EVIDENCE LAW IN THE AGE OF PLEA BARGAINING

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This Article challenges evidence law's entrenched trial-centricity, arguing that this orientation has rendered the field increasingly misaligned with the reality of a criminal justice system in which trials are rare and plea bargaining predominates. It begins by excavating how the historical and jurisprudential foundations of evidence law have narrowed our legal imagination, naturalizing the assumption that evidentiary regulation is the province of trial. It then advances a normative case for reorienting evidence law to the plea stage, where the most consequential determinations of guilt and punishment currently occur. This framework is translated into concrete reforms, including mandatory pre-plea evidentiary hearings, modeled on preliminary and suppression hearings, but repositioned to occur before plea entry; extending Crawford*'s confrontation and cross-examination rights to the pre-plea stage; and expanding* Brady *obligations to mandate that the prosecution make all relevant evidence available prior to finalizing a plea.*

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[I]t's part of this legal system that one is condemned when one is not only innocent, but also ignorant.[1]

INTRODUCTION

The U.S. Supreme Court's landmark decision in *Brady v. Maryland* established the due process requirement that the prosecution disclose material "evidence favorable to an accused."[2] But on December 5, 2022, the promise of *Brady* reached a legal impasse: the Court denied certiorari in *Mansfield v. Williamson County*,[3] leaving unresolved the pressing question of whether *Brady*'s obligations extend to the plea bargaining stage or apply only at trial.[4] The case of Troy Mansfield poignantly illustrates what's at stake.[5]

Proceedings against Troy Mansfield commenced in 1992, when he was charged in Williamson County, Texas, with first-degree aggravated sexual assault and indecency with a child following allegations that he had molested a four-year-old girl. He was twenty-five years old at the time. The prosecutors in Mansfield's case had evidence that seriously undermined the victim's credibility and raised doubts about his guilt. Rather than presenting this crucial evidence to Mansfield, the prosecution chose to make an enticing plea offer: 120 days in county jail, ten years of probation, and sex offender registration in exchange for a guilty plea to a lesser charge. Given the alternative of a ninety-nine-year-to-life sentence, Mansfield opted to accept the deal and pleaded guilty. It was nearly a quarter of a century later, in 2014, that Mansfield finally managed to obtain access to the prosecution's file, where he discovered the favorable evidence that had been withheld from him.[6] With this newfound information, a Williamson County judge vacated his conviction in 2016.[7] However, the damage had already been done. Mansfield spent years of his life labeled a convicted sex offender

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1 Franz Kafka, The Trial 40 (Mike Mitchell trans., Oxford Univ. Press 2009) (1925).

2 373 U.S. 83, 87 (1963). In 1972, the Supreme Court broadened this rule to include some impeachment material. See Giglio v. United States, 405 U.S. 150, 154 (1972).

3 30 F.4th 276 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 486 (2022).

4 Id. at 282 & n.9 (Higginbotham, J., concurring) (presenting the circuit split on this issue).

5 See Eza Bella Zakirova, Is It Rational or Not?: When Innocents Plead Guilty in Child Sex Abuse Cases, 82 Alb. L. Rev. 815, 833 n.102 (2019) (detailing the factual background of the Troy Mansfield case).

6 Id.

7 Ex parte Mansfield, No. 92-435-K277A (Tex. Jud. Dist. Ct. Jan. 19, 2016).

because of a plea agreement obtained through the suppression of exculpatory evidence, conduct that would have constituted a *Brady* due process violation had the case proceeded to trial.[8]

Mansfield's case underscores a profound tension: while the *Brady* doctrine mandates the disclosure of favorable evidence material to guilt or punishment, its application has been narrowly interpreted by some courts, notably the Fifth Circuit, as confined to the trial stage.[9] Consequently, when Mansfield sought civil redress for the earlier suppression, his case was dismissed, a decision the Fifth Circuit upheld, cementing its stance that *Brady* does not govern the plea bargaining stage.[10] The subsequent petition for certiorari, supported by amicus briefs from legal scholars and civil rights organizations, challenged this restrictive interpretation.[11] The Supreme Court's decision not to grant review effectively maintained the status quo, leaving unresolved the crucial constitutional question of *Brady*'s reach in the dominant plea bargaining system.[12]

