Arkansas Law Review

Volume 73 | Number 2 Article 6

August 2020

"Against the Defendant": Plea Rule's Purpose v. Plain Meaning

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"AGAINST THE DEFENDANT": PLEA RULE'S PURPOSE V. PLAIN MEANING

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INTRODUCTION

Rarely is there a proverbial "smoking gun" in criminal prosecutions.[1] Instead, prosecutors and defense attorneys must tell juries competing stories—largely from circumstantial evidence—and allow jurors to determine what happened based on inferences gleaned from argument and testimony.[2] Naturally, this creates substantial uncertainty for both prosecutors and defendants. Instead of rolling the dice at trial, the vast majority of criminal matters are resolved through plea bargaining.[3] Plea bargaining provides both sides with a certainty otherwise unobtainable through a traditional trial. The prosecution guarantees itself a conviction, and the defendant will often receive a lighter sentence than if he or she had gone to trial. The judiciary also benefits in the form of a lighter docket.

However, negotiations between the prosecutor and defendant do not always result in guilty pleas. Communication may break down, sending the case to trial. During negotiations, the

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* J.D. Candidate, University of Arkansas School of Law, 2021. Editor-in-Chief of the Arkansas Law Review, 2020-2021. This author sincerely thanks Professor Alex Nunn, University of Arkansas School of Law, for his guidance and wisdom during the writing process. The author would also like to thank the remarkable editors of the Arkansas Law Review for their attention to detail and precision while editing. Finally, the author thanks his family and friends for their continual support and encouragement.

1. This is especially true when prosecuting crimes that do not rely on physical evidence. *See* Jonathan D. Glater & Ken Belson, *In White-Collar Crimes, Few Smoking Guns*, N.Y. TIMES (Mar. 12, 2005), https://www.nytimes.com/2005/03/12/business/in-whitecollar-crimes-few-smoking-guns.html.

2. *See* Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUSTON L. REV. 1801, 1802-03 (2009).

3. Kyle Fleck, *Plea Negotiations: Why the Presumption of Waivability Does Not Apply to Federal Rule of Evidence 410*, 51 J. MARSHALL L. REV. 839, 839 (2018) (noting that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas") (alteration adopted).

criminal defendant may have made statements or concessions that would be prejudicial if presented to a jury. Congress, to protect criminal defendants and encourage plea bargaining, stepped in and passed Federal Rule of Evidence 410, which prohibits *the prosecution* from presenting any statements made during plea discussions.[4]

Critically, for purposes of this Comment, Rule 410 is silent as to whether *the defendant* can present such evidence *against the prosecution*.[5] As a matter of statutory interpretation, this silence means courts should weigh the relevance and probative value of evidence offered *by* the defendant against any unfair prejudice to determine admissibility.[6] Instead, courts have largely held that Rule 410 prohibits statements from plea negotiations, regardless of whether the evidence is being presented *by* the defendant or *against* the defendant.[7] This trend is problematic, legally and practically.

Legally, this disregard for the statute's plain language is in direct conflict with the fundamental principles of statutory interpretation.[8] The Federal Rules of Evidence (the Rule(s)) are essentially an instruction manual for courts. Judges are instructed to admit relevant evidence unless, among other things, a Rule provides otherwise. In some cases, such as Rule 410, Congress has predetermined admissibility. The majority of evidence, however, is admitted or excluded after the trial judge conducts a fact-intensive, case-by-case inquiry.[9] When courts forego this process and instead use Rule 410 to impose a blanket prohibition on plea-related evidence, they act contrary to clear legislative instruction.[10] Practically, it prevents criminal defendants from presenting evidence of an innocent conscience or the prosecution's doubt of the defendant's guilt.[11]

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4. *See* FED. R. EVID. 410.

5. *See* FED. R. EVID. 410.

6. *See infra* Part III.B.

7. GEORGE FISHER, EVIDENCE 143 (3d. ed 2013).

8. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (stating courts must enforce a statute according to its terms when the result is not absurd).

9. *See* FED. R. EVID. 401-03.

10. *See infra* Part III.B.

11. *See* Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407, 408

Part I will provide the history of Rule 410's legislative enactment and subsequent judicial applications. Most importantly, it will give insight as to how the majority trend came to be. It is also worth comparing the historical versions of Rule 410 to the Rule's current language. Part II begins with a summary of the two primary forms of statutory interpretation—purposivism and textualism. This section then provides a deeper review of these competing theories as they relate to judicial interpretations of the Rules.

Part III contains a statutory analysis of Rule 410. First, this section removes Rule 410 from an ongoing debate in the legal community as to whether the Rules are statutes or codifications of the common law. Second, it establishes that textualism provides the only proper interpretation of Rule 410. This section concludes by finding that Rule 410 does not prohibit evidence of statements made during plea negotiations when offered *by* the defendant. Finally, Part IV shows that the current evidentiary scheme is capable of handling defendant-offered evidence. Additionally, it pushes back on common justifications for the majority trend.

I. RULE 410'S HISTORY AND APPLICATIONS

Our modern evidentiary regime is a product of common law adjudication, historical evolution, and the balancing of competing interests inherent within our modern legal system.[12] Given the multitude of factors that drive our evidentiary scheme, it should come as no surprise that the process of codifying the Rules has often yielded somewhat ambiguous results. Take for example,

(2011) (discussing State v. Woodsum, 624 A.2d 1342 (N.H. 1993), where a defendant was prevented from presenting evidence of a rejected plea offer as proof of an innocent state of mind); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:71 (4th ed. 2019) (stating a prosecutor may concede that the jury will doubt parts of her case during plea discussions).

12. *See* Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1552 (1999) [hereinafter Weissenberger, *Evidence Myopia*] ("The Federal Rules of Evidence represent a codification of preexisting common law . . . ."); *see also* Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 159 (2008) (noting the "substantive" nature of the rules and the tension between the legislative and judicial branches in the rules' creation).

Rule 410, which has an especially convoluted and "murky" history.[13]

The drafting of Rule 410, which consisted of multiple versions and amendments, produced a seemingly straightforward evidentiary rule. Its current form, sometimes referred to as "the December 1980 version,"[14] states in relevant part:

> **(a) Prohibited Uses**. In a civil or criminal case, evidence of the following is not admissible *against the defendant* who made the plea or participated in the plea discussions:
>
> > **(1)** a guilty plea that was later withdrawn;
> > **(2)** a nolo contendere plea;
> > **(3)** a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
> > **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.[15]

Despite Rule 410's facial clarity, courts have struggled to interpret and apply the rule.[16] In particular, courts have wrestled with a problem that arises when a defendant wishes to admit evidence flowing from plea negotiations, such as a prosecutor's statements or the defendant's refusal to plead guilty.[17] Courts faced with this situation largely have two options.[18] First, a judge may try to ascertain Rule 410's purpose by considering contextual factors such as legislative history. Using this purposivist interpretation, the majority of courts have ruled that evidence flowing from plea negotiations is inadmissible regardless of which party presents it.[19]

Second, courts may defer to Rule 410's plain textual meaning and rule that such evidence is *per se* inadmissible only when

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13. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64 (quotation marks omitted).

