much evidence previously admissible are substantiated by the objections to the provision raised by the Department of Justice, see Hungate, supra note 3, at...
unless the plea of guilty is subsequently withdrawn.  

For reasons which are unexplained by the legislative history of the rule 11 amendments, Congress directed that the pleader be advised that his sworn statements may be introduced against him in a prosecution for perjury or false statement, but failed to provide advice about the more dire consequences that a guilty plea may carry with respect to subsequent court proceedings. This  


The extent to which statements made in conjunction with guilty pleas will be admissible has not yet been definitively decided. A recent decision in the Fourth Circuit, however, indicates that the provisions of criminal procedure rule 11(e)(6) and evidence rule 410 will be construed narrowly. In United States v. Mathis, 550 F.2d 180 (4th Cir. 1976) (per curiam), the court of appeals held that statements made at a rule 11 proceeding could be used to impeach the pleader when he testified as a witness at the trial of another person. The decision was undoubtedly correct, since the witness' guilty plea in that case had not been withdrawn. The court, however, may have carried its reasoning a step too far. In interpreting the pertinent statutes, the court stated: "Federal Rule of Evidence 410 and Rule 11(e)(6), F.R. Crim. P., only prohibit statements made in conjunction with a guilty plea from being used (1) against the person who made the plea, and (2) when that person has withdrawn the guilty plea. The decision was undoubtedly correct, since the witness' guilty plea in that case had not been withdrawn. The court, however, may have carried its reasoning a step too far. In interpreting the pertinent statutes, the court stated: "Federal Rule of Evidence 410 and Rule 11(e)(6), F.R. Crim. P., only prohibit statements made in conjunction with a guilty plea from being used (1) against the person who made the plea, and (2) when that person has withdrawn the guilty plea. The instant case . . . [the witness had not withdrawn his guilty plea and the statement was not used against him, but was used collaterally for purposes of impeachment." Id. at 182 (emphasis supplied). This language indicates that, in the Fourth Circuit, even statements made in connection with a withdrawn guilty plea may be admissible for impeachment purposes. Such a construction would drastically limit the plain meaning of rule 11(e)(6), and would effectively ignore the amendments to rule 410. When the Senate considered the rule 11 amendments promulgated by the House, it proposed that rule 11(e)(6) be stricken, and that the Federal Rules of Evidence, as they then stood, be left to govern the admissibility of statements made by a defendant at a plea hearing. See Comparison Between Proposed Senate Amendment and H.R. 6799, 121 Cong. Rec. 23326 (1975). The fact that the language permitting the introduction of related statements for purposes of impeachment was deleted from rule 410 after adoption of the rule 11 amendments indicates that Congress intended such an introduction to be prohibited.  

The dictum in Mathis, therefore, is incorrect. The wording of the relevant statute indicates that the phrase "against the person who made the plea" refers to the proceeding itself, rather than to the use to which the statements may be put. See Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410. This interpretation would render withdrawn guilty pleas and related statements inadmissible in any proceeding against the defendant, even for purposes of impeachment, unless the case falls within the exception to rule 11(e)(6). See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 410, at 410-3 to -7, ¶ 410[01], at 410-19 (1977).  

86. Congress carefully limited the applicability of the protective provision to cases in which a guilty plea is "later withdrawn." Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410. An exception to this limitation on the admissibility of related statements is provided in the case of a perjury or false statement prosecution when the rule 11 examination was recorded, the defendant sworn, and defense counsel present, Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410.  

87. Such advice, apparently, was not even considered. The discrepancy indicates that rule
inconsistency may improperly lead a pleader, who is warned in strict accordance with the unambiguous terms of rule 11(c)(5), reasonably to assume that he could not be prosecuted for making a false statement unless he is placed under oath during the proceeding. His assumption would be mistaken, however, unless he later sought successfully to withdraw his plea. Under the circumstances, a district judge might better advise the defendant generally that statements made in connection with his plea may later be used against him, rather than recite rule 11(c)(5) verbatim in his allocution. This would prevent any misapprehension on the part of the defendant that he is somehow immunized when, in fact, he is not.

In consideration of the numerous problems posed by rule 11(c)(5), it is suggested that the provision be repealed. The provision is not only misleading, but it is also unnecessary. There is no reason to warn a defendant who has been ceremonially sworn to tell the truth that he may be punished if he should lie. That, however, is the only advice imparted by the rule.

11(c)(5), as written, may not truly reflect the legislative intent. There are two plausible explanations for this inconsistency. The first possibility is that Congress was solely concerned with the use of a defendant's rule 11 statements at the trial on the very charge to which a guilty plea is entered and subsequently withdrawn, and meant to restrict the admissibility of those statements only at that particular trial. Such a construction would render rule 11(e)(6) a mere codification of case law. Cf. Kercheval v. United States, 274 U.S. 220 (1927) (statement related to withdrawn guilty plea held inadmissible in ensuing trial on the charge to which the plea had been entered); United States v. Albano, 414 F. Supp. 67 (S.D.N.Y. 1976) (same). This intent, however, is not articulated in the statute, which provides that the protected statements are "not admissible in any civil or criminal proceeding." Fed. R. Crim. P. 11(e)(6) (emphasis supplied).

An alternative theory is that the drafters would have included the additional advice, had they thought of it. The argument would be that since the legislators believed that, in fairness, pleaders should be apprised of the possibility of a perjury sanction, see text accompanying note 48 supra, they would also desire that the defendants be warned of similar ramifications that a guilty plea might carry. Such an interpretation, however, would unduly expand the plain meaning of the rule, and would violate the basic tenets of statutory construction. "[C]ourts will liberally construe the rules [of criminal procedure] to achieve their purposes, will not judicially legislate, will consider extrinsic materials in case of ambiguity, and interpret the rules in the light of the history of their adoption." 3 C. Sands, Statutes and Statutory Construction § 67.10, at 237 (4th ed. 1974) (footnotes omitted). Warning a pleader of the potential evidentiary uses of his statements is not constitutionally required, cf. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (Constitution requires advice of rights to trial by jury, of confrontation, and against self-incrimination), nor has it been considered a statutory requirement under previous versions of rule 11, cf. Wall v. United States, 500 F.2d 38, 39 (10th Cir.) (per curiam), cert. denied, 419 U.S. 1025 (1974) (defendant need not be advised of every collateral consequence of his guilty plea). The view that the court need not advise a defendant of the collateral consequences of his plea persists under the amended version of rule 11. See United States v. Bambulas, 571 F.2d 525, 527 (10th Cir. 1978)(per curiam); Sanchez v. United States, No. 77-2247, slip op. at 3398 (9th Cir. Dec. 30, 1977)(per curiam). If Congress had sought to change existing law to such an extent, it would have clearly done so.

88. See note 137 infra and accompanying text.

89. If the defendant should question this advice, the examining judge may then explain the potential sanctions more thoroughly.