[8] Although the court in *Mansfield* did not decide whether there had been a *Brady* violation since Mansfield's case never reached trial, it seems uncontroversial to conclude that the prosecution here withheld material exculpatory evidence upon request. See *Mansfield*, 30 F.4th at 277–78; Brady v. Maryland, 373 U.S. 83, 87–88 (1963); see also *Ex parte Mansfield*, slip op. at 5 (holding, independently and by State concession, that the prosecution's withholding of the victim's interview notes violated *Brady*); Sela Brown, *Brady* in the Plea Era: How *U.S. v. Ruiz* Should Be Reconstrued in Light of *Missouri v. Frye* and *Lafler v. Cooper*, 27 Berkeley J. Crim. L. 1, 3 (2022) (discussing the government's affirmative duty to share exculpatory and impeachment evidence with the defendant under *Brady v. Maryland*).

[9] Alvarez v. City of Brownsville, 904 F.3d 382, 392 (5th Cir. 2018) (en banc). There are federal courts of appeals that have recognized prosecutors' constitutional obligation to reveal exculpatory evidence to defendants before a guilty plea. See Laura Falk, Note, *Brady* Rights in a System of Pleas: Analyzing the Ninth Circuit's "Apparent Position," 67 Ariz. L. Rev. 241, 246–51 (2025); Michael Nasser Petegorsky, Note, Plea Bargaining in the Dark: The Duty to Disclose Exculpatory *Brady* Evidence During Plea Bargaining, 81 Fordham L. Rev. 3599, 3625–31 (2013).

[10] *Mansfield*, 30 F.4th at 281; see also Matthew v. Johnson, 201 F.3d 353, 361–62 (5th Cir. 2000) (stating that a *Brady* violation requires a trial); United States v. Conroy, 567 F.3d 174, 178 (5th Cir. 2009) (per curiam) (noting that there can be no *Brady* violation with a guilty plea).

[11] Petition for a Writ of Certiorari at 23–25, Mansfield v. Williamson County, 143 S. Ct. 486 (2022) (No. 22-186); Brief of *Amici Curiae* Law Professors in Support of Petitioner Troy Mansfield at 6–16, *Mansfield*, 143 S. Ct. 486 (No. 22-186); Brief of *Amicus Curiae* Professor Colin Miller in Support of Petitioner at 13–14, *Mansfield*, 143 S. Ct. 486 (No. 22-186); Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner at 13–14, *Mansfield*, 143 S. Ct. 486 (No. 22-186).

[12] See Montré D. Carodine, Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule, 69 Md. L. Rev. 501, 516 (2010) (noting based on data from 2004 that

To further illustrate the limitations of a trial-centric model,[13] consider the not infrequent scenario in which law enforcement obtains evidence without a valid warrant or elicits a confession through problematic interrogation tactics.[14] Rather than risking challenges to the evidence's admissibility and the exposure of the unlawful conduct at trial or during pre-trial suppression hearings, prosecutors may offer attractive plea deals.[15] Defendants, especially those facing severe penalties, may feel compelled to accept such deals, waiving the opportunity to effectively review the evidence against them.[16] This dynamic means that the

ninety-seven percent of felony convictions in the seventy-five most populous counties in the United States were obtained through guilty pleas (citing Tracey Kyckelhahn & Thomas H. Cohen, Bureau of Just. Stat., U.S. Dep't of Just., Felony Defendants in Large Urban Counties, 2004, at 1, 3 (2008), https://static.prisonpolicy.org/scans/bjs/fdluc04.pdf [https://perma.cc/P4MD-8EKP])); see also Darryl K. Brown, Response, What's the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining, 95 Tex. L. Rev. See Also 47, 62 (2017) (noting that some jurisdictions resolved ninety-nine percent of criminal cases with plea agreements).

[13] *Brady*'s disclosure obligations are firmly established within criminal procedure, so their invocation as an example of evidence law's trial-centricity may prompt hesitation. Yet it is precisely this distinction between a "disclosure right" and a "trial right," as well as the location of *Brady* in the realm of criminal procedure—in contradistinction to evidence law—that exemplifies the rigid and deeply ingrained trial-centric architecture of evidentiary doctrine. This Article seeks to interrogate this "division of labor" between evidence law and criminal procedure, exposing it as neither natural nor inevitable, but as a historically manufactured framework that essentially confines evidence law to the stage and formalities of trial. See infra Part I. It is this foundational assumption, that evidence law properly concerns only the regulated drama of the courtroom, that this Article aims to unsettle and ultimately transcend by extending evidentiary principles to the plea stage, where the most determinative decisions concerning conviction and punishment currently occur. See supra note 12 (detailing the dominance of plea bargaining in the current criminal justice system).