14. *Id*.

15. FED. R. EVID. 410 (emphasis added).

16. *See infra* Part I.B.

17. *See infra* Part I.B.

18. There is a third option—deem the evidence inadmissible hearsay. The hearsay approach is outside the scope of this article. Briefly summarized, a proper hearsay analysis leads to the conclusion that such evidence is not inadmissible hearsay, and the admissibility should be determined by a Rule 403 balancing test. *See* Miller, *supra* note 11, at 437-42.

19. *See* FISHER, *supra* note 7.

offered *against* the defendant. Under this textualist approach, ruling on the evidence's admissibility when offered *by* a defendant requires the court to determine whether it is relevant and weigh its probative value against the risk of unfair prejudice.[20]

A. Rule 410's Legislative History

Rule 410's history is "a murky fog that obscures more than it illuminates."[21] While common law values provided the foundation for the majority of the Rules,[22] the notion that evidence from plea negotiations should be excluded from trial is relatively new.[23] Rule 410 is also unique from other Rules in that it was not scheduled to go into effect until August 1975, while the rest of the Rules took effect a month earlier.[24] This delay was caused by initial concerns that Rule 410 would be duplicative and unnecessary. At the time, Congress was considering the new Federal Rule of Criminal Procedure 11(e)(6) that was identical to, and would supersede, Rule 410.[25] This tension was later resolved when Rule 410 became the only rule regarding the admissibility of statements from plea negotiations.[26] These identical rules, as originally enacted, stated in relevant part:

> [E]vidence 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 action, case,

20. *See* FED. R. EVID. 401-03.

21. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

22. Weissenberger, *Evidence Myopia*, *supra* note 12, at 1552.

23. Our nation's system of pleas only dates back to the twentieth century. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 10 (1979) (noting that 1892 marked the first time the Supreme Court upheld a guilty-plea conviction). By the 1930's, plea bargaining was a regular practice. *Id*. at 33 ("[I]n 1936, 77% of all felony convictions were by plea of guilty. By 1938, the figure was 80%, and by 1940, 86% . . . ."). By the 1970's, plea bargaining had become an "essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260 (1971).

24. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

25. *Id*.

26. *See* FED. R. CRIM. P. 11(f) (cross-referencing FED. R. EVID. 410).

> or proceeding *against the person who made the plea or offer*.[27]

Five years later, in December 1980, Rule 410 was amended, resulting in its current language.[28] Congress amended Rule 410 with "the primary purpose of clarifying exactly what evidence relating to plea bargaining [the Rules] render inadmissible."[29] Of particular importance, the original 1975 language "*against the person* who made the plea or offer" became "*against the defendant* who made the plea or participated in the plea discussions."[30] In the December 1980 amendment, the advisory committee, vaguely addressing that change, only added to the present confusion by stating that Federal Rule of Criminal Procedure 11(e)(6) and the identical Rule 410 do "not also provide that the described evidence is inadmissible 'in favor of' the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor."[31] Thus, while not *per se* admissible when offered *by* the defendant, statements from plea negotiations were plainly deemed inadmissible if offered *against* a defendant.

B. Courts' Interpretation and Application of Rule 410

Courts' interpretations and applications of Rule 410 have exacerbated the problems that were at the center of its muddled and difficult codification process. In particular, courts have struggled to apply Rule 410 when a criminal defendant tries to present statements from plea negotiations.[32] This is especially problematic for a criminal defendant, as this evidence could be used to argue that the prosecutor did not believe in her theory of the case or to show

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27. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (emphasis added) (amended in 1980 with current version at FED. R. EVID. 410).

28. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

29. Miller, *supra* note 11, at 412-13.

30. *Compare* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (emphasis added) (providing Rule 410's original language), *with* FED. R. EVID. 410 (emphasis added).

31. FED. R. CRIM. P. 11 (advisory committee's note to 1979 amendment). This language indicates that Congress intended for trial courts to determine admissibility through Rules 401-03. *See infra* Part IV.

32. MUELLER & KIRKPATRICK, *supra* note 11, § 4:71.

the defendant's innocent state of mind.[33] Despite being textually permissible under Rule 410, courts have largely held the evidence inadmissible in light of Rule 410's goal of fostering plea negotiations.[34] This trend began with the Eighth Circuit's decision in *United States v. Verdoorn*, where the court prevented a defendant from presenting evidence that he had rejected a favorable plea offer.[35] However, in *United States v. Biaggi*, the Second Circuit distinguished from *Verdoorn* and allowed a defendant to present evidence that he rejected an offer of immunity.[36]

i. Verdoorn: Birth of a Blanket Prohibition

The majority trend of imposing a blanket prohibition on statements from plea negotiations traces back to a 1976 decision from the Eighth Circuit. In *United States v. Verdoorn*, a defendant attempted to challenge the strength of the government's case by introducing evidence that he rejected a plea offer that only required him to admit to lesser charges and guaranteed him a shorter sentence.[37] Affirming the trial court's exclusion of the evidence, the *Verdoorn* court discussed two statutes in its decision: Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 408.[38] Despite Rule 410 and Federal Rule of Criminal Procedure 11(e)(6) specifically governing the admissibility of statements from plea negotiations in criminal trials, the *Verdoorn* court chose to rely on the spirit of Rule 408, finding that "government proposals concerning pleas should be excludable."[39] The *Verdoorn* court made clear its logic was influenced by the judiciary's wish to protect and encourage plea bargaining:

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33. *Id*. This evidence may come in the form of a prosecutor offering a plea to a lesser charge or conceding that a jury may doubt parts of her case. *Id*. Alternatively, the evidence could come in the form of a defendant rejecting a plea that would guarantee him a more lenient sentence. *Id*.

34. FISHER, *supra* note 7 (stating that, since evidence offered against the prosecutor "would frustrate the purpose of the rule, courts generally have ignored" the rule's plain language).

35. United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976).

36. United States v. Biaggi, 909 F.2d 662, 691 (2nd Cir. 1990).

37. *Verdoorn*, 528 F.2d at 107.