90. It is common knowledge that a witness at a trial is not specifically advised, at the time the
The remedy for the presiding judge's failure to comply strictly with rule 11 in his examination of the defendant is to grant the defendant permission to withdraw his guilty plea and plead anew.\textsuperscript{91} However, the vacation of a guilty plea does not appear to be appropriate where a judge neglects to advise a defendant that his rule 11 statements may later be used against him in a perjury prosecution. That is distinctly a collateral consequence of the plea, and is purely an evidentiary consideration.\textsuperscript{92} The proper remedial action, if any is required, should be exclusion of the relevant statements at a subsequent perjury trial, rather than vitiation of the defendant's guilty plea.\textsuperscript{93}

Provision (5) is an unnecessary detraction from rule 11(c) as a whole. It has compelled an appellate court, in the interest of justice, to carve out an exception to an otherwise mandatory rule.\textsuperscript{94} If not repealed in its entirety, the warning should at least be separated from the rest of rule 11(c), with a proviso that this advice need be given only when the perjury sanction would be available under rule 11(e)(6).\textsuperscript{95}

In district courts that do not now administer the oath during the rule 11 proceedings, the meaningless warning may well inhibit a defendant from entering an otherwise well-considered and advantageous guilty plea.\textsuperscript{96} On the other hand, it may delude a defendant into believing that his statements may never be used against him. Moreover, district judges who do not customarily place the pleader under oath may be induced to do so in order to facilitate compliance with the letter of the rule.\textsuperscript{97} These considerations negate the usefulness and desirability of rule 11(c)(5).

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{91} McCarthy v. United States, 394 U.S. 459, 471-72 (1969); Canady v. United States, 554 F.2d 203, 205 (5th Cir. 1977).
\item\textsuperscript{92} See 121 Cong. Rec. 23322 (1975).
\item\textsuperscript{93} If no perjury or false statement prosecution ensues, failure to advise the defendant of that eventuality should be considered harmless error. See Fed. R. Crim. P. 52(a) (harmless error rule).
\item\textsuperscript{94} See text accompanying notes 60-75 supra.
\item\textsuperscript{95} See note 7 supra.
\item\textsuperscript{97} Some recent cases indicate that this is, in fact, happening. Consider, for example, the following language: "The Court then proceeded to examine each of these defendants, \emph{under oath}, as contemplated by Rule 11." United States v. Slawik, 427 F. Supp. 824, 828 (D. Del. 1977) (emphasis supplied). "The proceedings began with an examination \emph{under oath}, including explanations to [the defendant], all as called for by F.R.Crim.P. 11(c) and (d)." United States v. Sarubbi, 416 F. Supp. 633, 634 (D.N.J. 1976) (emphasis supplied).

Although Congress has indicated that rules 11(c)(5) and 11(e)(6) should not be considered an order to place the defendant under oath at the plea hearing, see note 50 supra, the Advisory Committee and some commentators have recommended such a procedure as desirable, see Proposed Amendments, supra note 2, at 286 (Advisory Committee Note); Bishop, supra note 18, at 536.
\end{enumerate}
\end{footnotesize}
IV. THE PERJURY EXCEPTION TO RULE 11(e)(6)

Rule 11(e)(6)\(^{98}\) contemplates that a federal defendant who enters a guilty plea under oath may subsequently be subjected to a prosecution for perjury or false statement. The development of a satisfactory version of this provision engendered considerable congressional controversy. A comparison of the various proposals for the provision has been summarized as follows:

The Senate amendment would strike this provision altogether and leave it to the Rules of Evidence, which would permit on the record statements to be used for impeachment and in a prosecution for perjury or false statement. The Supreme Court proposal would not permit any use and the House bill would permit use of such statements in a perjury or false statement prosecution, provided it was made under oath on the record and in the presence of counsel.\(^{99}\)

The version ultimately adopted by Congress is a modification of the House proposal, and provides that statements made in connection with a withdrawn guilty plea, but not the plea itself, may be admissible in a subsequent prosecution for perjury or false statement.\(^{100}\)

It is noteworthy that the Supreme Court recommended no such exception to the protection otherwise afforded a defendant under rule 11(e)(6),\(^{101}\) and some legislators have charged that its inclusion is "unfair" and will "undermine—not facilitate—plea bargaining."\(^{102}\) While Congress realized that the perjury sanction might discourage candor and tend to thwart the plea bargaining process, it believed that these considerations were outweighed by the need to "protect the integrity of the judicial process from willful deceit and untruthfulness."\(^{103}\) The legislative history offers no further explanation for including the perjury exception to rule 11(e)(6). It would appear, however, that Congress added the provision as a matter of established policy,\(^{104}\) without due consideration for the distinctions between statements elicited at a plea pro-

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98. See note 7 supra.
100. See H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 10, reprinted in [1975] U.S. Code Cong. & Ad. News 713, 714. The Conference was of the opinion that "neither a plea nor the offer of a plea ought to be admissible for any purpose," and therefore modified the original House bill. Id.
101. The Supreme Court proposed that rule 11(e)(6) provide: "Inadmissibility of plea discussions. Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer." Proposed Amendments, supra note 2, at 276-77. See also ABA Standards Relating to Pleas of Guilty § 2.2 (Approved Draft 1968).
ceeding and other testimony. The governing theory seems to be that where sworn statements are given, a perjury sanction should be available.

Inclusion of the perjury exception in rule 11(e)(6) indicates Congress' recognition of the fact that some district courts do place the defendant under oath during the course of the plea proceeding. Therefore, in order to determine the value and validity of the statutory provision, it is necessary to examine the reasons underlying the employment of that practice by those courts.

As has been stated previously, the oath is not required under the Federal Rules of Criminal Procedure. Consequently, the practices with respect to the custom vary within the federal court system. For example, in the Second Circuit, as a general rule, the defendant need not be placed under oath.

Other circuits apparently utilize the practice but do not necessarily require it. The Court of Appeals for the Fifth Circuit, on the other hand, insists that the entire rule 11 proceeding be conducted while the defendant is under oath.

The practice of placing a defendant under oath when he enters a guilty plea appears to be a recent development. It has ostensibly been employed to ensure truthfulness at the plea proceeding and to "preclude collateral attacks" on guilty pleas by a defendant's later assertions that his statements

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105. See notes 192-96 infra and accompanying text.

106. Congressional awareness of the practice may further be inferred from the statement by the Judiciary Committee that it does not necessarily encourage the swearing-in of the defendant. See note 50 supra.

107. See text accompanying note 50 supra.

108. United States v. Journet, 544 F.2d 633, 637 n.6 (2d Cir. 1976).

109. This is evident from many cases which indicate that the defendants were placed under oath at the plea proceedings, apparently, as a matter of course. See, e.g., United States v. Adams, 555 F.2d 353, 354 (3d Cir. 1977); United States v. Scharf, 551 F.2d 1124, 1131 (8th Cir.), cert. denied, 98 S. Ct. 70 (1977); Forrens v. United States, 504 F.2d 65, 67 (9th Cir. 1974); United States v. Boyd, 429 F. Supp. 1018, 1019 (D. Md. 1977); United States v. Garafola, 428 F. Supp. 620, 622 (D.N.J. 1977).

110. See Bryan v. United States, 492 F.2d 775 (5th Cir.), cert. denied, 419 U.S. 1079 (1974). See also Reports of the Conference for District Court Judges, 64 F.R.D. 225, 250 (1974). The swearing-in of the pleader is considered a requisite procedure by the Court of Appeals for the Fifth Circuit and by the district courts within its jurisdiction. Vandenades v. United States, 523 F.2d 1220, 1224 (5th Cir. 1975); Dugan v. United States, 521 F.2d 231, 233 n.1 (5th Cir. 1975); United States v. Aleman, 417 F. Supp. 117, 120 (S.D. Tex. 1976). In a recent decision, the Fifth Circuit reiterated its stand on this issue as follows: "This court's construction of Rule 11 requires that the defendant be under oath for the entirety of the proceedings." United States v. Aldridge, 553 F.2d 922, 922 (5th Cir. 1977) (per curiam).