[14] See Laurie Magid, Deceptive Police Interrogation Practices: How Far Is Too Far?, 99 Mich. L. Rev. 1168, 1168 (2001) ("Virtually all interrogations—or at least virtually all successful interrogations—involve some deception."); Deborah Young, Unnecessary Evil: Police Lying in Interrogations, 28 Conn. L. Rev. 425, 425–26 (1996) (observing that lies to induce confessions are commonly reported and discussing some situations in which police avoid getting a proper warrant).

[15] See Inga Ivsan, To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice, 39 N.C. Cent. L. Rev. 135, 137 & n.9 (2017) (citing James F. Parker, Plea Bargaining, 1 Am. J. Crim. L. 187, 204 (1972) (observing that prosecutors may offer especially favorable plea deals to insulate constitutionally defective evidence of questionable admissibility from judicial scrutiny)).

[16] See id. at 137 ("A defendant arrested on the basis of illegally obtained evidence, and facing the threat of significant jail time, may be pressured to accept a plea agreement without having had any opportunity to review evidence meaningfully."); id. at 145 ("The plea bargain process enables prosecutors to act on what would otherwise be inadmissible evidence at trial . . . .").

exclusionary rule, rather than serving as a robust constitutional safeguard, becomes a "sliding scale of constitutionality,"[17] calibrated more by prosecutorial leverage at plea bargaining than by legal standards and judicial scrutiny.

The trial-centric orientation of evidence law, which treats the trial as the locus of evidentiary regulation and as the primary site of its application,[18] creates a fundamental disconnect between legal doctrine and the realities of the criminal justice system. Such trial fixation reinforces an outdated model of evidence law, one premised on the now-fictional notion that trials remain the central venue of criminal case disposition.[19] The scenarios discussed above highlight the urgent need to rethink this structure and adapt it to a legal landscape where convictions are overwhelmingly secured outside the trial setting.[20] Absent such adaptation, the power of evidentiary safeguards risks vanishing alongside the trial itself.

More than a quarter of a century ago, Mirjan Damaška diagnosed a fundamental crisis in the world of evidence law. In his seminal book *Evidence Law Adrift*, he situated the institution of evidence law within the realm of trial.[21] Observing the steady decline of courtroom proceedings and fundamental trial elements, Damaška identified "currents of change . . . sweeping" evidence law from its traditional moorings.[22] He argued that, in a post-trial world, the institution of evidence law has been "deprived of a convincing theoretical basis,"[23]

[17] Parker, supra note 15, at 205.

[18] In the words of Michael Pardo, "The law of evidence regulates the admissibility, the permissible uses, and (to a lesser extent) the weight of evidence in civil and criminal *trials*." Michael S. Pardo, Some Remarks on the Importance of Evidence Outside of Trials, 36 Rev. Litig. 443, 443 (2016) (emphasis added).

[19] See, e.g., Russell M. Gold, Power Over Procedure, 57 Wake Forest L. Rev. 51, 113 (2022) ("Defendants need not have robust opportunities to discover documentary evidence against them pretrial or depose witnesses, including their accusers, because trial provides the core protection for defendants, the story goes." (footnote omitted)).

[20] See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 87 (rev. ed. 2011) ("Nearly all criminal cases are resolved through plea bargaining . . . ."); supra note 12.

[21] Mirjan R. Damaška, Evidence Law Adrift 4 (1997) [hereinafter Damaška, Evidence Law Adrift] (identifying the jury trial, temporal concentration of proceedings, and adversarial factfinding as the foundations sustaining common law rules of evidence).

[22] Id. at 6.

[23] Id. at 142.

calling into question its increasingly untethered role.[24] This Article heeds Damaška's invitation, not by contesting the relevance of evidence law in an era of vanishing trials, but by challenging the trial-centric paradigm that has long shaped its contours and evolution. It advocates for a radical reimagining of evidence law through its proposed reorganization around pleas and plea bargaining (hereinafter referred to as the *pre-plea* stage).

