

# NOTES

## Reviving “Dead Letters”: Reimagining Federal Rule of Evidence 410 as a Conditional Privilege

*Though understudied relative to its fellow specialized relevance rules, Federal Rule of Evidence 410 protects a crucial element of the criminal justice system: plea negotiations. As written, the rule prevents the admission of evidence gathered during plea discussions, which helps assure criminal defendants that their candid discussions with prosecutors will not harm them in any future proceeding. But the Supreme Court has greatly weakened Rule 410, permitting broad waiver of the rule’s protections that run afoul of Congress’s purpose in creating the rule and its plain language. In light of these developments, the Note argues that Rule 410 should be reconceptualized as a conditional privilege. Conditional privileges share many attributes with the more familiar absolute privileges, but conditional privileges often apply to communications with governmental entities and can be overcome by an ad hoc showing of necessity. This Note will elaborate on why and how Rule 410 should be reimagined as a conditional privilege and how this change will better effectuate Rule 410’s original goals of promoting effective plea discussions.*

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## INTRODUCTION

Imagine that you are a purveyor of methamphetamine, and you have been caught red-handed.<sup>1</sup> Given the circumstances of your arrest, you face up to ten years in prison. But you possess information about several drug trafficking organizations that may be of value to the prosecutor. You and your defense counsel have a meeting with the Assistant U.S. Attorney to discuss the possibility of reaching a plea deal. Your attorney is hopeful—despite the almost certain conviction, taking your case to trial is hardly worth the prosecutor’s time. And given the information you purport to have, the prosecutor should be willing to shave your sentence down by several years if this information leads to future arrests of more “valuable” criminals.

You arrive at the meeting, and when the prosecutor arrives, he immediately hands you a form to sign before any discussions begin. The document is a form letter, given to all criminal defendants seeking plea negotiations, stipulating that you waive certain rights available to you under Federal Rule of Evidence 410. Your attorney explains to you that, by signing, anything you say during the meeting can be used in any subsequent trial to impeach you or rebut any contradictory evidence

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1. This hypothetical is loosely based on the facts of *United States v. Mezzanatto*, 513 U.S. 196, 198–99 (1995). For a detailed history of this case, see Christopher Slobogin, *The Story of Rule 410 and United States v. Mezzanatto: Using Plea Statements at Trial*, in *EVIDENCE STORIES* 103 (Richard Lempert ed., 2006). See also David P. Leonard, *Let’s Negotiate a Deal: Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After Mezzanatto*, 23 *CRIM. JUST.* 8, 9 (2008) (outlining the general perspectives of the prosecutors and defendants in this situation).

offered on your behalf. But you are not going to trial, so these provisions are moot. Further, the prosecutor refuses to continue the meeting without your signature, so you sign the form.

A few minutes later, you begin to admit your participation in crimes. As soon as you begin to implicate others, however, the discussion quickly falls apart. The prosecutor asks you about your whereabouts the morning of your arrest, and your answer contradicts numerous other eyewitness accounts. The moment the prosecutor senses you may be providing faulty information, he immediately calls an end to the meeting. The prosecutor withdraws his offer for a reduced sentence and informs your attorney he intends to try the case in the coming weeks. Given the confession you provided during the failed plea negotiations, the jury quickly convicts you.

Plea discussions are a critical element of the U.S. criminal justice system. Approximately ninety percent of cases generate plea discussions at some point.<sup>2</sup> These discussions benefit both defendants and prosecutors. Defendants get a preview of the prosecution's evidence and the opportunity to reduce their sentence. Prosecutors get to effectively manage their caseloads through compromise and may acquire information on continuing crimes.<sup>3</sup> To encourage candor between the parties, Congress enacted Federal Rule of Evidence 410 ("Rule 410"), which makes statements made during certain plea discussions inadmissible in court.<sup>4</sup> Rule 410 permits a defendant to

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2. Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1169 (2016) (citing *Missouri v. Frye*, 566 U.S. 134, 143 (2012)).

3. *See id.* at 1194 ("Does plea bargaining conserve scarce resources, saving time and money? Absolutely. Would the system crash if every case went to trial? Again, absolutely."); Leonard, *supra* note 1, at 9 ("Both sides know that settlement is a necessity in the criminal justice system. In fact, the system cannot function unless only a small percentage of cases are tried.").

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

(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.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

- (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

speak freely, knowing that the discussions are inadmissible at trial should a plea be withdrawn or fail for any reason. The resulting candor provides the prosecutor with more insight into potential criminal operations.<sup>5</sup> But prosecutors have one major issue with Rule 410: there are no negative consequences for liars, and defendants may be encouraged to lie in order to sweeten any potential deal.<sup>6</sup> Defendants, however, see this as protection against “any accidental slip or inconsistency.”<sup>7</sup>

The Supreme Court greatly weakened Rule 410 in *United States v. Mezzanatto*.<sup>8</sup> Though the legislative history reveals congressional concern that waiver of Rule 410 rights would allow for the impeachment of criminal defendants, the *Mezzanatto* Court ruled that such waivers are permissible.<sup>9</sup> Circuit courts have subsequently extended *Mezzanatto* to allow Rule 410 waivers that permit use of proffered information from plea discussions in the prosecution’s case-in-chief.<sup>10</sup> Thus, beyond evidence of a defendant’s prior inconsistent statements, courts now permit prosecutors to use statements made during plea negotiations as substantive evidence of guilt. In the past two decades, prosecutors have broadly sought these *Mezzanatto* waivers from all criminal defendants seeking plea discussions.<sup>11</sup> These waivers render the rule a “dead letter,” leaving criminal defendants with almost none of the protections guaranteed by the text of Rule 410.<sup>12</sup>

This Note argues that to properly effectuate Congress’s purpose of protecting criminal defendants and encouraging plea discussions, Rule 410 must be given new life as a conditional privilege recognized by the courts. Unlike absolute privileges, conditional privileges can be overcome through a showing of necessity by the opposing party. These

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(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present;

see also FED. R. EVID. 410 advisory committee’s note to 1972 proposed rules (outlining the intended policy behind the rule).

5. See Leonard, *supra* note 1, at 9 (“Accused persons . . . know they can speak freely with prosecutors, and even admit participation in the crime or offer to plead guilty, without fear that their words will be used against them if the discussions fail to yield a plea bargain . . .”).

6. See *id.* (noting that lying is incentivized to improve the sentence reduction or to continue negotiating for the promise of landing a “kingpin”).

7. *Id.*

8. 513 U.S. 196 (1995).

9. See Slobogin, *supra* note 1, at 103–04 (stating that, despite a congressional enactment that “prohibited . . . evidentiary use of withdrawn guilty pleas,” the Supreme Court held that Rule 410 waivers are permissible).

10. *E.g.*, *United States v. Sylvester*, 583 F.3d 285, 291 (5th Cir. 2009).

11. See Slobogin, *supra* note 1, at 104 (noting that “waiver of [Rule 410’s] protections is now the norm”).

12. See *Mezzanatto*, 513 U.S. at 211 (Souter, J., dissenting).

privileges often attach to communications with and within governmental entities. Rule 410's structure is unique compared to other specialized relevance rules—it operates as a complete bar on admission except in particular circumstances. In this way, the rule's structure already resembles a privilege. Furthermore, the creation of new privileges is often viewed under two distinct rationales: the instrumental rationale and the humanistic rationale. Under both of these paradigms, the proposed Rule 410 privilege satisfies the necessary requirements for judicial recognition. Ultimately, this transition will restore some life to the intended protections of Rule 410, which vanished after *Mezzanatto* and its progeny.

This Note proceeds as follows: Part I discusses the history and operation of Rule 410, detailing its unique position within the Federal Rules of Evidence and its legislative history. This Part also reviews the case law surrounding waivers of Rule 410 protections and details how circuit courts now unanimously recognize the validity of broad waiver provisions in the plea discussion context. Part II analyzes conditional privileges—the basic elements of these privileges, the competing rationales underlying U.S. privilege law, and the requirements for the creation of new privileges. Part III applies those ideas to Rule 410, arguing for a reconceptualization of the rule as a conditional privilege, affording criminal defendants more of the rights Congress intended to provide them without running afoul of the broad judicial consensus that these rights are subject to waiver.

## I. THE HISTORY AND UNFULFILLED PURPOSE OF FEDERAL RULE OF EVIDENCE 410

### A. *The Anomalous Nature of Rule 410*

Rule 410 occupies a curious position within the Federal Rules of Evidence. Rule 410 is a “specialized relevance rule” that operates as a clearer articulation of the general balancing principles set out by Rule 403.<sup>13</sup> Rule 410, however, is “fundamentally different from . . . each of the other specialized relevance rules.”<sup>14</sup> The other rules deny admission of the covered evidence only for particular purposes. For example, Rule 407 prohibits evidence of subsequent remedial measures to prove negligence, culpable conduct, product defects, or a failure to warn.<sup>15</sup> For

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13. See GEORGE FISHER, EVIDENCE 95 (3d ed. 2013) (“Each of these five rules reflect the rule writers’ judgment that, as a matter of law, the evidence it governs fails a Rule 403 weighing test.”); see also FED. R. EVID. 407–409, 411.