111. Research discloses no case prior to 1971 which indicates that a federal defendant was placed under oath at the time of his pleading guilty. An earlier case makes the following observation: "[T]he plea is not evidence. Nor is it testimonial. It is not under oath. Nor is it subject to cross-examination." Wood v. United States, 128 F.2d 265, 273 (D.C. Cir. 1942) (emphasis supplied).

during the proceeding were false. In Bryan v. United States the Fifth Circuit adopted the practice expressly for the purposes of limiting such attacks and ensuring that plea bargains are honored.

In Bryan the defendant pleaded guilty to an escape charge, and his plea was accepted by the district judge. At the rule 11 proceeding, both the defendant and his counsel asserted that no promises had been made to induce the defendant to enter the guilty plea. Later, in a section 2255 petition for post-conviction relief, the defendant alleged that a plea bargain had, in fact, been made, and that the record of the plea proceeding was a sham concocted by the defense, the prosecution, and the district judge. He frankly admitted that he had deliberately lied during the rule 11 inquiry for the purpose of developing a ritualistic record in accordance with the plea agreement.

The court upheld Bryan's guilty plea despite the defendant's post-conviction allegations. In its prospective opinion, however, it set out "minimum practices" for accepting guilty pleas, which included placing the pleader under oath. This practice has been subsequently upheld by that court as a requisite element of the rule 11 proceeding. However, its value in achieving

113. United States v. Maggio, 514 F.2d 80, 91 (5th Cir.), cert. denied, 423 U.S. 1032 (1975). Specifically, the object of the oath is "to eliminate the possibility that a defendant will believe that part of the process of implementing a plea bargain is to deny that such a bargain exists." United States v. Coronado, 554 F.2d 166, 174 (5th Cir.), cert. denied, 98 S. Ct. 214 (1977). The practice was further designed to make the perjury sanction available in such cases. Reports of the Conference for District Court Judges, 64 F.R.D. 225, 250 (1974).


115. Id. at 777. The defendant apparently was not placed under oath at that time.


117. 492 F.2d at 777.

118. The defendant's petition was denied on policy grounds. The court reasoned that a defendant who, at a plea proceeding, affirms that no plea bargain has been negotiated should not be permitted to rest on the falsity of his statements to successfully challenge his plea. The guilty plea was upheld because, in the opinion of the court, to grant the petition would open the door to innumerable similar requests. Id. at 780.

119. Id. at 781. The practices set out by the court as minimum requirements in accepting guilty pleas are as follows: "The court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. Specific inquiry shall be made as to the existence of such an agreement before a plea is accepted. The defendant shall be placed under oath." Id.

120. See Goodwin v. United States, 544 F.2d 826, 827 (5th Cir. 1977)(per curiam); Dugan v. United States, 521 F.2d 231, 233 n.1 (5th Cir. 1975); Rosado v. United States, 510 F.2d 1098, 1100 (5th Cir. 1975)(per curiam). Although most of the other requirements set forth in Bryan, see note 119 supra, have been incorporated into rule 11, as amended, the swearing-in of the defendant persists as an additional requirement in the Fifth Circuit, see United States v. Aldridge, 553 F.2d 922, 922 (5th Cir. 1977)(per curiam). However, it is apparent that the Fifth Circuit does not maintain that the oath is absolutely indispensable to a valid guilty plea. Unsworn pleas have been upheld within that jurisdiction where no prejudice resulted from failure to administer the oath. See United States v. Coronado, 554 F.2d 166, 175 (5th Cir.), cert. denied, 98 S. Ct. 214 (1977); United States v. Maggio, 514 F.2d 80, 91-92 (5th Cir.), cert. denied, 423 U.S. 1032 (1975). See also La Bar v. United States, 522 F.2d 202, 204 (5th Cir. 1975) (per curiam).
the purposes for which it was adopted is questionable.

The primary concern of the Bryan court was that a defendant might conceal a plea bargain because of the traditional attitude that such agreements should be "kept in the shadows." Viewed in light of the amendments to rule 11, however, this argument for placing the defendant under oath during the plea proceeding loses all cogency, since a principal purpose of the amendments was to encourage plea agreements. Rule 11 now specifically authorizes plea bargaining, and requires that the entire plea agreement be disclosed in open court. The very danger sought to be avoided by placing the pleader under oath has, therefore, been remedied by Congress. If a defendant should lie at a new rule 11 inquiry with respect to a plea agreement, and then challenge his plea on that basis, a reviewing court would be justified in relying on the record of the proceeding to determine the validity of his claim. The attorneys for the defense and the Government have an affirmative obligation to correct a defendant's misrepresentations on this issue immediately, if their understanding of the terms of the agreement differs from that of the defendant. Should the defendant's statements be permitted to stand without objection, they will, in fact, constitute the terms of the agreement to which the parties will be bound. The defendant, after having been questioned fully as to the existence and nature of any plea bargain, should not later be heard to complain as a result of his own willful failure to reveal the truth.

In some cases, of course, the rule 11 record will not dispose of certain claims which may be raised by a defendant in a post-conviction attack on his guilty plea and it may be necessary to hold an evidentiary hearing on the issue. This is particularly true where the defendant alleges, with good cause,

121. See text accompanying notes 113-14 supra.
122. 492 F.2d at 780. The court stated that "while no problem can arise from the fact of bargaining, the failure to insist that the court be told whether pleas presented for acceptance have any part of their basis in an agreement, and, if so, the details of that understanding, may imperil our system of justice." Id. at 781.
125. Fed. R. Crim. P. 11(e)(2). Because of this provision, any untruthfulness concerning a plea bargain should be attributable to prosecution and defense counsel, as well as to the defendant himself. It should be noted that, if good cause is shown, the plea proceeding may be conducted in camera. Id.
127. Some recent cases indicate that the transcript of the proceeding is regarded as conclusive whether or not the defendant was sworn, and even where the validity of the plea is challenged on the basis of its voluntariness, absent some cogent reason justifying the belief that the record is untruthful. See United States v. Bambulas, 571 F.2d 525, 526 (10th Cir. 1978)(per curiam); United States v. Cowin, 565 F.2d 548 (8th Cir. 1977) (per curiam). Indeed, it was on this very basis that Bryan's conviction was affirmed. Bryan v. United States, 492 F.2d at 779-80. Generally, a defendant may not repudiate express rule 11 statements, unless the issue of their voluntariness is raised. See Comment, Plea Bargaining Mishaps—The Possibility of Collaterally Attacking the Resultant Plea of Guilty, 65 J. Crim. L. & Criminology 170, 174 (1974).
128. See generally Collateral Attack, supra note 5.
that his plea was involuntary.129 Placing the defendant under oath at the plea proceeding, however, should not be employed as a means of alleviating the need for such hearings.130 When a defendant routinely affirms, at a rule 11 inquiry, that his guilty plea was not the result of any threats or promises, the fact that he was under oath at the time should not be used categorically to deter him from later presenting a meritorious claim that his previous assertion was not true.131

Although it has been recognized that placing the pleader under oath will not necessarily diminish the number of collateral attacks on guilty pleas or obviate the need for evidentiary hearings in such cases,132 proponents of the practice maintain that the perjury sanction should be available against a defendant who challenges his plea on the ground that his rule 11 statements were untrue.133 As a practical matter, however, it is unlikely that a defendant would ever actually be prosecuted on such a perjury charge. Where the defendant's attack on his guilty plea is not successful,134 the Government is generally satisfied to rest on the plea and sentence with respect to the substantive offense. An additional prosecution for perjury would be needless and time consuming, and would involve difficulties of proof.135 Moreover, since rule