The Article proceeds as follows. Part I traces the historical and jurisprudential foundations underlying evidence law's trial-centricity, locating them in three places: (1) evidence law's very emergence as a legal institution in the Anglo-American world, (2) against the backdrop of a functional dichotomy between investigation and adjudication, and (3) within the corresponding diminishment of the fact-finder's investigative capacities. This transformation was catalyzed by two historical developments: the reform of the jury system in the sixteenth and seventeenth centuries and the ascendancy of the adversarial trial in the eighteenth and nineteenth centuries. This Part demonstrates how these historical contingencies delineated the boundaries of evidence law and established trial as its primary site—a framework that persists to this day, continuing to limit our legal imagination and to shape both legal doctrine and scholarly discourse.

Part II offers a descriptive account of the decline of criminal trials in the United States, tracing the rise of plea bargaining to the post-1960s explosion in criminal caseloads and to the doctrinal entrenchment of pleas in *Santobello v. New York*.[25] The transformation of plea bargaining from an informal prosecutorial practice into the primary mechanism for criminal case resolution effectively collapsed the structural and functional divide between investigation and adjudication.

Part III is dedicated to the normative argument. It begins by challenging the common wisdom that the (re)consolidation of adjudicative and investigative capacities in the hands of the prosecutor under plea bargaining signifies a regression to inquisitorial logic and a

[24] In Damaška's words, evidence rules are in "danger of becoming antiquated period pieces, intellectual curiosa confined to an oubliette in the castle of justice." Id. For a similar account of Damaška's argument, along with a rebuttal that seeks to sever the link he draws between the decline of trials and the erosion of evidence law, see Samuel R. Gross, Law in the Backwaters: A Comment on Mirjan Damaška's *Evidence Law Adrift*, 49 Hastings L.J. 369, 369–71 (1998).

[25] 404 U.S. 257, 260 (1971).

reversion to the legal environment that predated the emergence of evidence law as an institutional framework in the Anglo-American world. Instead, this Part shows that plea bargaining radically intensifies adversarialism, amplifying partisan advocacy and thereby reinforcing, rather than undermining, the rationale for evidentiary regulation. The discussion calls for extending core evidentiary constructs—such as admissibility, sufficiency, confrontation, cross-examination, and testimony—to the pre-plea stage, where decisions about guilt and punishment are effectively made. This Part concludes by proactively addressing four principal objections that may be leveled against extending evidentiary regulation beyond the courtroom: (1) that rules of evidence applied at trial already effectively regulate the pre-plea stage, given that plea bargains are negotiated in the "shadow of trial"; (2) that trials continue to function as the principal sites of adjudication even within a plea-dominated system by virtue of the formal in-court confession that concludes the plea process; (3) the mirror-image claim that pleas are voluntary agreements rather than factfinding exercises, so their legitimacy derives from the defendant's consent, not from evidentiary integrity; and (4) that extending evidentiary regulation to the pre-plea stage risks generating deep structural distortions by altering the distribution of error across the criminal justice system, reshaping the incentives of key players, and placing additional pressure on the system's (already strained) judicial economy.

Part IV is prescriptive in nature and translates the normative framework into a set of concrete doctrinal proposals. It outlines evidentiary safeguards specifically tailored for the pre-plea phase, offering a vision of evidence law reimagined beyond the trial's traditional boundaries. These proposals include: (1) Mandatory pre-plea evidentiary hearings modeled on prevailing preliminary and suppression hearings but repositioned to occur before plea rather than before trial. These hearings are intended to ensure that plea agreements do not insulate unlawfully obtained evidence and to enforce a minimal standard of proof for a negotiated conviction. (2) Extension of *Crawford* confrontation rights to the pre-plea stage,[26] allowing defendants to depose and cross-examine key witnesses prior to pleading. This measure

[26] The idea of extending evidentiary protections beyond trial has been compellingly articulated by William Ortman in *Confrontation in the Age of Plea Bargaining*, 121 Colum. L. Rev. 451, 453 (2021) [hereinafter Ortman, Confrontation]. Ortman's proposal is discussed in detail in Part IV.

would ensure that the factual foundations of negotiated convictions are subjected to meaningful adversarial testing. (3) Extension of *Brady* obligations to mandate that the prosecution's entire case file be disclosed to the accused before any plea agreement can be finalized. In essence, this proposal suggests that all relevant evidence be "admitted" into the plea bargaining process, where it serves as the currency shaping the terms of agreement.