38. *Id*. *Verdoorn* was decided on January 13, 1976; therefore, the *Verdoorn* court relied on the broader original language of Rule 410. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 for the Rule's original language.

39. *Verdoorn*, 528 F.2d at 107.

> Plea bargaining has been recognized as an essential component of the administration of justice. "Properly administered, it is to be encouraged." If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.[40]

The *Verdoorn* decision remains a fundamental touchpoint for courts wishing to exclude statements from plea negotiations offered *by* a defendant.[41]

ii. Biaggi: The Traditional Evidentiary Analysis

Fourteen years later, the Second Circuit distinguished from *Verdoorn* in *United States v. Biaggi* by finding that Rule 410 allows a defendant to admit evidence of a rejected offer for immunity.[42] The *Biaggi* court's logic had two components. First, the opinion notes that under Rule 410, "plea negotiations are inadmissible 'against the defendant,' and it does not necessarily follow that the Government is entitled to a similar shield."[43] Next, the court employed the traditional evidentiary analysis by evaluating the relevance, probative force, and potential unfair prejudice of the rejected immunity offer.[44] The *Biaggi* court held that the probative force of a rejected immunity offer "is clearly strong enough to render it relevant" because when a defendant rejects an immunity offer "his action is probative of a state of mind devoid of guilty knowledge."[45] Finally, the *Biaggi* court addressed the "closer question" of whether excluding the rejected immunity

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40. *Id*. (internal citations omitted).

41. *Verdoorn* has been relied on by federal courts as well as state courts interpreting state rules modeled after Rule 410 and FRCP 11(e)(6). *See e.g*., United States v. Geisen, 612 F.3d 471, 496 (6th Cir. 2010); United States v. Greene, 995 F.2d 793, 798 (8th Cir. 1993) ("*Verdoorn* has settled the matter in our circuit"); State v. Tony M., 213 A.3d 1128, 1142 (Conn. 2019); State v. Dalrymple, 2003 WL 22176218 (Minn. Ct. App. 2003) ("Following the reasoning in *Verdoorn*" to prohibit defendant from admitting plea offer).

42. *Biaggi*, 909 F.2d at 691. Note that *Biaggi* was decided on June 29, 1990, and, therefore, the *Biaggi* court relied on the current language of Rule 410. *See supra* note 15 and accompanying text.

43. *Biaggi*, 909 F.2d at 690 (internal citations omitted).

44. *Id*.

45. *Id*. at 690-91.

offer violated Rule 403.[46] Ultimately, "the exclusion of [the defendant's] state of mind evidence denied him a fair trial."[47]

The *Biaggi* court compared a rejected immunity offer to the *Verdoorn* defendant's rejected plea for lesser charges and a lighter sentence. The court noted that a plea rejection "could also evidence an innocent state of mind, but the inference is not nearly so strong as" rejected immunity.[48] Still, the Second Circuit indicated that a rejected plea offer could be relevant to show an innocent state of mind:

> Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations.[49]

As noted, many courts still quote and rely on *Verdoorn*.[50] Despite the significantly different approach to Rule 410, few courts have directly confronted the tension between *Verdoorn* and *Biaggi*.[51]

II. STATUTORY INTERPRETATION

Statutory interpretation is immensely important.[52] Although the judiciary's approach to construing statutes has varied methodologically over time, modern statutory interpretation is rooted in the idea of "legislative supremacy."[53] Legislative supremacy commands courts to interpret statutes in a way that gives "effect

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46. *Id*. at 691.

47. *Id*.

48. *Biaggi*, 909 F.2d at 691.

49. *Id*. (quoting 2 WIGMORE ON EVIDENCE § 293, at 232 (J. Chadbourn rev. ed. 1979)).

50. *See supra* note 40 and accompanying text.

51. *See* United States v. Geisen, 612 F.3d 471, 496-97 (6th Cir. 2010); United States v. Greene, 995 F.2d 793, 798 (8th Cir. 1993); United States v. Christensen, 2016 WL 1753600 (D. Ariz. 2016); State v. Woodsum, 624 A.2d 1342, 1344 (N.H. 1993).

52. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31 (1982) (stating that it is even more important in the modern era in light of the "statutorification of the American legal system").

53. *E.g*., John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400-01 (2017) [hereinafter Manning, *Without Intent*].

to the intent of Congress."[54] How a court should determine congressional intent is the focus of intense debate among practitioners, academics, and judges alike.[55] The debate largely boils down to two approaches: purposivism and textualism.[56]

A. Purposivism and Textualism

When a statute's plain meaning is clear, there should be no struggle between a purposivist or textualist interpretation.[57] Only when the statute presents ambiguities should a judge turn to his or her personal philosophy to resolve that ambiguity.[58] However, this so-called "plain meaning" approach is often conflated with textualism.[59] Thus, the divide between purposivism and textualism is important regardless of how clear a statute's plain language appears.

Purposivists, who view legislating as "a purposive act," believe "judges should construe statutes to execute that legislative purpose."[60] In an attempt to observe legislative supremacy, purposivists look to the problem Congress faced and try to discover how the statute was meant to solve that problem.[61] A purposivist

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54. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940).

55. *See generally* VALERIE C. BRANNON, CONG. RES. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2018), https://fas.org/sgp/crs/misc/R45153.pdf.

56. *Id*. at 10.

57. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296-97 (2006) (quoting Hartford Underwriters Ins. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)) ("When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); S.C. Produce Ass'n v. Comm'r, 50 F.2d 742, 744 (4th Cir. 1931) ("[W]here there is no ambiguity, there is no need for either a liberal or strict construction.").

58. *See Caminetti*, 242 U.S. at 485.

59. Morrell E. Mullins, Sr., *Coming to Terms With Strict and Liberal Construction*, 64 ALB. L. REV. 9, 45 (2000) (stating that "courts sometimes muddle [the] simple relationship [between purposivism, textualism, and plain meaning] by combining strict construction and 'plain meaning' (or its variants) together in mindless fashion"); *see also* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 971-72 (2005) (conflating textualism and the plain meaning approach). 59.

60. ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014).

61. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 358 (1990).

court considers "how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history."[62] Thus, purposivism is a results-oriented philosophy, and purposivist judges will avoid outcomes they view as contrary to a statute's purpose.[63] The inevitable struggle for purposivists is therefore a question of limits—how far outside of the statute's text will a purposivist judge go to achieve a particular result?[64]

Textualism, on the other hand, "emphasiz[es] text over any unstated purpose."[65] Textualism observes legislative supremacy by focusing on the statute's words because those words are what survived the constitutionally prescribed legislative process and have the force of law.[66] Textualists read a statue the way a regular

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62. *See* KATZMANN, *supra* note 60, at 3.

63. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-08 (1979) (using legislative history to determine "Congress' primary concern" when passing the law and refusing to interpret that law in a way "completely at variance with" that purpose) (internal quotation marks omitted); *see also* Craig, *supra* note 59, at 998-1000 (criticizing the deference to plain meaning for its impact on statutory purpose).

64. *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 87 (2006) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374-81 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958)) ("[T]he words of a statue, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.").

65. BRANNON, *supra* note 55, at 13. *See also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (stating courts "begin with the text" and "enforce it according to its terms") (quotation marks omitted); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there."). *But see* BRANNON, *supra* note 55, at 43 ("If a court believes that the practical consequences of a particular interpretation would undermine the purposes of the statute, the court may reject that reading even if it is the one that seems most consistent with the statutory text."). This concern may arise when courts try to avoid "absurd and unjust result[s]." *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998) (holding the Line Item Veto Act was unconstitutional because its enforcement would lead to an "absurd and unjust result") (citing Griffin v. Oceanic Contractors, Inc., 458 U. S. 564, 574 (1982) (quotation marks omitted). This idea, also known as the "absurdity doctrine," has lost relevance over time. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389-90 (2003).

66. *See generally In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989) (explaining the superiority of the text of a statute over legislative history because the text survived the legislative process); *see also* Manning, *Without Intent*, *supra* note 53, at 2426-27 (explaining that adhering to the plain meaning of texts satisfies legislative supremacy, which allows Congress to choose what policies to enact by voting on the text); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L. Q. 1085, 1093 (1995) (citing *In re* Sinclair, 870 F.2d 1340, 1344 (7th

member of congress would have read it when deciding how to vote on its enactment.[67] To resolve ambiguities when they arise, textualists often turn to so-called "canons of construction."[68] Textualists typically employ "semantic" canons which place special focus on the grammatical and linguistic characteristics of the statute[69]:

1. "***Casus Omissus***: A matter not covered by a statute should be treated as intentionally omitted."[70]
2. "**General/Specific Canon**: Where two laws conflict, 'the specific governs the general . . . .' That is, a 'precisely drawn, detailed statute pre-empts more general remedies. . . .'"[71]
3. "**Legislative History Canons**: 'Clear evidence of congressional intent' gathered from legislative history 'may illuminate ambiguous text.'"[72]
4. "**Plain Meaning Rule and Absurdity Doctrine:** 'Follow the plain meaning of the statutory text, except when a textual plain meaning requires an absurd result or suggest a scrivener's error.'"[73]

While there are many other canons of construction, the handful provided above both illustrate textualism's deference to

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Cir. 1989)) (discussing textualism as being rooted in the "constitutional allocation of powers").

67. Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

68. BRANNON, *supra* note 55, at 25, 34-35 n.352.

69. Cory R. Liu, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J. L. & PUB. POL'Y 711, 715 (2015). Purposivists have their own collection of canons as well, such as the "substantive canons," which are used more frequently by purposivists than textualists. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 CHI. L. REV. 879-80 (2017). Substantive canons "look to the legal consequences of interpretation rather than to" the text alone. BRANNON, *supra* note 55, at 28-29 (quoting LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 65 (1993)) (quotation marks omitted).

70. BRANNON, *supra* note 55, at 54 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (1st ed. 2012)).

71. *Id*. at 55 (quoting SCALIA & GARNER, *supra* note 70, at 183; Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012); Brown v. Gen. Servs. Admin., 425 U.S. 820, 834 (1976)).

72. *Id*. at 56 (quoting Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011)) (alteration adopted). The value of legislative history in statutory interpretation is especially controversial among textualists. *See* SCALIA & GARNER, *supra* note 70, at 376-77 (criticizing the reliance on legislative history in statutory interpretation). *See infra* Section II.A.1 for an overview of the debate regarding legislative history's interpretative value.

73. BRANNON, *supra* note 55, at 57 (quoting WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1195 (5th ed. 2014)).

unambiguous text and are especially relevant for interpreting Rule 410.[74]

B. The Role of Legislative History

Perhaps the greatest tension between purposivists and textualists is the value given to legislative history as a tool for determining congressional intent.[75] Purposivists, with a focus on the legislative process, are far more likely to rely on legislative history when interpreting statutes than textualists.[76] Legislation, however, is the product of a broad endeavor, and legislative history can take many forms.[77] Legislative history includes committee reports, legislators' statements, statements by bureaucrats and academics, rejected proposals, and even "legislative silences."[78] All forms of legislative history are not equally reliable measurements of legislative intent.[79] Recognizing this, Professors William Eskridge, Jr. and Phillip P. Frickey formulated a "Hierarchy of Legislative History Sources" which includes, from most to least authoritative: committee reports; sponsor statements; rejected proposals; floor and hearing colloquy; views of non-legislator drafters; legislative inaction; and subsequent legislative history. [80]

Textualism gives very little value to almost all forms of legislative history, even those viewed as "most authoritative" by purposivists.[81] Textualism rejects legislative history for two primary reasons. First, textualists believe legislative supremacy is best

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74. *See* BRANNON, *supra* note 55, at 54-64.

75. *See id*. at 38.

76. *Id*. at 11; *see also* Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L. REV. 2027, 2029 (2005) (stating textualists regard "legislative history adduced as evidence of legislative intent . . . as illegitimate").

77. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

78. *Id*.

79. *Id*. at 636.

80. *Id*. (citing Eskridge, Jr. & Frickey, *supra* note 61, at 353). *See id*. for a visual representation.

81. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2149 (2016) ("committee reports . . . are not the law enacted by Congress"); Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history") (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U. S. 102, 118 (1980); Chrysler Corp. v. Brown, 441 U. S. 281, 311 (1979). *See generally* BRANNON, *supra* note 55, at 38-41.

served by focusing on the statutory text.[82] This importance flows from the text's status as the sole result of the constitutional law-making process.[83] Second, textualists are highly skeptical of legislative history's reliability. Justice Kennedy warned that much of what compromises legislative history is "steps removed from the full Congress." [84] Justice Breyer, alluding to an analogy used by Judge Harold Leventhal, once observed that using legislative history is like looking over a crowded cocktail party and picking out your friends.[85]

Differences notwithstanding, there is one form of legislative history which both purposivists and textualists agree is highly probative of congressional intent: subsequent legislative amendment.[86] These amendments satisfy purposivism's deference to the legislative process by creating a record of "congressional deliberation."[87] Textualists are appeased as well because these amendments are the result of congress exercising its lawmaking power.[88] When comparing the pre- and post-amendment text of a statute, courts act under the presumption that "Congress . . . intends its amendment to have [a] real and substantial effect."[89]

C. Interpreting the Rules of Evidence

As noted, both purposivism and textualism operate under the theory of legislative supremacy.[90] The Rules, however, were not entirely promulgated through the traditional legislative process.[91] Instead, the Rules include both "provisions adopted by Congress

82. BRANNON, *supra* note 55, at 14.

83. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) (stating it is not proper for courts to determine a law's meaning based on "what the lawgiver meant, rather than by what the lawgiver promulgated").

84. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001).

85. Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion on the Constitutional Relevance of Foreign Court Decisions at American University, Washington College of Law (Jan. 13, 2005) (transcript available at [https://perma.cc/R94Z-4JDY]).

86. *See* BRANNON, *supra* note 55, at 41.

87. *Id*.

88. *See id*.

89. Stone v. Immigration and Naturalization Serv., 514 U.S. 386, 397 (1995).

90. *See supra* notes 53-54 and accompanying text.

91. James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1218 (10th Cir. 2011).

and provisions adopted by the Supreme Court under the Rules Enabling Act."[92] Moreover, many of the Rules are codifications of common law principles, and some believe they should be interpreted differently (i.e., in light of these principles) as a result.[93] Both considerations perhaps support a unique construction of the Rules.[94] However, the Supreme Court has determined the Rules are to be interpreted the same as any other statute passed by Congress.[95]

i. Rules of Evidence: Purposivism

The codification theory is partially rooted in the text of Rule 102[96]—specifically, the Rule's call for courts to "promote the development of evidence law."[97] This theory, championed by Professor Glen Weissenberger, views the Rules of Evidence as "a perpetual index code" instead of statutes.[98] Per Professor Weissenberger, interpreting the Rules as statutes is "inappropriately defer[ential] to legislative supremacy. . . ."[99] Under this model, federal courts have "dynamic authority to expand the law of evidence consistent with the values" of administrative fairness and efficiency pursuant to Rule 102.[100]

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92. *Id*.

93. Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights From Article VI*, 30 CARDOZO L. REV. 1615, 1619-20 (2009) [hereinafter Weissenberger, *Proper Interpretation*] ("[T]he Federal Rules of Evidence represent a codification of the pre-existing common law . . . which informs their interpretation.").

94. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson In Statutory Interpretation*, 93 MINN. L. REV. 26, 32 (2008) ("[T]he Rules Enabling Act serves as a quintessential illustration of a statute whose ambiguous text must be interpreted in light of objectively determined background purposes, rather than via a narrow focus on either the literal meaning of the text or the specifics of legislative history."); Weissenberger, *Evidence Myopia, supra* note 12, at 1566 (stating Rule of Evidence 102 "expressly invites, if not commands," an activist interpretation of the Rules).

95. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

96. Weissenberger, *Evidence Myopia*, *supra* note 12, at 1552.

97. FED. R. EVID. 102. *See also* Weissenberger, *Evidence Myopia*, *supra* note 12, at 1580. It should be noted that when crafting the codification theory, Professor Weissenberger relied on a version of Rule 102 which contained the phrase "*promotion of the growth* and development of the law of evidence." *Id*. at 1551. The fact that the rule in its current state no longer contains the "promotion of growth" language is important as it is no longer as fair to infer legislative permission to expand beyond the Rules' text.

98. Weissenberger, *Evidence Myopia, supra* note 12, at 1580.

99. *Id*. at 1587.

100. Glen Weissenberger, *The Elusive Identity of The Federal Rules of Evidence*, 40 WM. & MARY L. REV. 1613, 1614 (1999) [hereinafter Weissenberger, *Elusive Identity*].

Courts have not gone so far as to expressly accept the invitation to disregard legislative supremacy.[101] However, many have looked past unambiguous text and made decisions based on the purpose, or "spirit," of the Rules in light of efficient administration and common law values.[102] These broader interpretations are especially notable in cases where courts review "specialized relevance rules."[103]

ii. Rules of Evidence: Textualism

While some advocate for the broader purposivist interpretation of the Rules, the United States Supreme Court has largely turned to textualism.[104] Moreover, the Court has rejected the notion that the text of a congressionally promulgated rule can be overpowered by common law values.[105] At most, the common law can "serve as an aid to [the Rules'] application."[106]

By interpreting the Rules textually, the Court "rejected the traditional, legal process approach" which "viewed each piece of

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101. At the time of this writing, the author found no caselaw adopting or discussing the Rules as a "perpetual index code."

102. *See* Ronda-Perez v. Banco Bilbao Vizcaya Argentina-Puerto Rico, 404 F.3d 42, 47 (1st Cir. 2005) (upholding exclusion of a rejected offer when that evidence fit "within the spirit[,] if not the letter" of Rule 408); United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) (imputing "the rationale of" Rule 408 to Rule 410); Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907, 918 (10th Cir. 1986) (holding trial court properly admitted evidence because exclusion would "strain the spirit of" Rule 407); *see also* FISHER, *supra* note 7, at 143.

103. Federal Rules of Evidence 407-11 are sometimes characterized as "specialized relevance rules." Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 782 n.104 (2011).

104. Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 390 (1996) [hereinafter Imwinkelried, *Moving Beyond*] ("Until recently, Supreme Court Justices largely adopted a 'textualist' approach to the construction of the rules."); Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 267 (1993) [hereinafter Imwinkelried, *Brief Defense*] (stating the Supreme Court "has adopted a moderate textualist approach to the construction of the Rules").

105. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) ("the Rules occupy the field"); United States v. Abel, 469 U.S. 45, 49 (1984) ("In the case of [the] Rules, too, it must be remembered that Congress extensively reviewed our submission, and considerably revised it."); *see also* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) ("In principle, under the Federal Rules no common law of evidence remains.").

106. *Daubert*, 509 U.S. at 588.

legislation as purposeful and rational."[107] Rather, the Court has interpreted the Rules under a "moderate textualist approach."[108] This moderate textualism "recognize[s] a strong, albeit rebuttable, presumption" that a Rule's text "prevails over any contrary meaning suggested by" legislative history.[109] Even under moderate textualism, a Rule's plain meaning will take priority so long as it would not lead to an absurd result.[110]

The textual approach is further bolstered by reading Rule 402.[111] A textual reading leads to the conclusion that Rule 402 expressly governs whether "courts retain the power to enforce [common law] exclusionary rules to block the admission of relevant evidence."[112] By 402's language, if the question of admissibility can be answered by the United States Constitution, a federal statue, the Rules, or other rules prescribed by the United States Supreme Court, then common law considerations carry little to no weight.[113]

III. DEFENDANT-OFFERED EVIDENCE IS NOT *PER SE* INADMISSABLE

Rule 410 is undoubtedly a statute. Courts tasked with interpreting Rule 410 must strive to achieve the legislature's intent just as they would with any other statute.[114] As noted, the two primary approaches courts use to ascertain Congress's intent are textualism and purposivism.[115] To comport with the notion of legislative

107. Imwinkelried, *Brief Defense*, *supra* note 104, at 268.

108. *Id*. at 267.