14. FISHER, *supra* note 13, at 141.

15. FED. R. EVID. 407.

all other purposes, evidence of subsequent remedial measures is admissible.<sup>16</sup> Rule 410 operates differently in that it bars evidence of the described plea discussions and related statements for *any* use.<sup>17</sup> The rule's exceptions for the admission of this evidence are narrow. The court can admit this evidence only (1) if other statements from the plea discussions have already been admitted or (2) in a criminal trial for perjury or other false statements, as long as the statements were made under oath with an attorney present.<sup>18</sup>

This structure distinguishes Rule 410 from its fellow specialized relevance rules largely because of Congress's purpose in creating the rule: to promote the "disposition of criminal cases by compromise."<sup>19</sup> By protecting certain plea discussions, Rule 410 recognizes that the lack of an exclusionary rule in this context would "discourage defendants from being completely candid and open during plea negotiations."<sup>20</sup> Courts have long seen the value in this policy and have often protected these statements. In 1927, the Supreme Court ruled that withdrawn pleas could not be introduced as evidence, as admission of such evidence would put criminal defendants "in a dilemma utterly inconsistent with the determination of the court awarding [them] a trial."<sup>21</sup> Subsequent cases created broader protections, barring the admission of statements related to plea discussions at trial.<sup>22</sup> As Professor Christopher Slobogin has noted, "It was against this backdrop that Congress began its efforts to draft Rule 410."<sup>23</sup>

### *B. Legislative and Judicial History of Rule 410*

While the rule's purpose appeared "noncontroversial" and its potential impact seemed negligible to many prosecutors at the time of

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16. See FISHER, *supra* note 13, at 95–99 ("Rules 407, 408, 409, and 411 all prohibit *only certain uses* of the evidence they govern, while permitting all other uses.").

17. FED. R. EVID. 410.

18. FED. R. EVID. 410.

19. FED. R. EVID. 410 advisory committee's note to 1972 proposed rules ("Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises." (citation omitted)); see FISHER, *supra* note 13, at 142 (explaining Rule 410's "unusually broad protection against evidence of plea negotiations and related statements").

20. H.R. REP. NO. 94-247, at 7 (1975).

21. *Kercheval v. United States*, 274 U.S. 220, 224 (1927); see also Slobogin, *supra* note 1, at 105 (noting that a privilege to withdraw a guilty plea isn't much of a privilege if it can then be used as evidence of guilt under a subsequent plea of not guilty).

22. Slobogin, *supra* note 1, at 105 ("A sizable number of decisions prohibited trial use of both the plea and any statements made during negotiations or to the plea-taking court."); see, e.g., *State v. McGunn*, 294 N.W. 208, 209 (Minn. 1940) (barring evidence of conditional offers to plead guilty after no formal guilty plea was made).

23. Slobogin, *supra* note 1, at 106.

its passage, Rule 410 “has the most convoluted legislative history of any of the Federal Rules of Evidence.”<sup>24</sup> Subsequent case law has construed the rule against a backdrop of presumptive waivability, further complicating the rule’s impact on criminal defendants today.<sup>25</sup> This Section highlights the legislative and judicial development of Rule 410 from its creation to its current status, outlining how the practical effects of the rule have strayed from its original purpose.

As noted above, Rule 410 was drafted by the Advisory Committee to promote compromise between prosecutors and criminal defendants, echoing a rationale previously adopted by many courts.<sup>26</sup> The committee’s efforts were quickly met with resistance from the Justice Department, however.<sup>27</sup> The Department wanted the rule narrowed to exclude only pleas, not statements accompanying the plea discussions.<sup>28</sup> Then-Deputy Attorney General Richard Kleindienst wrote Chief Justice Warren Burger a Christmas card asking the Court to play “Santa” and “make even more prosecution-friendly changes in the proposed Evidence Rules before they were promulgated,” including a narrowing of Rule 410.<sup>29</sup> Despite this pressure, the Advisory Committee remained resolute in barring related statements, making minimal concessions to the Justice Department’s wishes in promulgating Rule 410.<sup>30</sup>

The Justice Department, realizing it lost the fight to remove the rule’s protection of plea statements, attempted to narrow the rule in several ways.<sup>31</sup> Primarily, the Department wanted the rule to permit

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24. 23 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5341 (2d ed. Supp. 2019).

25. See *United States v. Mezzanatto*, 513 U.S. 196, 206 (1995) (“Thus, the plea-statement Rules expressly contemplate a degree of party control that is consonant with the background presumption of waivability.”); see also *United States v. Young*, 223 F.3d 905, 909 (8th Cir. 2000) (“The Supreme Court has recognized that the protections offered by Federal Rule of Evidence 410 . . . are presumptively waivable.”).

26. See *supra* notes 19, 22 and accompanying text.

27. 23 WRIGHT ET AL., *supra* note 24, § 5341.

28. *Id.*

29. *Id.* §§ 5006, 5341.

30. See *id.* § 5341 (“The Advisory Committee was permitted to respond to the [Justice Department’s] objections and, with respect to Rule 410, the Committee argued that no change should be made in the rule.”); Slobogin, *supra* note 1, at 106 (“[T]he Advisory Committee . . . stood firm, and it soon sent the revised version of 410 on to the Supreme Court for its consideration.”). The Advisory Committee did limit the exclusion to evidence introduced against the party that had made the plea or plea offer. 23 WRIGHT ET AL., *supra* note 24, § 5341.

31. See Slobogin, *supra* note 1, at 106 (“Realizing that deleting all reference to plea statements was probably a lost cause, [the Justice Department] argued that the rule should at least permit use of statements for subsequent perjury prosecutions and for impeachment of defendants who take the stand and contradict those statements.”). The Justice Department also argued that the rule conflicted with certain provisions of the Clayton Act by allowing the use of other judgments in antitrust damages calculations, and, in response, the House added a clause

the admission of plea statements for impeachment purposes.<sup>32</sup> The House Judiciary Committee, however, rejected these proposals, maintaining the rule's original bar on evidence of plea discussions and related statements for all purposes.<sup>33</sup> The proposed rule was then adopted by the entire House of Representatives.<sup>34</sup>

The Senate debate surrounding the rule provided the Justice Department with another opportunity to garner congressional support. Senator John McClellan of Arkansas sided with the Justice Department, arguing that the rule excluded too much material.<sup>35</sup> The Senate Judiciary Committee agreed to narrow the rule's exclusionary principle, allowing the admission of "voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."<sup>36</sup> Under this proposal, if a defendant came into court and made statements relating to a plea negotiation that eventually failed, the prosecution could later use those statements to impeach that witness or for any purpose in a later perjury trial.

At the same time, Congress was also debating amendments to the Federal Rules of Criminal Procedure.<sup>37</sup> One of the rules in question, Federal Rule of Criminal Procedure 11(e)(6), was an exact copy of the Supreme Court's proposal for Rule 410.<sup>38</sup> Given the disconnect between the House and Senate positions on Rule 410, the conference committee agreed to adopt the Senate's narrow version of Rule 410 but postpone its effective date until 1975, allowing for the amended Federal Rule of Criminal Procedure 11(e)(6) to supersede any inconsistencies once its final form was determined.<sup>39</sup>

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indicating nothing in the rule affected "other applicable statutory provisions." 23 WRIGHT ET AL., *supra* note 24, § 5341.

32. 23 WRIGHT ET AL., *supra* note 24, § 5341.

33. *Id.*; Slobogin, *supra* note 1, at 106.

34. 23 WRIGHT ET AL., *supra* note 24, § 5341.

35. *See id.* ("Senator John McClellan agreed with [the Justice Department's] objection and added another of his own.")

36. *Id.*

37. *Id.*

38. *Id.* § 5341 n.33:

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.

39. Slobogin, *supra* note 1, at 107.

The Justice Department launched identical attacks at Rule 11(e)(6), and this time it made progress toward its goals.<sup>40</sup> The House Judiciary Committee agreed to include exceptions to the rule for the prosecution of perjury and other false statements.<sup>41</sup> Once passed on to the Senate, Senator McClellan moved to entirely eliminate Rule 11(e)(6) due to its redundancy, which would have had the effect of codifying the Senate's version of Rule 410.<sup>42</sup> Senator McClellan's efforts were successful in the Senate, where the proposal passed without debate.<sup>43</sup> But the conference committee rejected the senator's maneuvering by passing a rule that allowed for the admission of pleas and related statements for perjury and false statement prosecutions but precluded the use of such evidence for impeachment purposes.<sup>44</sup> After Rule 11(e)(6)'s passage, the original Rule 410, which allowed the use of evidence gathered during plea discussions for impeachment purposes, was rendered moot.<sup>45</sup> Rules 410 and 11(e)(6) operated as legislative "twins" until 2002, when the duplicative text of Rule 11(e)(6) was eliminated for a cross-reference to Rule 410.<sup>46</sup>

Thus, at the end of the legislative debate, one clear takeaway emerged: Congress repeatedly rejected efforts to permit the use of pleas and related statements for impeachment purposes.<sup>47</sup> Despite the push to make the rule more prosecution-friendly, Congress's final rule appeared to foreclose this use of plea evidence.<sup>48</sup> Despite Congress's clear intent, however, the Justice Department would ultimately find a more sympathetic audience in the Supreme Court.<sup>49</sup>

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40. 23 WRIGHT ET AL., *supra* note 24, § 5341; Slobogin, *supra* note 1, at 107.