130. Even the Fifth Circuit has indicated that it would vacate a guilty plea if statements made during the rule 11 proceeding were shown to be truly coerced. See Bryan v. United States, 492 F.2d at 779. The court presumably would reach such a result even where the coerced statements were made under oath. See 121 Cong. Rec. 17492 (1975).
131. See Collateral Attack, supra note 5, at 1404 n.41. To predicate a defendant's conviction upon his own involuntary statements would violate his constitutional privilege against compulsory self-incrimination. "While the [Government's] concern with the finality of its convictions is not to be underestimated, the [Government]—not to mention the defendant—has a superior interest in assuring the accuracy of its truth-finding process and protecting the constitutional rights of criminal defendants." Guilty Plea as Waiver, supra note 14, at 1444 (footnote omitted). There is language to the effect that the oath may, in fact, seriously limit a defendant's chances of success in challenging the plea on the basis of voluntariness. In upholding the validity of a guilty plea that was attacked on the ground that it was coerced, one court has stated that to permit the defendant "to disregard his denial of any threats, made under a solemn oath in open court, without any prompting or urging by anyone, 'would seriously undermine respect for the oath, and ultimately for the judicial process itself.' " Edmonds v. Lewis, 546 F.2d 566, 568 (4th Cir. 1976), cert. denied, 431 U.S. 958 (1977) (quoting Martínez v. United States, 411 F. Supp. 1352, 1359-60 (D.N.J. 1976), aff'd, 547 F.2d 1162 (3d Cir. 1977)).
133. Id; see Reports of the Conference for District Court Judges, 64 F.R.D. 225, 250 (1974). It should be noted that the threat of a perjury sanction is an uncertain means of inspiring truthfulness from a defendant. See Silving, The Oath: I, 68 Yale L.J. 1329, 1389 (1959) (hereinafter cited as Silving I); Collateral Attack, supra note 5, at 1404 n.41. Similarly, the sanction is probably an ineffective deterrent for a defendant, who already faces a jail sentence for the crime to which he has pleaded, from attempting to contest his conviction. Id.
11(e)(6) applies only when a guilty plea has been vitiated, a defendant whose plea is upheld could be prosecuted for making false statements whether or not his declarations were made under oath, if such further punishment is deemed necessary. Therefore, the oath serves no useful purpose when the plea of guilty is finally dispositive of the original case.

When the defendant is permitted to withdraw his plea of guilty, different considerations come into play. The federal rules provide a number of methods by which a guilty plea may be withdrawn. Under rule 32(d) of the Federal Rules of Criminal Procedure, a defendant may move to withdraw his plea either before or after sentencing. Such withdrawal is considered a privilege rather than a right, and the decision to permit it rests within the discretion of the trial court.

Presentence withdrawal is governed by a "fair and just" standard which was established by the Supreme Court in Kercheval v. United States. The federal courts have interpreted this standard strictly, particularly in recent years. As procedures for accepting guilty pleas have

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(1974) [hereinafter cited as Perjury]. It has been noted that the initiation of such a perjury prosecution would be rare indeed. United States v. Boone, 543 F.2d 1090, 1092 n.2 (4th Cir. 1976).

136. See note 7 supra.


138. Although rule 11(e)(6) prohibits the introduction of a withdrawn plea of guilty or related statements generally in criminal proceedings, it preserves the perjury sanction in such cases, provided the rule 11 inquiry was conducted while the defendant was under oath, and the statement was made on the record and in the presence of counsel. Fed. R. Crim. P. 11(e)(6).


141. 274 U.S. 220 (1927). The applicable standard was announced as follows: "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." Id. at 224.

142. See generally Presentence Withdrawal, supra note 140. Interpretation of the "fair and just" standard has undergone many changes since it was first announced by the Supreme Court. Initially, it was thought that the guilty plea should stand unless the defendant had been denied some fundamental right. See United States v. Swaggerty, 218 F.2d 875, 880 (7th Cir.), cert. denied, 349 U.S. 959 (1955). Later, some circuits adopted a more lenient approach in holding that presentence withdrawals should be "freely allowed." Poole v. United States, 250 F.2d 396, 400 (D.C. Cir. 1957). As plea proceedings became more closely regulated, however, the courts began to shift from a "freely allowed" standard to a stricter approach by which "[o]nce it [was] established that Rule 11 ha[d] been fully complied with the occasion for setting aside a guilty plea should seldom arise." United States v. Rawlins, 440 F.2d 1043, 1046 (8th Cir. 1971). This rigid approach was ratified by the Supreme Court when it refused to vacate a guilty plea although the defendant alleged innocence of the crime and stated specific reasons for desiring to withdraw his plea. See Dukes v. Warden, 406 U.S. 250 (1972). Today, the federal courts of appeals will rarely...
become more rigid, the criteria for withdrawal have become stricter.\textsuperscript{143} Post-sentence withdrawal is permitted only "to correct manifest injustice."\textsuperscript{144} Apparently for policy reasons, a heavier burden is placed upon a defendant who seeks to withdraw his plea after sentence has been imposed.\textsuperscript{145} A sentenced federal defendant may seek to have his plea vacated by means of a section 2255 action,\textsuperscript{146} which is similar to a habeas corpus proceeding brought by a state prisoner. Such relief is difficult to obtain, however, and is generally granted only in exceptional circumstances, where prejudice inures from "a fundamental defect which inherently results in a complete miscarriage of justice."\textsuperscript{147} Finally, a district court must permit a defendant to withdraw his guilty plea if the court rejects a plea agreement between the defense and the prosecution.\textsuperscript{148} This is the only situation in which a defendant may withdraw his plea as a matter of right.\textsuperscript{149}

The foregoing provisions place an onerous burden on a defendant who seeks to withdraw his plea. In most instances, he must show that it would be unjust and prejudicial to allow the guilty plea to stand. If the plea proceeding is conducted in compliance with rule 11, the only valid bases upon which a defendant may successfully contest his plea are those of coercion or of the court's refusal to accept a negotiated plea agreement. To impose a perjury sanction on a defendant whose plea is vacated on such grounds, however, would clearly be unjust.

Logically, it is incongruous that statements made at a plea proceeding that was initially unfair can, nevertheless, be used to convict a defendant for perjury. A literal reading of rule 11(e)(6),\textsuperscript{146} however, would authorize such a prosecution against a defendant who states under oath that his plea of guilty is voluntary, if it later appears that the plea was in fact coerced. This problem

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\textsuperscript{143} The present status of presentence guilty plea withdrawals has been characterized as follows: "The courts seem to indicate that since they are bending over backwards to make sure that a defendant is aware of what he is doing when he enters a guilty plea, they will not allow that defendant to make a mockery of the system by allowing him to withdraw his plea simply because he changes his mind and now wants a jury trial." \textit{Presentence Withdrawal}, supra note 140, at 799.

\textsuperscript{144} Fed. R. Crim.P. 32(d).


\textsuperscript{148} Fed. R. Crim. P. 11(e)(4).

\textsuperscript{149} \textit{Presentence Withdrawal}, supra note 140, at 799.

\textsuperscript{150} \textit{See} note 7 \textit{supra}. 
was discussed in the House of Representatives, where it was agreed that statements made in connection with coerced guilty pleas should not be admitted into evidence under the exception to rule 11(e)(6), on the ground that such statements would be tainted and a perjury prosecution would not lie. Although no change was made in the proposed bill to reflect this clarification, it is clear that the legislature intended that statements related to a coerced plea of guilty should not be used against the defendant in a subsequent perjury prosecution.