109. Edward J. Imwinkelried, *Whether The Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness is Worse Than Myopia*, 40 WM. & MARY L. REV. 1595, 1596 (1999) [hereinafter Imwinkelried, *Blindness is Worse*]. This legislative history includes materials such as Advisory Committee Notes and congressional committee rules. Imwinkelried, *Moving Beyond*, *supra* note 104, at 391.

110. *See* United States v. Zolin, 491 U.S. 554, 566 (1989); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 760-62 (1990) (discussing *Zolin*, 491 U.S. 554); *see also* Imwinkelried, *Moving Beyond*, *supra* note 104, at 391.

111. *See* Imwinkelried, *Blindness is Worse*, *supra* note 109, at 1608-09.

112. *Id*. at 1608.

113. *See id*.

114. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

115. BRANNON, *supra* note 55, at 10.

supremacy, courts must read specialized relevance rules, such as Rule 410, textually.

A. Rule 410 Must Be Interpreted as a Statute

As noted, there is much debate as to whether the Rules should be interpreted as statutes or merely as codifications of the common law.[116] There should be no such debate about Rule 410. Rule 410 is not one of the many Rules adopted by the Supreme Court pursuant to the Rules Enabling Act.[117] Instead, it was legislatively promulgated after much consideration and debate.[118] Rule 410 also cannot be seen as a simple codification of common law principles. Plea bargaining is a relatively new component of the American justice system, and jurisprudence concerning the admissibility of plea-related evidence only goes back to the early twentieth century.[119] Thus, neither factor in support of a non-statutory reading of the Rules is present with Rule 410.[120] The critical inquiry, then, is not whether Rule 410 is a statute, but how courts should interpret and apply Rule 410.

B. Rule 410 Must Be Interpreted Under Textualism

Textualism provides the proper interpretation of Rule 410 because a textual reading best comports with the notion of legislative supremacy.[121] Under the guise of the Rules, Congress has instructed the judiciary to only admit evidence if a judge finds it

116. *See supra* Part II.B.

117. *See* MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

118. *Id*. (Rule 410 was originally enacted by Congress in 1975); Miller, *supra* note 11, at 412 (Rule 410 was legislatively amended in 1979).

119. Alschuler, *supra* note 23, at 10, 33; *see* Kercheval v. United States, 274 U.S. 220, 225 (1927) (prohibiting evidence of a withdrawn guilty plea).

120. *See* Redish & Murashko, *supra* note 94, at 32 (stating rules promulgated under the Rules Enabling Act "must be interpreted in light of objectively determined background purposes, rather than via a narrow focus on either the literal meaning of the text or the specifics of legislative history."); Weissenberger, *Proper Interpretation*, *supra* note 93, at 1619-20 (claiming that pre-existing common law must influence judicial interpretations of the Rules).

121. *See* Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also In re* Sinclair, 870 F.2d 1341-42 (7th Cir. 1989); Manning, *Without Intent, supra* note 53, at 2426-27; Frickey, *supra* note 66, at 1093.

relevant to the case.[122] Determining relevance under Rule 401 is a fact-intensive inquiry which Congress has largely left to the courts.[123] Yet with specialized relevance rules, such as Rule 410, Congress takes decision-making authority away from trial judges and deems certain pieces of evidence inadmissible no matter how relevant they may be to a particular case. These specialized relevance rules only apply to very specific forms of evidence and in narrow circumstances.[124] If the offered evidence fits within the scope of the Rule's text, then legislative supremacy demands that courts deem the evidence inadmissible without further consideration. If it does not, Congress has clearly intended for trial judges to determine admissibility by balancing the evidence's relevance and probative value against its unfair prejudice.[125] Thus, trial judges must read these Rules closely to determine where Congress has allocated decision-making power.

i. Rule 410's Plain Language Is Unambiguous

Simply reading the Rule's text makes clear that Rule 410 is inapplicable when the defendant is the party offering the plea-related evidence. As noted, specialized relevance rules such as Rule 410 apply only to particular forms of evidence under narrow circumstances.[126] Rule 410 governs a rather wide array of evidence—essentially anything related to the plea-bargaining process.[127] However, this seemingly broad jurisdiction is significantly narrowed by the fact that Rule 410 is only triggered when that evidence is being offered against the defendant who

122. *See* FED. R. EVID. 402.

123. *See* FED. R. EVID. 401; MUELLER & KIRKPATRICK, *supra* note 11, § 4:3 ("decisions on relevancy are made on a case-by-case basis, and each is dependent on surrounding facts, circumstances, and issues").

124. *See* FED R. EVID. 407 (only barring evidence of subsequent remedial measures when used to establish negligence or culpability); FED. R. EVID. 408 (only barring evidence from civil settlement negotiations when used to establish liability); FED R. EVID. 409 (only barring offers to pay medical or similar expenses when used to establish liability); FED R. EVID. 410 (only barring evidence from criminal plea negotiations when used against the same defendant who was part of the plea negotiations); FED R. EVID. 411 (only barring evidence of insurance coverage when used to establish negligence or culpability).

125. *See* FED R. EVID. 401-03.

126. *See supra* note 124 and accompanying text.

127. *See* FED R. EVID. 410.

was a party to the plea-bargaining discussions.[128] Since these parameters are clearly dictated within the Rule's text, Rule 410 is unambiguous.[129]

Because Rule 410's text is clear, there is no reason for courts to turn to purposivism or textualism.[130] Applied as written, Rule 410 requires trial judges to ask, as a threshold question, whether the evidence is being admitted "against the defendant who made the plea or participated in the plea discussions."[131] When the answer to this question is no, courts must turn to the traditional evidentiary analysis provided in Rules 401-03.

ii. Rule 410 Under the Canons of Construction

Despite this simplicity, courts use Rule 410 to exclude evidence offered *by the defendant*.[132] As a result, Rule 410's silence on defendant-offered evidence is treated as an ambiguity, opening the door to contrary interpretations.[133] Additionally, some have observed that Rule 410's failure to address defendant-offered evidence is "hard to understand."[134] Because of this lapse, it is argued courts should look "to the policies underlying Rule 410" and take "resort" in Rule 408.[135] The aforementioned canons of

128. *See id*.