41. 23 WRIGHT ET AL., *supra* note 24, § 5341; Slobogin, *supra* note 1, at 107.

42. 23 WRIGHT ET AL., *supra* note 24, § 5341; Slobogin, *supra* note 1, at 108.

43. 23 WRIGHT ET AL., *supra* note 24, § 5341; Slobogin, *supra* note 1, at 108.

44. 23 WRIGHT ET AL., *supra* note 24, § 5341; Slobogin, *supra* note 1, at 108.

45. 23 WRIGHT ET AL., *supra* note 24, § 5341.

46. *Id.* ("[N]o explanation was offered for the existence of duplicate provisions . . .").

47. *See* Slobogin, *supra* note 1, at 108 ("[D]espite numerous efforts by the Justice Department and its congressional allies, Congress specifically rejected even a limited impeachment exception.").

48. *See* 23 WRIGHT ET AL., *supra* note 24, § 5341 ("Although the Conference Report makes this appear like a compromise of opposing positions, it was, in fact, a Senate surrender to the House position on this issue." (footnotes omitted)).

49. *See* Slobogin, *supra* note 1, at 108 ("The Justice Department knew that there is more than one way to skin a cat.").

*C. Mezzanatto v. United States and Rule 410's Subtle Demise*

In the summer of 1991, police arrested Gary Mezzanatto for trafficking methamphetamine in San Bernardino, California.<sup>50</sup> Several months after the arrest, Mezzanatto's attorney requested a meeting with the local federal prosecutor in hopes of striking a deal.<sup>51</sup> The prosecutor began the meeting with the "routine practice in the federal prosecutor's office for the Ninth Circuit" of providing Mezzanatto with a waiver agreement.<sup>52</sup> This waiver agreement allowed the prosecution to use Mezzanatto's statements for impeachment purposes at trial, but not during its case-in-chief.<sup>53</sup> Prosecutors utilized these waivers as an incentive for defendants to be truthful during plea discussions.<sup>54</sup>

The plea discussions quickly soured. Mezzanatto admitted to his role in the crime and the methamphetamine trade, but the prosecutor caught Mezzanatto misrepresenting certain facts and terminated the meeting.<sup>55</sup> Beyond the discrepancies in his testimony, the prosecutor remained unconvinced that Mezzanatto had any information of value and was prepared to go to trial.<sup>56</sup> Mezzanatto soon found himself on the stand as the defense's only witness, and during cross-examination, over the defense's Rule 410 objections, the prosecutor utilized Mezzanatto's statements from the brief plea discussion to destroy the defense's theory of the case.<sup>57</sup> The jury found Mezzanatto guilty and sentenced him to fourteen years in prison.<sup>58</sup>

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed Mezzanatto's conviction, as the panel ruled 2–1 that allowing waivers of Rule 410 would contradict the clear congressional intent behind the rule.<sup>59</sup> Waiver, in the court's eyes, would "severely" injure

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50. For the most complete account of the facts of this case and its subsequent proceedings, see *id.* at 109–23.

51. *Id.* at 111.

52. *Id.* In his interview with Professor Slobogin, however, it was revealed Mezzanatto still had misconceptions about the operation of the waiver and how it impacted the subsequent proceedings. See *id.* ("Schneidewind says he also explained the waiver arrangement to Mezzanatto. According to Mezzanatto, however, the explanation didn't take.")

53. *Id.*

54. See *id.* ("As he later explained, [the prosecutor] believed that such an arrangement was crucial in 'proffer' situations such as this; 'without a hammer, there is no incentive to be truthful' about who else was involved in crime and the evidence to support it.")

55. *Id.* at 112.

56. *Id.*

57. *Id.* at 114–17.

58. *Id.* at 117.

59. *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993); see also Slobogin, *supra* note 1, at 118.

“candid and effective plea bargaining.”<sup>60</sup> Seeing another opportunity to narrow the scope of Rule 410, the Justice Department decided to appeal.<sup>61</sup>

In a 7–2 decision, the Supreme Court reversed the Ninth Circuit’s opinion, holding that Rule 410, like other rights of criminal defendants, is subject to voluntary and knowing waiver.<sup>62</sup> Writing for the Court, Justice Thomas argued that Rule 410 was adopted against a “background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement[s] . . . .”<sup>63</sup> While Justice Thomas agreed that some rights are so fundamental that allowing for voluntary waiver would harm the public’s faith in the courts, Rule 410 and its protections do not rise to that level.<sup>64</sup> In the majority’s view, Rule 410 and Federal Rule of Criminal Procedure 11(e)(6) “‘creat[ed], in effect, a *privilege* of the defendant,’ and, like other evidentiary privileges, this one may be waived or varied at the defendant’s request.”<sup>65</sup>

Justice Ginsburg, along with two other Justices who signed onto Justice Thomas’s opinion, filed a concurrence to highlight the fact that the ruling was actually quite narrow.<sup>66</sup> Because the waiver at issue was only used for impeachment purposes, and not for the prosecution’s case-in-chief, Justice Ginsburg believed this form of waiver was sufficiently aligned with “Congress’ intent to promote plea bargaining.”<sup>67</sup> She explicitly noted, however, that waivers allowing for the use of plea discussions in the prosecution’s case-in-chief “would more severely undermine a defendant’s incentive to negotiate, and thereby inhibit plea bargaining.”<sup>68</sup>

Justice Souter filed a strong dissent, arguing that the Court’s decision was “at odds with the intent of Congress and [would] render the Rules largely dead letters.”<sup>69</sup> Justice Souter conceded that most rights are indeed waivable but pointed to the legislative history to show “good reason to believe that Congress rejected the general rule of

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60. *Mezzanatto*, 998 F.2d at 1455.

61. *See* Slobogin, *supra* note 1, at 119.

62. *See* *United States v. Mezzanatto*, 513 U.S. 196, 210–11 (1995).

63. *Id.* at 203.

64. *Id.* at 204.

65. *Id.* at 205 (emphasis added) (citation omitted) (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 410.05 (Mark S. Brodin ed., Matthew Bender 1st ed. 1994)).

66. *See id.* at 211 (Ginsburg, J., concurring) (emphasizing that the Court was not exploring the case-in-chief question).

67. *Id.*

68. *Id.*

69. *Id.* (Souter, J., dissenting).

waivability when it passed [Rule 410].”<sup>70</sup> In Justice Souter’s view, the Advisory Committee Notes showed “Congress probably made two assumptions when it adopted the Rules: pleas and plea discussions are to be encouraged, and conditions of unrestrained candor are the most effective means of encouragement.”<sup>71</sup> Given these intentions, Congress could not “be presumed to have intended to permit waivers that would undermine the stated policy of its own Rules.”<sup>72</sup>

Justice Souter made two predictions for how the Court’s decision would affect plea discussions going forward. First, Justice Souter thought “the Rules will probably not even function as default rules, for there is little chance that they will be applied at all.”<sup>73</sup> Because most criminal defendants have little leverage at the beginning of plea discussions, they “are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.”<sup>74</sup> Second, because “the majority’s reasoning [provides] no principled limit,” Justice Souter believed that Rule 410 waivers would functionally become waivers of trial.<sup>75</sup> Because the rules do not distinguish between using evidence of plea discussions for impeachment or for the prosecution’s case-in-chief, the waiver principle could allow prosecutors to use such evidence for any purpose.<sup>76</sup> And, in his view, once prosecutors begin utilizing waivers to allow for any use of plea discussions, “there is nothing this Court will legitimately be able to do about it.”<sup>77</sup>

Justice Souter’s predictions have largely come true.<sup>78</sup> Despite the concurring Justices’ assurances that the waiver at issue was particularly narrow, courts have allowed prosecutors to introduce evidence and statements gathered during plea discussions in the prosecution’s case-in-chief.<sup>79</sup> *Mezzanatto* waivers have become standard

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70. *Id.* at 213.

71. *Id.* at 214.

72. *Id.* at 215.

73. *Id.* at 216.

74. *Id.*

75. *Id.* at 217.