In the event that a plea bargain negotiated by the prosecution and the defense is rejected, the district court must afford the defendant an opportunity to withdraw his plea. If the defendant takes advantage of this opportunity, however, the Government may then be able to “go after the defendant for perjury.” Although a defendant has an automatic right to withdraw his guilty plea in such a case, his ability to exercise that right may be effectively thwarted by the threat of a perjury sanction. Such intimidation would appear to violate the insistence by the Supreme Court that a defendant's


152. 121 Cong. Rec. 17492 (1975).


154. See notes 148-49 supra and accompanying text.


156. One advocate of taking guilty pleas under oath maintains that the practice should not be a bar to withdrawing a plea, at least prior to sentencing, where the defendant knows the possible double consequences of such an action. Bishop, supra note 18, at 538. It must be admitted, however, that although the oath need not constitute a procedural bar to plea withdrawal, the perjury sanction may undoubtedly inhibit a defendant from moving to withdraw an otherwise voidable plea. Bishop agrees that a “potential perjury prosecution might well stave off plea withdrawal,” and that if an appellant from a conviction upon a plea of guilty “faces possible consecutive sentences for perjury, it might well deter him from the effort unless his appeal has genuine merit.” Id. at 537-38. But see Collateral Attack, supra note 5, at 1404 n.41. Bishop concedes, however, that valid reasons to appeal do exist, and that to preclude the defendant’s right to appeal would pose constitutional problems. Bishop, supra note 18, at 538. See also note 157 infra and accompanying text. Measures to limit the number of appeals from guilty pleas should not be taken at the expense of justice. “The state's interest in assuring the accuracy of criminal convictions so that defendants are not unjustly deprived of their liberty should be given greater effect than its concomitant concern with preserving the finality of convictions.” Guilty Plea as Waiver, supra note 14, at 1444.
procedural rights should not be curtailed. For example, it has been held that a defendant's right to appeal may not be restrained by the threat of receiving a stiffer sentence, should he exercise that right. Similarly, a defendant should not be dissuaded from exercising his statutory right to withdraw his guilty plea through fear of a subsequent perjury prosecution.

It is likely that a defendant who withdraws his plea may be effectively precluded from asserting his innocence at trial, because of the availability of the perjury sanction. If he should contradict statements made at the plea proceeding, while testifying in his own behalf at trial, he would afford the Government the basis for another prosecution against him. Moreover, the sanction serves as a punitive mechanism because it would most probably be imposed upon a defendant who, after withdrawing his plea, is acquitted of the charges at trial.

In view of the limited situations in which the perjury sanction would be available and the even fewer cases in which it would actually be imposed, it is most apt to affect the defendant who has the "misfortune" to be represented by counsel, has a valid and just reason for withdrawing his plea, and is acquitted at the trial on the substantive charge. Instead of preserving the integrity of the courts, it would seem that the oath and its concomitant perjury sanction, in such a situation, serve merely as additional means by which the prosecution can pursue a defendant whom it could not otherwise convict. Therefore, although one should not be granted a "license to lie" in court, no practical reason exists for placing a defendant under oath at the time he enters a guilty plea.

V. The Nature of the Plea Proceeding

The rule 11 proceeding is inquisitorial in nature. The court's allocution is designed to ascertain the defendant's understanding of his rights and the nature of the charges against him, the voluntariness of the plea, the accuracy of the plea, and the existence and nature of any agreement. The subjectiveness of these issues necessitates that they be determined primarily through a personal inquiry of the defendant—an inquiry considerably more extensive than the colloquial "How do you plead?" The examination typically involves questions concerning the defendant's background, education, use of and treatment for alcohol or drugs, and history of any mental illness. In addition, the court must often inquire as to the details of the criminal activity involved in order to satisfy itself that the defendant admits his guilt as to each and every element of the crime charged. The

158. See Perjury, supra note 133, at 369.
161. See id. 11(d).
162. See id. 11(f).
163. See id. 11(e)(2).
164. The requirement that a factual basis for the plea exist was designed to "protect a
examining judge has wide latitude in his questioning, and his examination is apt to encompass more than the bare statutory essentials of a valid guilty plea. The court may request information which the defendant, for various reasons, may be reluctant to divulge. For instance, the inquiry may call for answers which would inculpate the defendant in other crimes. In addition, it may entail technically nonincriminatory matters that the defendant may nevertheless find difficult to discuss. Serious legal and ethical considerations arise when the defendant is placed under oath in such a situation.

The defendant's rights at the rule 11 proceeding have not been clearly defined. When faced with incriminatory questions, however, he should clearly be permitted to invoke his fifth amendment privilege against compulsory self-incrimination. The fact that the defendant, by pleading guilty, waives his right to a trial on the crime charged and his right to remain silent at that trial does not imply that he simultaneously agrees to answer inquiries that may elicit admissions or information relating to other crimes that he may have committed, but with which he has not been charged. The defendant should

defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." McCarthy v. United States, 394 U.S. 459, 467 (1969) (quoting Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules to the 1966 Amendments to Rule 11); Rizzo v. United States, 516 F.2d 789, 794 (2d Cir. 1975) (same). It should be noted, however, that "[a]n acknowledgment of the truth of all the facts essential to guilt is not necessary to satisfy the factual-basis requirement." United States v. Davis, 516 F.2d 574, 577 (7th Cir. 1975). In fact, a defendant may enter a valid guilty plea over protestations of innocence, if the prosecution's evidence shows that the likelihood of his conviction, should he proceed to trial, is strong. See North Carolina v. Alford, 400 U.S. 25, 37-38 (1970); United States v. Davis, 516 F.2d at 578.

165. There are no statutory restrictions on the judge's inquiry, and many of the findings which must be made by the court are expressly governed by a discretionary or subjective standard. See Fed. R. Crim. P. 11.

166. See Collateral Attack, supra note 5, at 1408 n.51. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. For a survey of the development of the privilege against self-incrimination, see L. Levy, Origins of the Fifth Amendment (1968).

167. As has been stated previously, a plea of guilty necessarily entails a waiver of the pleader's constitutional privilege against self-incrimination. See note 18 supra and accompanying text. The extent of this waiver, however, is unclear. The drafters of the amendments to rule 11 believed that the waiver was best explained in terms of the defendant's right to plead not guilty and his right to a trial at which he may not be compelled to testify against himself. See Proposed Amendments, supra note 2, at 279-80. Rule 11, therefore, merely states that, in pleading guilty, the defendant waives his right to a trial and his concomitant right to remain silent at that trial. See Fed. R. Crim. P. 11(c)(3)-(4). It does not address the issue of whether the defendant may assert his privilege against self-incrimination at the plea proceeding itself.