129. *Id*. *See also* MUELLER & KIRKPATRICK, *supra* note 11, § 4:64 (acknowledging that Rule 410's plain language clearly does not govern admissibility of evidence offered by the defendant).

130. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (citation omitted).

131. FED R. EVID 410.

132. *See* FISHER, *supra* note 7, at 143 (explaining that courts have generally held defendant-offered evidence inadmissible because it contradicts the "purpose" behind Rule 410).

133. The majority of courts have chosen to conduct a purposivist analysis and hold defendant-offered evidence inadmissible because of Rule 410's goal to foster plea negotiations. *See id*. (stating that "courts generally have ignored the strict language"). *But see* United States v. Mezzanatto, 513 U.S. 196, 205 (1995) (acknowledging that Rule 410 "leave[s] open the possibility that a defendant may offer [plea-related] statements . . . for his own tactical advantage"); United States v. Biaggi, 909 F.2d 662, 690 (2d Cir. 1990) (acknowledging Rule 410's plain language does not prohibit defendant-offered evidence).

134. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

135. *Id*. This is precisely what the Eighth Circuit did in *United States v. Verdoorn*. *See supra* Part I.B.1.

construction establishes that these methods are inconsistent with the fundamental notion of legislative supremacy.

First, the "plain meaning rule and absurdity doctrine" canon of construction states that a statute's unambiguous language should always govern unless enforcement would lead to an "absurd result."[136] Applying Rule 410 as written does not lead to an absurd result. Rather, it gives criminal defendants the opportunity to argue their innocence by presenting evidence of an innocent state of mind or the prosecutor's doubt in their guilt.[137] Some observers characterize this as an absurd result because allowing the defendant to present statements from plea negotiations "would be confusing to juries and likely misleading."[138] However, Congress has already addressed these concerns with Rule 403.[139]

Second, a statute's silence does not empower courts to fill in the blanks. The "c*asus omissus*" cannon provides that when a statute is silent on a matter, courts should treat it as a purposeful omission by Congress.[140] Thus, blatantly ignoring the omission would contradict the foundational notion of legislative supremacy.[141]

Third, taking "resort"[142] in Rule 408 is contrary to the "general/specific" cannon of construction.[143] When two statutes conflict, courts should defer to the one that is more narrowly tailored to the situation.[144] Rules 408 and 410 clearly conflict, as 408 prohibits evidence of negotiations regardless of which party offers the evidence while 410 is only triggered when the evidence is offered against the defendant.[145] Thus, Rule 408 should have no bearing because Rule 410 is precisely drawn for the express

136. BRANNON, *supra* note 55, at 57 (quoting ESKRIDGE, JR., ET AL., *supra* note 73, at 1195).

137. MUELLER & KIRKPATRICK, *supra* note 11, § 4:71.

138. *Id*. § 4:64.

139. *See infra* Part IV.B.

140. BRANNON, *supra* note 55, at 54 (quoting SCALIA & GARNER, *supra* note 70, at 93).

141. United States v. Am. Trucking Ass'n, 310 U.S. 534, 542 (1940) (stating courts must "give effect to the intent of Congress").

142. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

143. BRANNON, *supra* note 55, at 55 (quoting SCALIA & GARNER, *supra* note 70, at 183).

144. *Id*.

145. *Compare* FED. R. EVID. 408, *with* FED. R. EVID. 410.

purpose of governing admissibility of plea-related evidence in criminal prosecutions.[146]

Finally, Rule 410's legislative history supports the claim that a prohibition on defendant-offered evidence was purposely omitted. Under the "legislative history" canon, looking to a statute's legislative history is permissible to "illuminate ambiguous text."[147] The most authoritative form of legislative history is subsequent legislative amendment.[148] The original version of Rule 410 deemed plea-related evidence inadmissible when offered against "the *person* who made the plea or offer."[149] This language *was* ambiguous as to whether the rule excluded evidence offered against the prosecution. In a situation where the prosecutor initiates plea negotiations, the government may be viewed as extending an offer through the prosecutor as its agent, and therefore could be covered by the rule.[150]

Due to such ambiguities, and a desire to narrow the exclusionary window, Congress amended Rule 410.[151] As a result, the rule only forbids plea-related evidence when it is offered "*against the defendant* who made the plea or participated in the plea discussions."[152] Because Congress intends for such amendments to have a "real and substantial effect," courts using Rule 410 to exclude evidence offered *by* the defendant are not showing appropriate deference to legislative supremacy.[153]

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146. Even advocates for taking "resort" in Rule 408 acknowledge doing so is "at best awkward." MUELLER & KIRKPATRICK, *supra* note 11, § 4:71.

147. BRANNON, *supra* note 55, at 56 (quoting Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011)) (internal quotation marks omitted).

148. *See id*. at 41.

149. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (providing Rule 410's original language).

150. Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, U.S. DEP'T. JUST. (Oct. 17, 2006), https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all ("Either the government or the defendant can initiate plea negotiations . . . ."); *see also* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017) (explaining that prosecutors often employ "take-it-or-leave-it" offers in plea negotiations").

151. *See* Miller, *supra* note 11, at 412-13.

152. FED. R. EVID. 410 (emphasis added).

153. Stone v. INS, 514 U.S. 386, 397 (1995).

IV. THE CURRENT EVIDENTIARY SCHEME IS COMPETENT TO HANDLE DEFENDANT-OFFERED EVIDENCE

The foregoing analysis is not meant to proclaim that statements from plea negotiations are always admissible when offered by the defendant. Rather, it establishes that Congress has allocated the decision-making authority to trial judges. In doing so, Congress commands trial judges to determine whether the defendant-offered evidence is relevant and weigh its probative value against the unfair prejudice, if any.[154]

A. Relevance and Probative Value

Relevance is a notoriously low barrier to overcome.[155] Determining whether a piece of evidence is relevant requires the trial judge to assess "materiality" and "probative value."[156] Evidence is material if it "is of consequence in determining the action."[157] Probative value is measured by the evidence's "tendency to make a fact more or less probable than it would be without the evidence."[158]

Defendants offering evidence from plea negotiations are likely trying to prove an innocent conscience or the prosecutor's lack of confidence in the defendant's guilt.[159] Both purposes easily surpass the low threshold of relevance. As to materiality, "evidence of a defendant's innocent state of mind" has been

154. *See* FED. R. EVID. 401-03. Rule 401 defines relevant evidence. FED. R. EVID. 401. Rule 402 creates a presumption of admissibility for relevant evidence. FED. R. EVID. 402. Rule 403 allows for the exclusion of otherwise relevant evidence if there is a risk of unfair prejudice that *substantially* outweighs the evidence's probative value. FED. R. EVID. 403.