76. *Id.*

77. *Id.*

78. Slobogin, *supra* note 1, at 121.

79. See *United States v. Sylvester*, 583 F.3d 285, 291 (5th Cir. 2009) (“*Mezzanatto*, for its part, explained that impeachment waivers do not undermine these efforts, and we see no reason why this rationale should not extend to case-in-chief waivers as well.”); *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000) (allowing the introduction of affidavits secured during plea discussions for non-impeachment purposes); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (“On reflection . . . we cannot discern any acceptable rationale for not extending the majority opinion in *Mezzanatto* to this case.”); see also *United States v. Mitchell*, 633 F.3d 997, 998 (10th Cir. 2011) (upholding admission of defendant’s plea statements during trial when defendant

practice throughout the federal system and have expanded into the routines of state prosecutors as well.<sup>80</sup> Prosecutors refuse to begin any plea discussions unless the defendant signs a standard waiver form eliminating his Rule 410 rights.<sup>81</sup>

Despite the expansion of *Mezzanatto* waivers, the Supreme Court continues to emphasize the central role that plea bargaining plays in the federal justice system. In two 2012 decisions, *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court ruled that the Sixth Amendment protects certain plea bargaining rights, such as the right to have counsel effectively present the terms and conditions of formal plea offers.<sup>82</sup> In his dissent in *Lafler*, Justice Scalia lamented the Court's creation of "a whole new field of constitutionalized criminalized procedure," acknowledging the significance the majority accorded to plea negotiations.<sup>83</sup> Where prosecutors have attempted to impose waivers for these significant rights, courts have begun to brush them back.<sup>84</sup>

Thus, despite Congress's clear intent to instill strong protections against the introduction of plea discussions in criminal trials and the courts' repeated affirmation that plea bargaining is a crucial element of the U.S. justice system, Rule 410 has essentially no effect today. And unlike Rule 408, which covers compromise offers in the civil context, criminal defendants do not enjoy the same market forces as civil litigants that allow for fair bargaining.<sup>85</sup> Short of overturning *Mezzanatto*, criminal defendants will continue to sign their rights away to enter plea discussions. Without force as an evidentiary rule, Rule 410 must take another form if its protections are to have the effect that Congress intended.

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executed a plea agreement that waived his right to Rule 410 protections despite his later withdrawal from the plea agreement); *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008) (upholding admission of proffer waiver at trial for non-impeachment purposes); *United States v. Krilich*, 159 F.3d 1020, 1025–27 (7th Cir. 1998) (upholding admission of statements made during plea negotiations).

80. See Christopher B. Mueller, "Make Him an Offer He Can't Refuse" – *Mezzanatto* Waivers as *Lynchpin* of Prosecutorial Overreach, 82 MO. L. REV. 1023, 1034–35 (2017).

81. See *id.* at 1037 ("The waiver is part of the 'price of talking,' and the defendant pays the price before he knows where the conversation is going or what might emerge in it.").

82. See *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012); see also *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that counsel can be ineffective when failing to advise defendant that a guilty plea makes defendant subject to deportation); Mueller, *supra* note 80, at 1035.

83. *Lafler*, 566 U.S. at 175 (Scalia, J., dissenting).

84. See, e.g., *United States ex rel. U.S. Attorneys for the E. & W. Dists. of Ky. v. Ky. Bar Ass'n*, 439 S.W.3d 136, 156 (Ky. 2014) (prohibiting the practice of counseling criminal defense clients into signing malpractice claim waivers).

85. See Mueller, *supra* note 80, at 1026 ("[W]e cannot aspire to create 'market conditions' in which the prosecutor and defense have 'equal bargaining power.'").

## II. CONDITIONAL PRIVILEGES: HISTORY, RATIONALES, AND REQUIREMENTS

Rule 410's anomalous structure, in many ways, resembles an evidentiary privilege rather than an evidentiary rule. Rules of evidence are filters against the presumption of admissibility, whereas privileges "exclude evidence that suffers from no suspicion of irrelevance or unreliability."<sup>86</sup> Like privileges, Rule 410 excludes evidence not because it suffers from relevance or reliability concerns but because of policy concerns. Additionally, Rule 410 can be overcome in a manner similar to that of privileges. Like absolute evidentiary privileges, such as attorney-client privilege, Rule 410 does not attach if other statements from the same proceeding have already come in or if the trial concerns false statements.<sup>87</sup> These exceptions parallel waiver principles and exceptions to absolute privileges, like the crime-fraud exception to the attorney-client privilege.<sup>88</sup>

Given the rule's current ineffectiveness along with its atypical, privilege-like structure, the rule's original purpose would be best served by recognizing the rule's protections as a conditional privilege.<sup>89</sup> Conditional privileges, unlike absolute privileges, can be overcome on a case-by-case basis if there is an overwhelming need for the privileged information.<sup>90</sup> Judicial recognition of Rule 410 as a conditional privilege will promote Congress's original goal of generating truthful plea discussions and protecting criminal defendants. This Section provides an overview of U.S. privilege law and conditional privileges, and highlights the rationales that support their creation and operation. This summary will clarify how Rule 410 already resembles a form of privilege and lay the foundation for the proposal in Part III.

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86. FISHER, *supra* note 13, at 930.

87. FED. R. EVID. 410(b).

88. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 562–63 (1989) (illustrating the scope and policy of the crime-fraud exception to attorney-client privilege).

89. *See infra* Part III.

90. *See* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 7.1 (3d ed. 2020) ("Although both absolute and conditional privileges are subject to waiver and 'exceptions,' only conditional or qualified privileges can be defeated simply by a case-specific showing of overriding need for the privileged information."); *see also* United States v. Grice, 37 F. Supp. 2d 428, 431 n.13 (D.S.C. 1998) ("[N]o matter how great prosecutorial need for privileged information may be, the [attorney-client] privilege still prevails.").

### A. Development of U.S. Privilege Law

The Federal Rules of Evidence did not include rules for individual privileges.<sup>91</sup> Instead, Congress favored a broad grant of deference to the federal and state common law traditions. Privileges would be valid as long as they did not violate the Constitution, federal statutes, or Supreme Court rules.<sup>92</sup> While most evidentiary rules and standards have weakened over time, privileges have largely resisted this trend.<sup>93</sup> Generally, there are two theories underlying the creation of evidentiary privileges: the instrumental rationale and the humanistic rationale. While these rationales have often been applied to traditional absolute privileges, the same theories support the creation of conditional privileges as well.<sup>94</sup>

#### 1. The Instrumental Rationale

The traditional theory leading to the creation of privileges has been the instrumental theory.<sup>95</sup> Under the instrumental theory, “the end objective of privilege law is encouraging certain types of desirable consultations and revelations.”<sup>96</sup> This theory is largely based on the writings of Jeremy Bentham and Dean John Henry Wigmore, which remain influential in the realm of evidentiary privileges.<sup>97</sup> Under the instrumental rationale, privileges serve legitimate social purposes as the privileges protect, and thus encourage, beneficial interactions.<sup>98</sup> Further, the privileges come at no cost because the privilege itself is the but-for cause of the evidence.<sup>99</sup> In other words, the declarant would not make the statements and the evidence would not exist but for the privilege.<sup>100</sup> Thus, privileges do not make determining the truth more difficult.<sup>101</sup>

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91. *E.g.*, FED. R. EVID. 501.

92. FED. R. EVID. 501.

93. *See* IMWINKELRIED, *supra* note 90, § 1.1 (“Privilege rules may have proved so resistant to the general abolitionist trend because they protect privacy interests, and there is a widespread public consensus in the United States that personal privacy deserves additional protection.”).

94. *See infra* Section III.C.

95. *See* IMWINKELRIED, *supra* note 90, § 2.3.

96. E.J. Imwinkelried, *The Paradox of Privilege Law*, in 2 *NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE* 339, 339 (C.M. Breur et al. eds., 2000).

97. *See* IMWINKELRIED, *supra* note 90, § 3.1 (“Bentham and Wigmore are responsible for solidifying the trend that culminated in the current dominance of instrumental rationales.”).

98. *See* Imwinkelried, *supra* note 96, at 339.

99. *See id.*

100. *See id.*

101. *Contra* IMWINKELRIED, *supra* note 90, § 3.1 (“Bentham viewed most privileges as unjustified obstructions to search for truth in adjudication.”).

The Supreme Court has largely followed this view. For example, in *Jaffee v. Redmond*, which established the psychotherapist privilege, the Court noted that adopting this privilege would support the “public good” of mental health and without such a privilege, the evidence resulting from the patient-psychotherapist communications is “unlikely to come into being.”<sup>102</sup> This rationale hews closely to the instrumental theory of privileges, emphasizing the positive effect the privilege has on socially beneficial “consultations and revelations.”<sup>103</sup> Put another way, proponents of the instrumental rationale claim that without the operative privilege, these beneficial interactions—communications with spouses, clergy, or psychotherapists—are less likely to occur.

## 2. The Humanistic Rationale

In contrast, some modern theorists have rejected the instrumental theory in favor of the humanistic approach.<sup>104</sup> Rather than relying on empirical beliefs about human behavior, the humanistic view aims to protect “the individual citizen’s rights to make life preference choices which are at once intelligent and independent.”<sup>105</sup> Under this rationale, privileges rest on a desire to respect personal rights, including privacy and personal autonomy.<sup>106</sup> But courts often find these privacy interests too “nebulous” to serve as the foundation for a privilege.<sup>107</sup> The autonomy rationale, however, garners more support, as demonstrated by Professor Edward Imwinkelried’s summary of how privileges can advance an individual’s sense of autonomy:

As cognitive beings, citizens partially realize themselves by making intelligent life preference choices. The difficulty is that in some cases, they lack the information or expertise needed to make a truly informed choice. In these cases, they must consult a third party, usually a professional . . . , about both the range of choice and the ramifications of individual choices. . . . A dilemma arises because, in the process of consulting a third party in order to make an intelligent choice, the citizen exposes himself or herself to the risks of manipulation and coercion – which can undermine the independence of the ultimate choice.<sup>108</sup>

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102. 518 U.S. 1, 11–12 (1996).