I. EVIDENCE LAW'S ROAD TO TRIAL-CENTRICITY: TWO HISTORIES OF EVIDENCE LAW

The development of evidence law as a legal institution in the Anglo-American world has both molded and simultaneously restricted our legal thinking, leading to a deeply ingrained view of evidentiary regulation as fundamentally linked to the trial process. To understand the depth and durability of this linkage, we must first unearth its historical foundations. Only by tracing the forces that forged the alignment between evidence law and trial can we grasp its full extent and the challenges it now presents.

Evidence law is a relatively recent phenomenon within the Anglo-American world, with a structured system of evidentiary rules implemented much later than were other common law institutions and doctrines.[27] The origins of Anglo-American evidence law have been the subject of a heated debate essentially shaped by two competing theories that trace evidence law's emergence to distinct historical moments. According to Wigmore, the institution of evidence law arose in the sixteenth and seventeenth centuries, when juries shifted from functioning as active investigators to passive triers of fact.[28] Langbein,

[27] See G. Alexander Nunn, The Incoherence of Evidence Law, 99 Notre Dame L. Rev. 1255, 1293 (2024) (noting the comparatively recent emergence of modern evidence law within the common law tradition). This characterization, of course, does not deny the existence of evidentiary regulation in premodern times and legal systems. In a recent book, Mirjan Damaška discusses how the Roman-canon tradition subjected judges to a dense web of formal proof rules. See Mirjan Damaška, Evaluation of Evidence: Premodern and Modern Approaches 47 (2019). Likewise, ancient Jewish law developed a highly articulated evidentiary regime, reflected in the Babylonian Talmud and earlier rabbinic sources. See Aaron Kirschenbaum, Self-Incrimination in Jewish Law 34–49 (1970) (discussing the development of evidence rules through the lens of Tannaitic passages).

[28] See John Henry Wigmore, A General Survey of the History of the Rules of Evidence, *in* 2 Select Essays in Anglo-American Legal History 691, 692–93 (Ass'n of Am. L. Schs. ed., 1908).

on the other hand, situates modern evidence law's development in the late eighteenth century, attributing evidence law to the rise of defense counsel and the formalization of adversarial legal structures.[29] While these accounts are often juxtaposed against each other, I contend that they converge on a shared premise: both recognize that the institution of evidence law is historically rooted in the functional and structural separation between investigation and trial and in the adjudicator's loss of unmediated access to the facts of the case. In other words, under both accounts, the origins of evidence law are also the origins of its trial-centricity. Evidence law does not merely govern factfinding at trial. It is shaped by the contours of trial and exists because of the delineation between investigation and adjudication. This Part now turns to further address each of these two central historical accounts as to the origins of evidence law, beginning with that of Wigmore.

A. Jury Reform as Catalyst: Wigmore on the Origins of Modern Evidence Law in the Common Law

John Henry Wigmore, the pioneering historian of Anglo-American evidence law, locates modern evidence law's origins in the sixteenth and seventeenth centuries, identifying the emergence of evidentiary regulation in the transformation of juries from self-informed and self-informing investigative bodies into passive triers of fact.[30] The jury system emerged in the thirteenth century following the decline of trial by ordeal,[31] yet its original function differed significantly from its later counterpart.[32] In its earliest incarnation, the jury drew on its members'

[29] John H. Langbein, The Origins of Adversary Criminal Trial 5–6 (2003) [hereinafter Langbein, Adversary Criminal Trial].

[30] See Wigmore, supra note 28, at 692 (situating the rise of modern evidence law within the structural pressures introduced by the maturing jury system).

[31] See Robert Bartlett, Trial by Fire and Water: The Medieval Judicial Ordeal 137–39 (1986). "Trial by ordeal" refers to judicial practices in which the accused underwent physical tests, such as holding a burning object, with outcomes interpreted as divine intervention to determine guilt or innocence. Id. at 1.

The Fourth Lateran Council prohibited ordeals, citing theological concerns regarding the presumptuousness of compelling divine intervention and responding to allegations that priests were bribed to manipulate the severity of ordeals by varying the temperature of the iron. See Edward L. Rubin, Essay, Trial by Battle. Trial by Argument, 56 Ark. L. Rev. 261, 272–73 (2003).