155. *E.g.*, Forrest v. Parry, 930 F.3d 93, 114 (3d Cir. 2019) ("[T]he bar for what constitutes relevant evidence is low.").

156. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 395 (7th ed. 2014).

157. FED R. EVID 401(b).

158. FED R. EVID. 401(a).

159. State v. Woodsum, 624 A.2d 1342, 1344 (N.H. 1993) (stating that "[m]any inferences follow from a defendant's decision to exercise his or her right to a jury trial," including "that a defendant [truly] believes he or she did not commit the crime [charged]"); Miller, *supra* note 11, at 408 (discussing *Woodsum*); MUELLER & KIRKPATRICK, *supra* note 11, § 4:71 (suggesting a prosecutor may offer a plea deal because "a jury may doubt parts of her case").

described as "critical to a fair adjudication of criminal charges."[160] Evidence of a prosecutor's lack of confidence in their own case has also been deemed admissible. In *State v. Black*, a trial court allowed the defendants to present "the delay in the commencement of the prosecution against them as an implied admission" as evidence that the prosecution was "conscious of the weakness of the State's case against the defendants."[161]

Turning to probative value, a defendant's rejection of a plea offer is probative of "an innocent state of mind."[162] A favorable plea offer can be a persuasive sign of innocence, as "innocent defendants typically receive especially attractive plea offers."[163] Therefore, courts should view a defendant's rejection of such an offer as "some evidence of an innocent state of mind."[164] Evidence of a plea offer is likewise probative of a prosecutor's doubt as to the defendant's guilt because these doubts are among the most prominent reasons prosecutors offer plea bargains.[165] However, "relevance alone does not [guarantee] . . . admissibility."[166]

B. Unfair Prejudice

While there is a presumption of admissibility for relevant evidence,[167] courts may nonetheless exclude it "if its probative value

160. United States v. Biaggi, 909 F.2d 662, 692 (2d Cir. 1990).

161. State v. Black, 53 S.E.2d 443, 445 (N.C. 1949); *see also* Miller, *supra* note 11, at 442 (discussing *Black*).

162. *Biaggi*, 909 F.2d at 691 (stating that rejection of a favorable plea offer "could . . . evidence" an innocent mind); *see also* note 49 and accompanying text.

163. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 26-27 (2002).

164. Miller, *supra* note 11, at 449. *But see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1943 (1992) (characterizing guilty defendants as "unusually prone to risk taking" and therefore more likely to reject a favorable plea offer and gamble on the outcome of a trial).

165. *See generally* Miller, *supra* note 11, at 446; *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968) ("[S]trength or weakness of the state's case [is viewed] as the most important factor in the task of bargaining."); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 642 n.10 (2008) (providing a 1964 study which found that 85% of prosecutors "were influenced by weaknesses in the government's case").

166. GN Netcom, Inc. v. Plantronics, Inc., 930 F.3d 76, 85 (3d Cir. 2019) (quoting Coleman v. Home Depot, Inc., 306 F.3d 133, 1343 (3d Cir. 2002).

167. FED. R. EVID. 402 (relevant evidence is generally admissible unless the Constitution, a federal statute, other rules of evidence, or rules prescribed by the Supreme Court

is substantially outweighed by a danger of . . . unfair prejudice."[168] Observers have largely noted two sources of unfair prejudice when defendants offer evidence of statements made during plea negotiations. First, such evidence may be "confusing to juries and likely misleading."[169] Second, and much more prominent, is the fear that "admitting such statements would discourage plea bargaining."[170] Neither concern justifies a blanket prohibition on defendants' ability to admit statements made during plea negotiations.

Rule 403 expressly provides that evidence, while relevant, may be excluded if it presents a danger of "misleading the jury."[171] However, it is only proper to exclude the evidence if the likelihood of juror confusion "*substantially* outweigh[s]" the evidence's probative value.[172] Thus, Rule 403 requires trial judges to undertake a factually-intensive inquiry before deciding whether relevant evidence—such as a rejected plea offer or a prosecutor's statements—may be excluded for fear of juror confusion.

The judiciary's desire to protect and encourage plea bargaining is similarly unsupportive of a blanket prohibition. It is true that conservation of judicial resources is a key concern underlying Rule 403 and that plea bargaining is an "essential component" of the efficient administration of justice.[173] Still, Rule 403 is concerned with efficiency within a *particular proceeding*, not within the judicial system as a whole. Such an overarching concern is best left to Congress.[174] If the legislature finds that the judicial

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demand otherwise). *See also Coleman*, 306 F.3d at 1343 ("[T]here is a strong presumption that relevant evidence should be admitted . . . .").

168. FED. R. EVID. 403.

169. MUELLER & KIRKPATRICK, *supra* note 11, § 4:64.

170. *Id*. Courts using Rule 410 to impose a blanket prohibition have largely done so out of a desire to protect and encourage plea bargaining. *See e.g.*, United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976); *see also* FISHER, *supra* note 7, at 143.

171. FED. R. EVID. 403.

172. FED. R. EVID. 403 (emphasis added).

173. Santobello v. New York, 404 U.S. 257, 260 (1971). *See also* FED. R. EVID. 403 (allowing relevant evidence to be excluded if it presents a danger of "undue delay, wasting time, or needlessly presenting cumulative evidence"); Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz, *supra* note 164, at 1912) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

174. This is evidenced by Congress's promulgation of the "specialized relevance rules." *See supra* Part III.

branch cannot properly function while also allowing defendants to present evidence of rejected plea offers and prosecutors' statements, Congress should amend Rule 410 to exclude such evidence.

CONCLUSION

This Comment does not claim that evidence of statements from plea negotiations is admissible anytime it is offered *by* the defendant. But it does criticize the majority of courts for their improper interpretation and application of Federal Rule of Evidence 410. Rule 410 is a congressionally promulgated statute. When courts are tasked with interpreting statutes, they must strive "to give effect to the intent of Congress."[175] The proper way to achieve this goal is to enforce statutes according to their plain language.[176] Rule 410 clearly does not prohibit defendants from presenting evidence of a rejected plea offer or statements made during plea negotiations. Yet, courts routinely prevent defendants from doing so because of a desire to promote and encourage plea bargaining.[177] Instead, courts should be analyzing the probative value and unfair prejudice of the defendant-offered evidence on a case-by-case basis—as Congress has commanded them to do.[178]

175. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940).

176. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

177. *See* FISHER, *supra* note 7, at 143.

178. *See supra* Part III.B.1.