103. See Imwinkelried, *supra* note 96, at 339.

104. See *id.* at 346.

105. *Id.* at 348.

106. IMWINKELRIED, *supra* note 90, § 5.1.2.

107. See *id.* § 5.3.2 (“[I]t would be unwise and unnecessary to tie privilege doctrine to this alleged constitutional right.”); Imwinkelried, *supra* note 96, at 347 (“[P]rivacy can be a dangerously nebulous concept. . . . It seems sounder to link privilege doctrine directly to the democratic value of autonomy.”); Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 119 (2008).

108. Imwinkelried, *supra* note 96, at 347.

Professor Imwinkelried and others who subscribe to the humanistic lens question the behavioral aspect of the instrumental theory.<sup>109</sup> For example, Professor Imwinkelried highlights research that indicates individuals do not factor in the existence of privilege when communicating within privileged relationships.<sup>110</sup> While Professor Imwinkelried does not think the instrumental rationale should be replaced entirely, he does think exclusive reliance on the rationale is improper in developing U.S. privilege law.<sup>111</sup>

### *B. The Basics of Conditional Privileges*

The most common privileges are absolute privileges, which cannot be overcome by any case-by-case balancing.<sup>112</sup> These privileges—like the attorney-client privilege or the clergy-penitent privilege—are absolute.<sup>113</sup> Courts have also recognized conditional privileges, however, which are subject to balancing considerations every time they are invoked.<sup>114</sup> Examples of these privileges include the informant privilege, the required government reports privilege, the reporter privilege, the presidential privilege, the self-critical privilege, and the deliberative process privilege.<sup>115</sup> Like absolute privileges, conditional privileges are subject to waiver and exceptions, and analysis of the two privilege forms can largely proceed under an identical framework.<sup>116</sup>

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109. *See id.* at 342–43 (stating that there is mounting evidence of the instrumental theory’s weakness).

110. *See id.* at 343 (outlining how psychotherapy patients are more concerned with out-of-court disclosure to an employer rather than judicially supervised disclosure in court).

111. *See id.* at 344; *see also* IMWINKELRIED, *supra* note 90, § 5.3.4 (“There is no logical necessity to base all privileges on the same, exclusive rationale. Furthermore, the humanistic and instrumental rationales are neither irreconcilable nor mutually exclusive.” (footnotes omitted)).

112. *See, e.g.*, *United States v. Grice*, 37 F. Supp. 2d 428, 431 n.13 (D.S.C. 1998) (“[N]o matter how great prosecutorial need for privileged information may be, the [attorney-client] privilege still prevails.”).

113. *See* IMWINKELRIED, *supra* note 90, § 6.2 (explaining that only a relatively small number of relationships qualify for protection by an absolute privilege that is unqualified).

114. *Id.* § 7.1 (“Although both absolute and conditional privileges are subject to waiver and ‘exceptions,’ only conditional or qualified privileges can be defeated simply by a case-specific showing of overriding need for the privileged information.”).

115. *See id.* Conditional privileges can also be applied to particular topics rather than specific communications. For example, conditional privileges are recognized for trade secrets and for political votes. *See generally id.* §§ 9.2–3.

116. *Id.* § 7.1. Professor Imwinkelried boils down the basic framework into six major questions:

In what types of proceedings does the privilege apply? Who is the holder of the privilege? What rights does the holder possess? What is the nature of the privileged information? What acts constitute a waiver of the privilege? And are there any special exceptions to the scope of the privilege?

*Id.*

The source of a privilege does not determine its character: common-law tradition and statutory interpretation have both created conditional privileges. For example, the common law roots of the informant's privilege, which grants qualified protections to those who voluntarily share information with the government regarding criminal activity, stretch back to the eighteenth century.<sup>117</sup> The current law enforcement privilege, on the other hand, has largely emerged from exemptions in the Freedom of Information Act.<sup>118</sup>

Conditional privileges typically concern communications to and within government entities.<sup>119</sup> For example, in evaluating claims under the informant's privilege, the court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense."<sup>120</sup> Absent a determination that excluding the evidence at issue will lead to injustice, courts will give effect to the privilege.

The factors in this determination are rather clear and predictable for each conditional privilege. For example, under the deliberative process privilege, the relevant factors are: the relevance of the evidence; the availability of other evidence; the gravity of the case and the issues involved; the role of the government in the litigation; and the concern that future privilege holders will feel unprotected by the privilege's protections.<sup>121</sup> Fundamentally, courts weigh the relative importance of the evidence against the need to protect the privileged information.

Courts, however, have not clarified the exact balancing procedures for conditional privileges.<sup>122</sup> Different standards appear to apply to different privileges. For example, to overcome the deliberative process privilege, the public interest in protecting the information must "clearly outweigh" the corresponding interest in disclosure.<sup>123</sup> But to overcome the informant's privilege, the opposing party must demonstrate that one of three exceptions applies: (1) the identity of the informant is already known to those who would resent the report; (2)

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117. *Id.* § 7.3.

118. *Id.* § 7.4.2.

119. *Id.* § 7.1.

120. *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

121. *IMWINKELRIED*, *supra* note 90, § 7.7.5 (citing *Elkem Metals Co. v. United States*, 126 F. Supp. 2d 567, 580 (Ct. Int'l Trade 2000)).

122. *See, e.g., id.* § 7.1 (describing the relevant factors but not the appropriate standard for defeating the deliberative process privilege); *see also In re Lifschutz*, 467 P.2d 557, 572 (Cal. 1970) ("In this area, the careful exercise of this discretion is necessary to provide substantial protection for the patient's legitimate interests . . .").

123. *IMWINKELRIED*, *supra* note 90, § 7.7.5 (citing *Citizens for Open Gov't v. City of Lodi*, 205 Cal. App. 4th 296, 306–07 (2012)).

the informant is a critical witness with first-hand knowledge; or (3) the evidence is important for supporting probable cause.<sup>124</sup>

Though distinct, the balancing test required by Federal Rule of Civil Procedure 26 often informs how courts analyze conditional privileges.<sup>125</sup> In limiting the information available for the jury to determine a case, conditional privileges often collide with discovery procedures that advocate for broad disclosures.<sup>126</sup> As such, analyses regarding whether a conditional privilege has been overcome will likely invoke similar tensions and arguments as disputes under Rule 26(b).

Like absolute privileges, conditional privileges can be supported by both instrumental and humanistic rationales.<sup>127</sup> As with absolute privileges supported by a typical instrumental rationale, conditional privileges protect socially valuable communications.<sup>128</sup> There is an inherent tension in recognizing privileges under an instrumental theory and allowing them to be defeated by case-specific needs, however. For proponents of the humanistic view, “[t]he apparent anomaly of modernly classifying these privileges, based on instrumental reasoning, as conditional may be a further indication that the courts have misgivings about the instrumental theory itself.”<sup>129</sup>

Because conditional privileges largely protect communications with and between government entities, the privacy prong of the humanistic view is weak.<sup>130</sup> Under the autonomy prong of the humanistic rationale, however, conditional privileges “can provide a non-constitutional layer of protection for the constitutional value of personal autonomy.”<sup>131</sup> Therefore, although both rationales can apply, Professor Imwinkelried has detailed the tight nexus between the

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124. *Id.* § 7.3.2.

125. *See* FED. R. CIV. P. 26(b)(1); *see also* Smith, *supra* note 107, at 115 (“Federal courts invoking notions of fairness and truth-seeking when considering questions of [privilege] waiver . . . employ analyses based upon the scope of discovery permitted under Federal Rule of Civil Procedure 26, an approach that is separate from, and independent of, privilege considerations.”).

126. *See* Smith, *supra* note 107, at 115 (“The tension between absolute and conditional privileges stems in large part from the broad scope of discovery under the Federal Rules of Civil Procedure and federal courts’ general reluctance to limit the disclosure of any potentially relevant information.”).

127. IMWINKELRIED, *supra* note 90, § 7.1.

128. *See* Imwinkelried, *supra* note 96, at 339. *Cf.* Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (noting that the value of maintaining the privilege between psychotherapist and patient outweighs the “normally predominant principle of utilizing all rational means for ascertaining truth”) (quotations omitted).

129. IMWINKELRIED, *supra* note 90, § 7.1.

130. *Id.* (attributing this lack of strong privacy interest to the United States’ tradition of openness in the public sector).