168. It may be argued that a defendant, by entering a plea of guilty, waives his privilege against self-incrimination entirely, on the ground that he exposes himself to a high level of incrimination by pleading guilty, and, therefore, should be prepared to answer any and all questions concerning the crime he committed, without the benefit of the fifth amendment privilege. See generally Comment, Waiver of the Fifth: What Level of Incrimination?, 26 Sw. L.J. 589 (1972). Under this view, if the defendant wishes to preserve his right to remain silent, he may do so by pleading not guilty and proceeding to trial on the charge. This contention, however,
be able to enter an informed plea of guilty to the particular offense charged without being compelled to give evidence which may be used to convict him of a separate past crime.\textsuperscript{169} The availability of the privilege, however, is of

is unpersuasive and the result would be unfair. A guilty plea should constitute only a limited waiver of the defendant's fifth amendment privilege, that is, a waiver to the extent that the defendant admits his guilt of the specific offense to which he is pleading, but retention of the privilege to the extent that his rule 11 responses may implicate him in other crimes. Since rule 11 contains no provision for advising the defendant either that he has the right to remain silent after offering to plead guilty, or that by his offer he waives any such right and must answer any questions posed by the court, a more encompassing waiver should not be implied. It has been stated that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). But see generally Keefe, Confessions, Admissions and the Recent Curtailment of the Fifth Amendment Protection, 51 Conn. B.J. 266 (1977).

Moreover, it may not be in the defendant's interest to proceed to trial. Placing a defendant who wishes to plead guilty in a situation in which he is effectively forced to exercise his right to a trial frustrates one purpose of rule 11, which is "to facilitate the plea bargaining process and thus allow criminal cases to be concluded without going to trial." H.R. Rep. No. 247, 94th Cong., 1st Sess. 37, reprinted in [1975] U.S. Code Cong. & Ad. News 674, 708. It is incongruous that a defendant who is willing to admit his guilt to a specific charge and to accept punishment for it may, nevertheless, be compelled to go through an expensive, time-consuming, and possibly futile trial in order to retain his fifth amendment rights. To place a defendant in such an untenable position, while simultaneously defeating the purposes of a viable legislative enactment, is clearly unjust.

\textsuperscript{169} "[T]he privilege against self-incrimination precludes the use of compelled testimony to prove a prior crime." Note, Statutory Immunity and the Perjury Exception, 10 Cal. W.L. Rev. 428, 441 (1974). It has been held that the privilege is available in many types of proceedings, and is not limited to courtroom trials. See, e.g., In re Gault, 387 U.S. 1 (1967) (juvenile delinquency proceeding); Miranda v. Arizona, 384 U.S. 436 (1966) (police custodial interrogations); Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942)(preliminary hearing in Police Court). Similarly, the privilege should be available at the plea proceeding with respect to crimes other than that to which the plea is entered. If a defendant is precluded from asserting the privilege when faced with incriminatory questions at the plea proceeding, his responses would be unconstitutionally compelled, unless he is afforded immunity which is coextensive with his privilege against self-incrimination. See Kastigar v. United States, 406 U.S. 441, 453 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 54, 79 (1964); Malloy v. Hogan, 378 U.S. 1, 11 (1964). Within the context of the plea proceeding, however, it is highly improbable that such immunity would be available.

Generally, a person who is required to make incriminating statements may seek protection from prosecution based on those statements. See 18 U.S.C. § 6002 (1976). Under the federal immunity statutes, however, the court may not grant immunity \textit{sua sponte}. That prerogative lies with the prosecutor. United States v. Garcia, 544 F.2d 681, 685 n.4 (3d Cir. 1976); see 18 U.S.C. §§ 6003, 6005 (1976). If immunity from further prosecution is not incorporated into the plea agreement, it is most unlikely that the Government would consent to immunity with respect to unrelated admissions elicited by the judge. The plea proceeding is not an investigation, and the prosecution would gain no benefit from such a gesture. It is also noteworthy that in the federal courts, immunity may not be automatically invoked by a witness' incriminating response, but may be granted only after an affirmative assertion of his fifth amendment privilege. See \textit{id.} § 6002.
questionable value. The defendant may be hesitant to assert it before the judge who will ultimately determine his sentence. Moreover, the privilege offers no protection for a defendant who is reluctant to give answers which, although they may be odious and humiliating, will not necessarily provide evidence that could be used to convict him of another crime.

The defendant's ability to remain silent at the plea proceeding, should he desire to do so, is severely restricted. The Supreme Court has made some affirmative response on the part of the pleader a constitutional requisite to a valid guilty plea. The Court reversed the conviction of a defendant who had refused to speak at a plea proceeding and who, instead, had pleaded guilty

The limited protection afforded under Fed. R. Crim. P. 11(e)(6) is of no aid to most defendants in guarding against violations of fifth amendment rights, since that provision applies only if the plea is later withdrawn, and it does not provide for the exclusion of derivative evidence. Although Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 preclude the use of statements made in connection with a withdrawn plea in subsequent proceedings, they do not purport to restrict the admissibility of the fruits of such evidence. Compare Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 with 18 U.S.C. § 6002 (1976). In addition, the precise meaning of “statements made in connection with, and relevant to” a plea of guilty, Fed. R. Crim. P. 11(e)(6), has not yet been definitively interpreted by the courts. Cf. Hutto v. Ross, 429 U.S. 28, 30 n.3 (1976) (per curiam) (question of related statements within the meaning of rule 11(e)(6) expressly not decided). It is possible, therefore, that an admission of another crime during the rule 11 inquiry may be considered unrelated to the plea negotiation process and, thus, fall outside the coverage of rule 11(e)(6). Cf. United States v. Stirling, 571 F.2d 708, 729-32 (2d Cir. 1978) (detailed and incriminating grand jury testimony given by defendant pursuant to a plea bargain that was later frustrated held admissible against defendant in subsequent trial). It is clear that the rule 11(e)(6) protection is not coextensive with the privilege against self-incrimination.

This fear may actually be unfounded in law, since a court's requiring a defendant to make nonimmune incriminating statements in order to avoid a harsh sentence is subject to constitutional challenge. It has been held that a judge may not condition leniency in sentencing upon a defendant's waiver of his fifth amendment privilege. See United States v. Garcia, 544 F.2d 681 (3d Cir. 1976). To put a defendant to this "Hobson's choice: remain silent and lose the opportunity to be [an] object[ ] of leniency, or speak and run the risk of additional prosecution," erodes the protection afforded by the fifth amendment. Id. at 685.

A defendant who prefers not to answer the court's questions may be able to withdraw his offer to plead guilty and proceed to trial on the charge. Such an action, however, may well be detrimental to both the defendant and the Government. If the defendant has offered to plead guilty, it is likely that the Government has sufficient evidence with which to convict him at trial. The defendant may, therefore, wish to plead guilty for a variety of reasons, including the hope of obtaining a lighter sentence and avoiding the embarrassment of an extended trial. Overman v. United States, 306 F. Supp. 237, 240 (W.D. Tenn. 1969); Pleading Guilty, supra note 5, at 117. The prosecution, on the other hand, may be prejudiced by reliance on the fact that the case would be disposed of by guilty plea. Trials are expensive and time consuming for the Government, and dispositions by guilty plea help to improve the quality of the trials held in other cases. Brown v. Parratt, 560 F.2d 303, 309 (8th Cir. 1977). "Perhaps the greatest benefactor from plea bargaining is the [Government's] criminal justice system, which cannot tolerate significant numbers of trials." Note, The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights, 41 Alb. L. Rev. 115, 123-24 (1977).
through his attorney.\textsuperscript{173} It did so on the ground that the waivers of constitutional rights entailed in a plea of guilty must be intelligent and that the defendant must indicate his understanding of the waivers involved.\textsuperscript{174} In addition, rule 11 requires that the judge personally address the defendant,\textsuperscript{175} and authorizes him to "ask [the defendant] questions about the offense to which he has pleaded."\textsuperscript{176} The requirements of the courts and the legislature in this respect are obviously reasonable, and were adopted in the interest of the uninformed defendant. Nevertheless, they effectively negate any absolute claim that the pleader might have to remain silent during the course of the proceeding.\textsuperscript{177}