131. *Id.*

humanistic rationale and the qualified nature of conditional privileges.<sup>132</sup>

### *C. Requirements for Creating Conditional Privileges*

Dean Wigmore's instrumental framework for the creation of new privileges has had the greatest impact on the development of U.S. privilege law.<sup>133</sup> Wigmore's framework includes four requirements that a privilege must meet to be adopted:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>134</sup>

Under his own analysis of these criteria, Wigmore noted that few hypothetical privileges could pass muster under his structure.<sup>135</sup>

This instrumental foundation has greatly influenced U.S. courts. Courts "continue to treat the criteria as *the* litmus test for determining the propriety of recognizing a privilege."<sup>136</sup> Courts focus mainly on the lack of informational cost of these privileges, as privileges themselves generate the evidence.<sup>137</sup>

The humanistic rationale provides its own criteria. Professor Imwinkelried's proposal for a humanistic model relies upon three requirements.<sup>138</sup> First, the relationship must be a consultative one. Second, the consulting party's task is to "single-mindedly" assist the other party to achieve a result or make a choice in line with her own

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132. *See id.* § 5.4.4 ("Under a humanistic rationale, the case for evidentiary privileges is derived from a right such as the right to autonomy or decisional privacy. In liberal democratic theory, few, if any, personal rights are absolute.")

133. *See id.* § 3.2.3 (noting that Wigmore's criteria for new privileges is "certainly the most frequently cited passage" of his treatise on privileges).

134. *Id.* (citing 8 J. WIGMORE, EVIDENCE § 2285, at 527–28 (McNaughton rev. 1961)).

135. *See id.* ("[Wigmore] candidly acknowledged that he believed that few privileges could satisfy the criteria. He urged these criteria not only to make courts and legislatures reluctant to create new privileges; he also did so in the hope that courts in particular would rethink the scope of existing privileges.")

136. *Id.*

137. *See supra* notes 99–101 and accompanying text; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) (arguing that "the loss of evidence is more apparent than real"); Jaffe v. Redmond, 518 U.S. 1, 12 (1996) ("Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being.")

138. For a full summary of this proposed model, *see* IMWINKELRIED, *supra* note 90, § 6.2.

best interests. This factor requires fiduciary-like duties of the consulting party, with a legal understanding that the consulting party is to assist the other party to achieve an “enlightened choice furthering the person’s interests.”<sup>139</sup> And finally, the subject of the consultative relationship must relate to a choice “implicating a fundamental life preference.”<sup>140</sup> This model would recognize a significantly greater number of privileged relationships than the instrumental model.<sup>141</sup>

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With this understanding of the basic operation of and frameworks for absolute and conditional privileges, the normative arguments for treating Rule 410 as a conditional privilege can be laid out in detail.

### III. REIMAGINING RULE 410 AS A CONDITIONAL PRIVILEGE

As discussed above, Rule 410’s curious structure distinguishes it among its fellow specialized relevance rules. The rule operates as a complete bar on the admission of statements made during certain plea discussions, rather than barring that evidence when used only for specific purposes.<sup>142</sup> In many ways, this structure resembles a privilege more than a specialized relevance rule.

Given Rule 410’s diminished protections for criminal defendants in practice today, some change is needed to bring the rule into alignment with Congress’s purpose for enacting it in the first place. By reconceptualizing Rule 410’s protection as a conditional privilege, advocates and judges can remedy this disconnect between Congress’s intentions and the nonexistent protections criminal defendants possess today.<sup>143</sup> This Part outlines how that reconceptualization can take place.

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139. *Id.*

140. *Id.*

141. *Id.* Though beyond the scope of this Note, Professor Imwinkelried highlights that recognition of the humanistic model in recognizing privileges would move the United States in line with several foreign countries. For example, Germany recognizes privileges as rights that follow directly from beliefs about personal autonomy, one of the key components of the humanistic rationale for privileges. For more information on these comparisons, see *id.* §§ 12.2.1–6.

142. See *supra* Section I.A.

143. Similar proposals have been made regarding Federal Rule of Evidence 408, a specialized relevance rule regarding compromise offers in civil cases. Though Rule 408 does not have Rule 410’s anomalous structure, it does facilitate a similar purpose—encouraging efficient civil settlements—and protects similar information. Professor Richard Reuben proposes upgrading Rule 408 from a quasi-privilege to a full privilege, using the 2001 Uniform Mediation Act as “a secure, politically tested, and judicially embraced model for making this transition.” See Richard

*A. Courts Have Weakened Rule 410 Contrary to the Text and Congress's Clear Legislative Purpose*

The debate surrounding Rule 410 makes clear that Congress did not want plea discussions and related statements used at trial for impeachment purposes, much less in the prosecution's case-in-chief. In passing Rule 410, the major hurdle proponents faced was preventing statements from being used against criminal defendants for impeachment purposes. Language permitting this use of the information was expressly rejected by the conference committee.<sup>144</sup> The rejection of language effectuating a potential interpretation of legislation should be read as a congressional denial of that interpretation.<sup>145</sup>

By allowing waivers in *Mezzanatto* and its progeny, courts have limited the rule's effectiveness and have run afoul of common canons of construction. First, by allowing these waivers for impeachment or in a prosecution's case-in-chief, the courts have rendered Rule 410 largely ineffective, violating the "presumption against ineffectiveness" canon.<sup>146</sup> Adherence to this canon "ensures that a text's manifest purpose is furthered, not hindered."<sup>147</sup> Given the limited negotiating power most criminal defendants have when arranging for a plea discussion, essentially no safeguard exists to prevent the waiver of these rights. Once prosecutors adopt *Mezzanatto* waivers, criminal defendants in that jurisdiction will not benefit from Rule 410's protections.

Second, these decisions run afoul of the "omitted-case" canon.<sup>148</sup> Under this canon, "[n]othing is to be added to what the text states or reasonably implies."<sup>149</sup> Before the 2011 restyling, Rule 410 clearly stated that "[e]xcept as otherwise provided in this rule, evidence of the following is not . . . admissible against the defendant."<sup>150</sup> As Justice

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C. Reuben, *Rethinking the Law of Legal Negotiation: Confidentiality Under Federal Rule of Evidence 408 and Related State Laws*, 59 B.C. L. REV. 523, 578 (2018).

144. See *supra* notes 35–47 and accompanying text.

145. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000) (noting that Congress had repeatedly rejected legislative proposals extending FDA jurisdiction to cigarettes, precluding the court from effectuating such jurisdiction); *Fleming v. Hawkeye Pearl Button Co.*, 113 F.2d 52, 58 (8th Cir. 1940) ("The refusal of Congress to thus broaden the Act to include the manufacture of fishery products clearly shows its intention to omit the manufacture of such products. This is a circumstance which should be weighed with others.").

146. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 63 (2012).

147. *Id.*

148. *Id.* at 93.

149. *Id.*

150. ADVISORY COMM. ON EVIDENCE RULES, SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE 36 (2011), [https://www.uscourts.gov/sites/default/files/fr\\_import/EV2011-](https://www.uscourts.gov/sites/default/files/fr_import/EV2011-)

Souter noted in his dissent in *Mezzanatto*, the plain meaning of Rule 410's text does not support waiver outside of the rule's explicit exceptions.<sup>151</sup> Poking fun at the textualists in the majority, Justice Souter noted that “[b]elievers in plain meaning might be excused for thinking that the text answers the question.”<sup>152</sup> The assumption that Rule 410 was drafted against a presumption of waivability goes against the plain language and purpose of the rule.<sup>153</sup>

Thus, *Mezzanatto* eschewed traditional canons of construction to reach a result contrary to the rule's purpose. In light of Congress's clear rejection of these principles and a stated desire to encourage plea discussions through protections of defendants' candor, these decisions wrongly construe the rule. Some change is required.<sup>154</sup>

### *B. Existing Similarities Between Rule 410 and Evidentiary Privileges*

The anomalous structure of Rule 410 makes it unique among the Federal Rules of Evidence. Because of its default bar on admission, the rule resembles an evidentiary privilege. After *Mezzanatto*, both Rule 410 and privileges are subject to waiver. And like privileges, Rule 410 explicitly provides exceptions—communications that do not earn the rule's protections.<sup>155</sup> Under Rule 410(b)(2), statements made under oath and with counsel present can be used “in a criminal proceeding for perjury or false statement.”<sup>156</sup> In many ways, this can be seen as a parallel to the attorney-client privilege's crime-fraud exception, which precludes privilege claims when the communication is used to break the

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10%20Symposium.pdf [https://perma.cc/XB7Z-92ZJ]. As noted in the advisory committee's notes following all restyled rules, the restyling efforts were “stylistic only” and not designed to have any legal effect. *Id.*

151. *United States v. Mezzanatto*, 513 U.S. 196, 212 (1995) (Souter, J., dissenting) (“At first glance, the question of waivability may seem short on substance . . .”).

152. *Id.* at 212; *see also* Slobogin, *supra* note 1, at 122 (“In short, *Mezzanatto* permits courts to go beyond the plain meaning of the federal rules. It was the first Supreme Court case to read into an evidence rule a provision that is not there.”).

153. *Mezzanatto*, 513 U.S. at 213 (Souter, J., dissenting) (“There is, indeed, good reason to believe that Congress rejected the general rule of waivability when it passed the Rules in issue here, and once the evidence of such congressional intent is squarely faced, we have no business but to respect it . . .”).

154. Other rationales for overturning *Mezzanatto* have been argued. Professor Christopher Mueller highlights several reasons *Mezzanatto* waivers should be rejected as an acceptable practice. For example, he argues that these waivers are invalid under traditional contract law due to illusory consideration and unconscionability. For this discussion regarding *Mezzanatto* waivers, *see generally* Mueller, *supra* note 80 and *infra* Section III.D.