Refusal to answer the court's questions may have significant repercussions for the defendant. First, he presumably may be held in contempt of court,\textsuperscript{178} although the exercise of the court's contempt power in the context of a rule 11 proceeding seems inappropriate and unfair. The entire federal plea procedure purports to be free of coercion. The guilty plea itself must be voluntarily entered. Similarly, statements made by the defendant should be voluntarily given. That a pleader might be compelled, under threat of contempt, to respond to questions which he would not otherwise answer, is nothing less than paradoxical. Imposition of the contempt sanction in such a situation would appear to be a flagrant abuse of judicial discretion. Secondly, a judge faced with a recalcitrant pleader may be inclined to impose a harsher sentence for the crime admitted than he otherwise would. A judge has wide discretion in determining which factors he will consider in imposing sentence.\textsuperscript{179}

The most likely result of the defendant's silence would be the court's refusal to accept his guilty plea. It has been observed that the defendant has no

\textsuperscript{174} Id. at 242-44.
\textsuperscript{175} See Fed. R. Crim. P. 11(c)-(d).
\textsuperscript{176} Id. 11(c)(5); see id. 11(f).
\textsuperscript{177} Id. 11(c)(5); see id. 11(f).
\textsuperscript{178} The issue of whether the defendant may have any right to refuse to answer questions posed by the court was raised during a discussion among district court judges. "One judge raised a question about required inquiry of a defendant under Rule 11 about the facts of the act to which a plea of guilty was entered; to wit, might the defendant have the right to remain silent once he offers a plea of guilty?" Reports of the Conference for District Court Judges, 65 F.R.D. 285, 319 (1974). An answer to the question was not reported.
\textsuperscript{179} See 18 U.S.C. § 401 (1976). The rule 11 inquiry is a judicial proceeding at which the contempt sanction may properly be employed. Refusal to answer nonincriminatory matters is a basis for contempt, see United States v. Seewald, 450 F.2d 1159, 1162 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972), and a person must answer when directed to do so by the court if the fifth amendment privilege does not apply, see United States v. Martin, 525 F.2d 703, 708 (2d Cir.), cert. denied, 423 U.S. 1035 (1975); United States v. Flegenheimer, 82 F.2d 751, 751 (2d Cir. 1936). For the contempt sanction to be imposed for recalcitrance, the question to be answered must be material, relevant and, not privileged. In re Judson, 14 F. Cas. 4, 4-5 (C.C.S.D.N.Y. 1853) (No. 7,563); Rosenberg v. Carroll, 99 F. Supp. 629, 630 (S.D.N.Y. 1951). Of course, a judge generally would consider his own questions, asked in an effort to establish a factual basis for a guilty plea, to be both material and relevant.
absolute right to have his plea of guilty accepted.\textsuperscript{180} Acceptance of the plea is discretionary with the court.\textsuperscript{181} Since, on the other hand, the defendant need not provide the court with the information necessary to assure it that the plea has a basis in fact,\textsuperscript{182} it would appear that once the defendant has satisfied the court that he is pleading voluntarily and that he understands his rights, he no longer has a duty to speak, provided that the accuracy of the plea can be otherwise established. In fact, the court's rejection of a guilty plea may, under certain circumstances, constitute an abuse of judicial discretion.\textsuperscript{183} Nevertheless, direct interrogation of the defendant is the preferred procedure for establishing a factual basis for the plea,\textsuperscript{184} and although the defendant has a "conditional right to have his guilty plea accepted"\textsuperscript{185} despite his recalcitrance, he may have to withstand a lengthy trial and appeal before it is finally determined whether his silence was justified.

Because silence carries the risk of undesirable counteraction by the court, the pleader may feel compelled to answer any and all questions asked of him during the rule 11 colloquy. If he is under oath at the time, he must answer the questions truthfully or expose himself to a perjury prosecution. Since the questions relate to the respondent's own undesirable activity, the choice is not an easy one. A defendant who is placed in the position of relating humiliating events under the penalty of perjury is faced with a serious dilemma in which


\textsuperscript{181} United States v. Hamilton, 492 F.2d 1110, 1114 (5th Cir. 1974); United States v. Melendrez-Salas, 466 F.2d 861, 862 (9th Cir. 1972) (per curiam); United States v. Bednarzki, 445 F.2d 364, 366 (1st Cir. 1971).

\textsuperscript{182} See note 38 supra and accompanying text.

\textsuperscript{183} See United States v. Davis, 516 F.2d 574, 578 (7th Cir. 1975) (dictum); United States v Navedo, 516 F.2d 293, 298 (2d Cir. 1975) (dictum); United States v. Martinez, 486 F.2d 15, 20-21 (5th Cir. 1973); United States v. Gaskins, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (per curiam); Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968); United States v. Rocco, 397 F. Supp. 655, 658 (D. Mass. 1975); cf. McCoy v. United States, 363 F.2d 306, 307 (D.C. Cir. 1966) (a voluntary and informed plea should not be refused without good reason). "When the trial judge is presented with a 'factual basis for the plea,' . . . an intelligent and voluntary counselled plea should not be refused simply because the defendant who is willing to enter a plea of guilty is unable or unwilling to testify to his guilt in factual terms." United States v. Gaskins, 485 F.2d at 1049 (footnote omitted).

\textsuperscript{184} See note 40 supra and accompanying text.

\textsuperscript{185} United States v. Maggio, 514 F.2d 80, 91 (5th Cir.), cert. denied, 423 U.S. 1032 (1975). Because a defendant does have a right, albeit not an absolute one, to plead guilty, rejection of his plea for his refusal to answer incriminatory questions may not only constitute an abuse of discretion, but also may be unconstitutional. To force a defendant to choose between two rights—his right to enter a guilty plea and his right to remain silent—impinges on his fifth amendment privilege against self-incrimination. See United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977); United States v. Garcia, 544 F.2d 681, 685 (3d Cir. 1976). "A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." United States ex rel. Wilcox v. Johnson, 555 F.2d at 120.
his rectitude\textsuperscript{186} is set against his self-preservation.\textsuperscript{187} A defendant has a natural tendency—augmented, perhaps, by reluctance to cast himself in a poor light before the judge who will sentence him—to minimize his own culpability.\textsuperscript{188} The effect of the oath at the plea proceeding, therefore, is to encourage perjury rather than to inspire truthfulness.

To administer the oath under circumstances which are conducive to perjury undermines respect for the ritual and, ultimately, for the judicial process of which it is a part. This fact has been recognized in civil law jurisdictions, where efforts have been made to avoid such situations.\textsuperscript{189} In those countries, no oath is administered to an accused in a criminal case.\textsuperscript{190} This prohibition against the oath of the accused was designed "to protect the declarant ... against the danger of criminal prosecution for perjury [and] against being required to relate 'events in which he played a more or less odious role.' "\textsuperscript{191} Common law jurisdictions, on the other hand, have persisted in administering an oath to the accused—as for example, when he testifies at trial in his own defense.\textsuperscript{192} In view of the nature of the plea proceeding, the civil law practice appears to be the better rule in the context of guilty pleas. The pleader is in a significantly different position from that of the trial witness. Whereas a trial is adversarial and oral testimony must often be relied upon to determine the guilt or innocence of the accused, the plea is a "procedural mechanism"\textsuperscript{193} and statements made at the time it is offered are not intended as evidence.\textsuperscript{194} In effect, the only party to the plea proceeding is the defendant himself. No compelling social interest is harmed if the pleader minimizes his participation in the crime.\textsuperscript{195} By shading the truth he neither obstructs justice nor impedes

\textsuperscript{186.} Perjury has been considered a crime involving moral turpitude. \textit{See} \textit{Perjury, supra} note \textsuperscript{135}, at 363 & n.37.