155. FED. R. EVID. 410(b).

156. FED. R. EVID. 410(b)(2).

law.<sup>157</sup> Rule 410(b)(1) resembles the waiver principles of absolute privileges, as it removes Rule 410 protections from communications that have already been divulged in open court.<sup>158</sup> Thus, the prescribed exceptions to Rule 410 match those present in privileges.

Only one circuit court has considered whether Rule 410 merits the creation of a common-law privilege, but it ultimately decided not to extend Rule 410 protections in this manner.<sup>159</sup> In *Doe No. 1 v. United States*, the U.S. Court of Appeals for the Eleventh Circuit rejected arguments that a Rule 410 privilege should be created because the “Supreme Court has cautioned federal courts to be ‘especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.’”<sup>160</sup> In the court’s view, recognition of a privilege “would upset the balance that Congress struck when it adopted Rule 410.”<sup>161</sup> The *Doe* court did not factor in the effects of the *Mezzanatto* decision on Rule 410, however, and thus this analysis cannot be considered complete without a full accounting of the rule’s current operation.

The *Doe* panel greatly underestimated the methods courts can undertake to recognize privileges. Like other evidentiary privileges, a Rule 410 privilege could derive from either the common law or the relevant statutory language. Recognition under the common law would proceed from Federal Rule of Evidence 501, in which Congress delegated the determination of privileges to the courts.<sup>162</sup> Because of this broad grant, courts can rely on the balancing factors under the humanistic and instrumental rationales to recognize privileges. Additionally, strong arguments could be made that the plain language of Rule 410 creates a privilege for criminal defendants. In eliminating much of Rule 410’s power, Justice Thomas acknowledged that Rule 410 created “in effect, a privilege of the defendant.”<sup>163</sup> Thus, a viable

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157. See, e.g., *United States v. Zolin*, 491 U.S. 554, 562 (1989) (illustrating the scope and policy of the crime-fraud exception to attorney-client privilege).

158. FED. R. EVID. 410(b)(1).

159. *Doe No. 1 v. United States*, 749 F.3d 999, 1009 (11th Cir. 2014). Interestingly, this decision seems to spurn the same court’s overview of *Jaffee* factors for determining when a federal privilege should be recognized. In *Adkins v. Christie*, the Eleventh Circuit identified four factors for recognizing a privilege: “1) [T]he needs of the public good; 2) whether the privilege is rooted in the imperative need for confidence and trust; 3) the evidentiary benefit of the denial of the privilege; and 4) consensus among the states.” 488 F.3d 1324, 1328 (11th Cir. 2007). All these factors, absent the fourth, support the creation of a Rule 410 privilege.

160. 749 F.3d at 1009 (quoting *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 189 (1990)).

161. *Id.* at 1010.

162. See FED. R. EVID. 501.

163. *Mezzanatto v. United States*, 513 U.S. 196, 205 (1995) (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 410.05 (Mark S. Brodin ed., Matthew Bender 1st ed. 1994)).

pathway towards the creation of a Rule 410 privilege exists both through the common law and pure statutory interpretation.

*C. Both Instrumental and Humanistic Rationales Support the Extension of a Conditional Privilege*

Both the traditional instrumental and more modern humanistic rationales support the extension of Rule 410's protections by conditional privilege.<sup>164</sup> Under the instrumental rationale, the requirements surrounding the purpose of the relationship are easily satisfied. In order to meet Wigmore's requirements, the relationship gaining the privilege must be "sedulously fostered."<sup>165</sup> Generally, this requirement is satisfied when the relationship produces a societal belief that is important and worthy of fostering.<sup>166</sup> Because of the importance Congress placed on plea bargaining, the relationship between negotiating criminal defendants and prosecutors has tremendous social value and has been deemed worthy of protection by Rule 410. In the debates surrounding Rule 410 before its passage, Congress decided that confidentiality was necessary to foster candid discussions between the parties.<sup>167</sup> And like other instrumental privileges, the relevant evidence emerges out of the relationship seeking protection, thus eliminating evidentiary costs of creating the privilege.<sup>168</sup> Applying the logic from other recognized privileges, such as the psychotherapist-patient privilege, extension of the privilege would create more societal benefit than injury, satisfying Wigmore's fourth prong.<sup>169</sup>

The most difficult requirement to satisfy under the instrumental rationale for the Rule 410 privilege is that the "element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."<sup>170</sup> One could argue

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164. *See supra* Section III.C.

165. IMWINKELRIED, *supra* note 90, § 3.2.3 (citing 8 J. WIGMORE, EVIDENCE § 2285, at 527–28 (McNaughton rev. 1961)).

166. *See id.*

167. *See supra* note 30 and accompanying text.

168. *See supra* note 102 and accompanying text.

169. A criticism of this approach would note that under the current system with *Mezzanatto* waivers, criminal defendants still enter into plea discussions, and despite the potential pitfalls resulting from the waiver of their Rule 410 rights, any change limiting the current operation of plea discussions would result in less information available for trial and, as detractors of extended privileges note, "occasional injustice." *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (Scalia, J., dissenting). The central premise of this Note, however, is that the current system runs afoul of Congress's intended scheme for protecting criminal defendants, and some protections are required to balance out the vastly unequal market forces available to each party.

170. IMWINKELRIED, *supra* note 90, § 3.2.3 (citing 8 J. WIGMORE, EVIDENCE § 2285, at 527–28 (McNaughton rev. 1961)).

that because successful plea negotiations often end in a guilty plea, the privacy interests involved are very low and confidentiality could not serve as an essential element of the relationship.

However, while a successful negotiation might result in the eventual public disclosure of the communications—to a judge or a jury, for example—until that deal is reached, disclosure is not assured. Once negotiations begin, defendants remain concerned that small misstatements could be used against them.<sup>171</sup> The initial purpose of Rule 410 was to allow criminal defendants to eschew these concerns in the interest of candor with prosecutors.<sup>172</sup> By analyzing the plea discussion process in this stepwise manner, the need for confidentiality before an agreement is reached becomes clearer.

Under the humanistic rationale, the relationship must be a consultative one, and the subject of the communications must relate to a “fundamental life choice.”<sup>173</sup> While not a traditional consultative relationship, both the criminal defendant and the prosecutor are largely consulting each other: the criminal defendant provides information about ongoing criminal activity, and the prosecutor communicates the value of that information in terms of reduced punishment. Because the judge is not bound to follow the prosecutor’s sentencing recommendation, the prosecutor is only offering guidance on what benefits cooperation might yield for the defendant.<sup>174</sup> In this way, plea discussions are consultative.

Further, for the criminal defendant, deciding what information to provide in exchange for fewer years of imprisonment is clearly a fundamental life choice. Professor Imwinkelried views fundamental life choices as those choices that have “enhanced constitutional protection for independent decision-making.”<sup>175</sup> Given Justice Scalia’s lamentations in *Lafler* that plea negotiations have become “a whole new field of constitutionalized criminalized procedure,” plea negotiations appear to satisfy this stringent standard.<sup>176</sup>

The most challenging prong for a Rule 410 privilege to satisfy under the proposed humanistic requirements is that the consulting party must have a “singlemindedness” when assisting the counterparty with the decision. Constructing a fiduciary-like relationship between prosecutor and defendant would likely prove difficult. The prosecutor is

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171. See Leonard, *supra* note 1, at 9.

172. See *id.*

173. See *supra* note 138 and accompanying text.

174. See generally Barry Boss & Nicole L. Angarella, *Negotiating Federal Plea Agreements Post-Booker*, 21 CRIM. JUST. 22, 24–26 (describing the sentence bargaining process).

175. IMWINKELRIED, *supra* note 90, § 6.2 (footnote omitted).

176. See *supra* note 83 and accompanying text.

there, however, to facilitate an “enlightened choice furthering the person’s interests.”<sup>177</sup> One of the primary reasons for privileging communications of this type is “to minimize the danger that the risk of public disclosure of his or her advice will distort the counsel that the confidant gives the person.”<sup>178</sup> Under this rationale, prosecutors also benefit from the confidentiality, which allows them to operate in a manner that defers to their own judgment about how to manage the docket of cases without significant public scrutiny.

Finally, conditional privileges almost exclusively exist with regard to communications with and within state and federal governments. Communications with prosecutors would fall within this protected sphere. By applying these privileges as conditional and not absolute, prosecutors would still be able to show that the pursuit of justice requires disclosure. Courts could weigh a variety of factors—the potential harms of nondisclosure, effects of disclosure on similarly situated individuals, and a balancing of other equity concerns—to determine when disclosure is proper. Thus, the conditional label strikes a balance between the current lack of protections and the protections of an absolute privilege, which would bar introduction even when justice demands, all while avoiding any contravention with existing case law on this topic.

#### *D. How Recognition as a Conditional Privilege Would Restore Rule 410 Protections*

One potential criticism of this approach is that reimagining Rule 410 as a privilege would not change anything in practice. As the Court held in *Mezzanatto*, these protections are waivable—just like privileges—and prosecutors will seek waivers of any newly recognized privilege.<sup>179</sup> Viewed this way, no practical change would occur in relation to the rights and protections of criminal defendants during plea negotiations. Rather than make this an unwaivable right, maintaining waivability is important. Waivability allows criminal defendants maximum flexibility in pleading their case. Just like with any privilege, waiver might be strategically beneficial at times. For example, exculpatory statements made during plea negotiations might provide strong evidence of innocence. This solution does not aim to limit choices available to criminal defendants.

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177. IMWINKELRIED, *supra* note 90, § 6.2.

178. *Id.*

179. *United States v. Mezzanatto*, 513 U.S. 196, 200–02 (1995) (describing the Rule’s waivability).

However, reimagining Rule 410 as a conditional privilege does create a material effect on the rule's waiver. First, courts could apply traditional contract doctrines to these agreements—rendering anticipatory waivers invalid under several potential theories.<sup>180</sup> Second, if the underlying contracts to waive the privilege are valid, the defendant's waiver should be revocable. Revocable waivers exist in similar contexts, and the ability to revoke a Rule 410 waiver would protect defendants when negotiations break down. Finally, elevation of these protections from an exclusionary rule to a privilege held by the defendant would likely signal to defendants the importance of the rule and the risks of waiver. The instrumental rationale, adopted by the Supreme Court, relies on awareness of the privilege and its effect on the privilege holder—because the privilege holder knows she enjoys the privilege's protections, she is more likely to engage in protected communications. Therefore, increased awareness of the privilege's protections will generate more protected and socially beneficial communications.

### 1. Contract Doctrines Limiting Anticipatory Privilege Waivers

Historically, most courts facing contracts to anticipatorily waive privileges have deemed these agreements valid.<sup>181</sup> As with any contract, however, courts can apply traditional interpretive tools to limit the effect and scope of these waivers. First, courts often construe the contract against the drafter in the context of privilege waivers.<sup>182</sup> Thus, if the prosecutor's waiver form contains any ambiguity or inconsistency, defense counsel could invoke this traditional contract argument, hoping to either limit or eliminate the effects of the waiver.

Also, some scholars have argued that these contracts are unconscionable and thus unenforceable. Professor Christopher Mueller notes that anticipatory waivers in the Rule 410 context satisfy the Restatement's requirements of unconscionable agreements, including a disparity in bargaining power and values exchanged, and terms that unreasonably benefit one party.<sup>183</sup> As Professor Mueller's analysis concludes, however, "most courts continue to reject challenges to terms in plea agreements based on unconscionability."<sup>184</sup> This is likely due to

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180. See Mueller, *supra* note 80, at 1062 ("A plea agreement is a contract, and cases without number invoke principles of contract law in dealing with the issues that arise.")

181. IMWINKELRIED, *supra* note 90, § 6.12.4.

182. *Cf. id.* § 6.12.4 n.87 (collecting sources of instances of "*contra proferentem*" in the context of anticipatory privilege waivers, mostly in civil suits against insurers hoping to pierce the medical privilege).

183. Mueller, *supra* note 80, at 1067–70.

184. *Id.* at 1069.

the high burden required to demonstrate a contract's substantive and procedural unconscionability.<sup>185</sup> As jurisdictions vary in these requirements or place a greater import on privacy through state constitutional provisions, these arguments may prove more effective in certain jurisdictions than others.<sup>186</sup>

Finally, interpretations of waiver could be colored by the actions of the holders of that privilege. Some courts have held that the mere intent to waive privilege is ineffective until disclosure outside the privileged relationship occurs.<sup>187</sup> Thus, unless the parties inform an outside party of the substance of the communications, the privilege would still attach to the communications. By focusing on the breach of the privileged relationships through actual disclosure with external parties, courts can rule that the privilege survives a promise to waive because the privileged information has not escaped the relationship.<sup>188</sup>

## 2. Waiver Revocation

Regardless of whether the contracts underlying *Mezzanatto* waivers are legal, courts should begin to treat Rule 410 waivers as revocable upon the failure to reach a plea deal. In most circumstances, privilege waiver is irrevocable.<sup>189</sup> In limited circumstances, however, revocations are enforced. For example, within the medical privilege context, waiver is found if “the patient injects the specific issue of his or her condition either in the pleadings or through the tenor of the proffered testimony.”<sup>190</sup> On the other hand, if the litigant removes the particular claim invoking this information from the pleading, the waiver of the medical privilege is deemed revoked.<sup>191</sup>

Similarly, in cases where litigants waive psychotherapist and medical privileges under particular HIPAA provisions, courts have found that waiver can be revoked as well.<sup>192</sup> In *Koch v. Cox*, the U.S. Court of Appeals for the D.C. Circuit allowed for a revocation of a waiver of a litigant's psychotherapist privilege because the information had not

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185. See IMWINKELRIED, *supra* note 90, § 6.12.4.

186. See *id.*

187. See, e.g., *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 341 (9th Cir. 1996) (“[W]e have admonished that the focal point of privilege waiver analysis should be the holder's disclosure of privileged communications to someone outside the attorney-client relationship, not the holder's intent to waive the privilege.”).

188. Cf. FED. R. EVID. 502 (describing the waiver of the attorney-client privilege as the result of intentional and unintentional disclosure to parties outside the privileged relationship).

189. IMWINKELRIED, *supra* note 90, § 6.12.6 n.632 (collecting sources).

190. *Id.* § 6.13.3.

191. *Id.*

192. *Id.* § 6.12.6 (citing *Koch v. Cox*, 489 F.3d 384, 391–92 (D.C. Cir. 2007)).

yet been disclosed outside the privileged relationship.<sup>193</sup> In these situations, the defendant is utilizing the waiver to further some strategic goal. But if she relinquishes that potential benefit, the privilege can take effect again.

Within the Rule 410 context, defendants should be permitted to revoke *Mezzanatto* waivers. Once the plea discussions between the prosecutor and criminal defendant fall apart, the defendant should be able to revoke her waiver made in reliance on the belief that some deal would be made. This revocation could be prepared by defense counsel in advance of plea negotiations and signed by the defendant upon the dissolution of negotiations. When negotiations end, there is limited opportunity for the prosecutor to divulge information gained during the plea negotiations. Therefore, it is unlikely the discussed information has escaped the privileged relationship. Once the negotiation ends, the defendant is no longer utilizing the waiver for her benefit, and as in the situations described above, the privilege should be able to attach once more.

### 3. Elevation of Rule 410's Status

Reconceptualizing Rule 410 as a privilege would likely increase the general awareness of the rule's protections and of the potential harmful effects of a *Mezzanatto* waiver. Much of this effect will result from how defense counsel presents the issue to the criminal defendant. As Professor Slobogin notes, one of the challenges resulting from *Mezzanatto* is that defense attorneys must prevent their clients from speaking to prosecutors unless they are certain they can strike a deal.<sup>194</sup> Because of the breadth of waivers courts allow, any communication between the defendant and the prosecutor could be used in subsequent proceedings, and thus the defense counsel must impress upon the defendant the importance of such communications.<sup>195</sup> Consequently, by elevating the rule's protections to that of a privilege, defense attorneys can signal the significance of these protections and encourage defendants to speak only when success seems certain.

This inference is borne out by the elevated role of privileges in comparison to other procedural protections under the instrumental

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193. *Koch*, 489 F.3d at 391.

194. See Slobogin, *supra* note 1, at 125 (“[D]on’t let your client talk to prosecutors unless and until you have some indication from the government that it thinks the client’s information is significant enough to warrant a formal prosecutorial request for leniency . . .”).

195. See *id.* (explaining that “many prosecutors require broad Rule 410 waivers even for these preliminary attempts to find out what the defendant knows,” which might lead to the introduction of otherwise protected information at the current, or even a future, trial).

view. Under the instrumental rationale, privileged communications would not occur without the privilege. Courts have been amenable to these arguments. In *Jaffee*, the Supreme Court appeared to be swayed by amicus briefs indicating patients knew of and relied upon the confidentiality of the psychotherapist relationship before communicating.<sup>196</sup> By merely creating the privilege and making it known to potential defendants, the Court believed the privilege would generate and foster discussions protected by the privilege. Thus, by protecting plea discussions with a Rule 410 privilege, defendants will better understand the potential costs of waiver, forcing a more considered decision with the assistance of counsel.

### CONCLUSION

Ultimately, Rule 410 must undergo changes to restore the protections Congress initially intended it to provide. This Note analyzed why Rule 410 fails to fulfill its original congressional purpose and proposed a potential solution by reconceptualizing the protections as a conditional privilege. While prosecutors will likely mobilize against any changes to existing *Mezzanatto* waivers and argue against the existence of any systemic issues, the current system fails to provide sufficient protections for criminal defendants. *Mezzanatto* is not likely to be overruled, and Congress is unlikely to reclaim any power it delegated to the courts in determining privileges. Recognition of a Rule 410 conditional privilege is in line with traditional and modern rationales for privilege creation and would create new safeguards for the original Rule 410 protections of criminal defendants.

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196. See *Jaffee v. Redmond*, 518 U.S. 1, 10 n.9 (1996) (giving weight to the notion that knowledge of the privilege facilitates the desired communications between patient and psychotherapist).

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