\textsuperscript{187.} Some early theologians "thought that where self-preservation [was] at stake, perjury was natural, inevitable and hence excusable." \textit{Silving I, supra} note \textsuperscript{133}, at 1361.

\textsuperscript{188.} \textit{See, e.g., United States v. Navedo,} 516 F.\textsuperscript{2d} 293, 297 (2d Cir. 1975). "A defendant may attempt to minimize his culpability during his allocution because he knows that the same judge will be imposing his sentence." \textit{Id.} at 299 (Kaufman, C.J., dissenting). This tendency on the part of pleaders is illustrated by the excerpt of a rule 11 colloquy set out in \textit{Holland v. United States,} 427 F. Supp. \textsuperscript{733}, \textsuperscript{736-37} (E.D. Pa. 1977). \textit{Compare id.} (defendant's admissions) \textit{with id.} at \textsuperscript{737-38} (Government's evidence).

\textsuperscript{189.} \textit{Silving, The Oath: II,} 68 Yale L.J. \textsuperscript{1527}, \textsuperscript{1552} (1959) [hereinafter cited as \textit{Silving II}]. "[T]here is a trend toward limiting oath-taking and avoiding its indiscriminate use." \textit{Id.}

\textsuperscript{190.} \textit{Id.} at 1529-30, 1533-36.

\textsuperscript{191.} \textit{Id.} at 1535-36 (footnote omitted).

\textsuperscript{192.} \textit{Silving I, supra} note \textsuperscript{133}, at 1368; \textit{Silving II, supra} note \textsuperscript{189}, at 1568.

\textsuperscript{193.} \textit{United States ex rel. Spears v. Rundle,} 268 F. Supp. \textsuperscript{691}, \textsuperscript{698} (E.D. Pa. 1967), \textit{aff'd}, \textsuperscript{405} F.\textsuperscript{2d} \textsuperscript{1037} (3d Cir. 1969).

\textsuperscript{194.} \textit{Wood v. United States,} 128 F.\textsuperscript{2d} \textsuperscript{265}, \textsuperscript{273} (D.C. Cir. 1942). If the statements were considered testimony per se, the oath would be required. \textit{See} \textit{Fed. R. Evid.} \textsuperscript{603}; \textit{cf. United States v. Fiore,} 443 F.\textsuperscript{2d} \textsuperscript{112}, \textsuperscript{115} (2d Cir. 1971), \textit{cert. denied}, \textsuperscript{410} U.S. \textsuperscript{984} (1973) (oath required for all testimonial statements).

\textsuperscript{195.} This observation may be contrasted with the fact that perjurious testimony at a trial may result in the acquittal of a dangerous criminal or the conviction of an innocent man. \textit{See} \textit{Perjury, supra} note \textsuperscript{135}, at 363.
To cause a person who is willing to admit his guilt and accept punishment to deprecate and humiliate himself unnecessarily in public under the penalty of perjury is an indignity which should not be tolerated.\textsuperscript{197} "Unless a clear social interest can be shown to exist, the state should not punish a man for abstract lying."

In addition to the indignity it inflicts, the oath produces anxiety in the taker, thereby disturbing the spontaneity of his statements.\textsuperscript{199} Such anxiety at the rule 11 proceeding is especially deleterious. The essence of the guilty plea is its voluntariness.\textsuperscript{200} Candor is to be encouraged, since it bears heavily on this issue. The trepidation instilled by the solemn oath, which may impel a defendant to furnish information against his will,\textsuperscript{201} undermines the voluntary nature of the entire proceeding.

\textbf{VI. Conclusion}

The practice of placing a defendant under oath when he pleads guilty to a crime in federal court should be abandoned. In view of the Supreme Court's recent tendency to restrict the scope of fifth amendment protection,\textsuperscript{202} it is unlikely that the practice per se could be successfully challenged on the basis of its constitutionality. Nevertheless, it may present constitutional problems in individual cases. In addition, the threat of a perjury sanction may discourage some defendants from entering intelligent and advantageous guilty pleas, thereby defeating a principal purpose of the amendments to rule 11 by frustrating the attainment of successful plea agreements. Abandonment of the practice would also obviate the need for the rule 11(c)(5) warning, and thus, would alleviate the problems posed by that provision. An analysis of the reasons propounded in favor of the practice reveals that the procedure is unnecessary and essentially ineffective in obtaining the objectives sought. Moreover, the disparagement of human dignity inflicted by the practice outweighs its value as an abstract means of protecting the integrity of judicial administration.

The oath has an intimidating effect at the plea proceeding, and therefore tends to subvert the voluntariness of the defendant's rule 11 allocution. A

\begin{itemize}
  \item \textsuperscript{196} The plea proceeding is not an investigative tool. It should not be used to "procure evidence for conviction." Wood v. United States, 128 F.2d 265, 270 (D.C. Cir. 1942) (emphasis in original).
  \item \textsuperscript{197} For an argument that the oath per se violates the dignity of man, see Silving II, supra note 189, at 1574-76.
  \item \textsuperscript{198} Id. at 1577.
  \item \textsuperscript{199} Silving I, supra note 133, at 1389.
  \item \textsuperscript{200} See Fed. R. Crim. P. 11(d). "Since [the Government] cannot compel the accused to be a witness against himself, a plea of guilty must be voluntary to be effective as an admission of guilt." Guilty Plea as Waiver, supra note 14, at 1436 (footnotes omitted).
  \item \textsuperscript{201} For a discussion of the "compulsive" nature of the oath, see Silving II, supra note 189, at 1573-74.
  \item \textsuperscript{202} See generally Keefe, Confessions, Admissions and the Recent Curtailment of the Fifth Amendment Protection, 51 Conn. B.J. 266 (1977); Ritchie, Compulsion That Violates the Fifth Amendment: The Burger Court's Definition, 61 Minn. L. Rev. 383 (1977).
\end{itemize}
counseled defendant who has made an informed choice to admit his guilt, but who prefers not to reveal the odious circumstances surrounding his criminal activity, should be permitted to do so. If the defendant chooses to lie, the prosecutor may introduce contradictory evidence, if it is available. If the court becomes aware that the defendant has misrepresented the facts, it may consider that along with all other circumstances at the time of sentencing.\textsuperscript{203} The defendant should "have a choice as to whether he [feels] silence or speech [would] better serve[ ] his interests, taking all logical inferences into account just as in other ordinary decisions in life."\textsuperscript{204} Requiring a defendant to swear to his guilt in order to finalize a conviction is as reprehensible as the long-abandoned oath \textit{ex officio}, by which the accused was compelled to swear to his innocence. Administration of the oath to a guilty pleader should, therefore, be discontinued.

\textit{Margaret M. Vaughan}

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\item\textsuperscript{203} See 18 U.S.C. § 3577 (1976).
\item\textsuperscript{204} Givens, \textit{Responding to Violence Through Order and Justice: Evolution of Rules Concerning Interrogation}, 14 N.Y.L.F. 780, 790 (1968).
\item\textsuperscript{205} For a discussion of the oath \textit{ex officio} and its abolition, see L. Levy, \textit{Origins of the Fifth Amendment} 266-300 (1968).
\end{enumerate}
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