[32] See John H. Langbein, The Origins of Public Prosecution at Common Law, 17 Am. J. Legal Hist. 313, 314 (1973). Daniel Klerman characterizes this view as the prevailing historical account. See Daniel Klerman, Was the Jury Ever Self-Informing?, 77 S. Cal. L.

deep integration within tightly knit agrarian communities to either know firsthand about case-related facts or be uniquely positioned to investigate and uncover them. In the words of M. Neil Browne, Carrie Williamson, and Garrett Coyle:

> With the decline of . . . medieval methods of proof, one of the earliest forms of the "jury" trial emerged, as sheriffs would often rely upon selected citizens to provide testimony about any knowledge they had that was relevant to a particular case. Alternatively, if these selected citizens did not know about the facts in dispute, they played an active role in "finding" facts related to the case.[33]

Unlike present-day jurors, who are expected to be impartial and have no prior knowledge, medieval jurors were deliberately selected for their familiarity with the case at hand and those involved. They were chosen precisely because they had firsthand knowledge of the events or because they could leverage their communal ties to investigate independently.[34] This model of adjudication was deeply embedded in a social structure where justice was administered through collective knowledge, reinforcing the jury's function as an extension of the local community rather than a separate and neutral entity: "The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a

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Rev. 123, 123–24 (2003) ("For nearly two centuries, legal historians have believed that the medieval English jury differed fundamentally from the modern jury. Its members hailed from the immediate vicinity of the dispute and came to trial already informed about the facts. Jurors based their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities where rumor, gossip, and local courts kept everyone informed about their neighbors' affairs. Interested parties might also approach jurors out of court to relate their side of the case. Witness testimony in court was thus unnecessary. The jurors themselves were considered the witnesses—not necessarily eyewitnesses, but witnesses in the sense that they reported facts to the judges.").

[33] M. Neil Browne, Carrie Williamson & Garrett Coyle, The Shared Assumptions of the Jury System and the Market System, 50 St. Louis U. L.J. 425, 427 (2006) (footnote omitted) (citing Ellen E. Sward, Values, Ideology, and the Evolution of the Adversary System, 64 Ind. L.J. 301, 320–22 (1989)); see also Robert J. McWhirter, How the Sixth Amendment Guarantees You the Right to a Lawyer, a Fair Trial, and a Chamber Pot, Ariz. Att'y, Dec. 2007, at 12, 16 ("[J]urors would have gone out and investigated the case themselves.").

[34] See Edward K. Cheng & G. Alexander Nunn, Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law, 97 Tex. L. Rev. 1077, 1084 (2019) (arguing that the epistemic design of early juries rested on their members' proximity to the dispute, which enabled the jury to generate its own evidentiary knowledge rather than rely on in-court presentations).

verdict formulated in advance."[35] This backdrop rendered the formal regulation of factfinding through evidence law largely superfluous. The jury's function, which fused investigative and adjudicative capacities,[36] obviated the need for evidence law and its constraints on factfinding.

Between the fourteenth and seventeenth centuries, the jury system underwent a radical transformation, driven in part by the sweeping sociocultural upheavals following the Black Death plague.[37] As small agrarian communities gradually declined and more populous urban centers arose, jurors could no longer rely on personal familiarity for firsthand knowledge.[38] By the seventeenth century, jurors were no longer drawn from circles familiar with the parties or the underlying events. As lay fact-finders without personal knowledge, they became reliant on information introduced at trial, chiefly the testimony of witnesses and the accounts offered by the accused.[39] The routine admission of such testimony in open court shattered the jury's exclusive control over the trial's factual narrative. The jury was no longer the master of fact but a passive audience. As externally presented, formal evidence became central, the courtroom became the exclusive site for proof production.[40] Jurors, now detached from the investigative function, were expected to come to court as *tabulae rasae* and to base their verdicts solely on the evidence introduced during the judicial

[35] John Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 Colum. L. Rev. 1168, 1170 (1996) [hereinafter Langbein, Ryder Sources]. For similar accounts, see Klerman, supra note 32, at 127; Barbara J. Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence 4 (1991).

[36] See Nunn, supra note 27, at 1293 ("In its initial form, the jury—individuals with the greatest preknowledge of the events at issue—would assume a quasi-prosecutorial role during adjudication." (emphasis omitted)).

[37] See John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 224–25 (2009) (contending that the Black Death undermined a system that relied on jurors' direct knowledge of the facts in small agrarian communities). In the agrarian system that Langbein describes, evidentiary regulation was unnecessary since the jury was "self-informing." Id. at 225.

[38] See Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800, at 105 (1985) ("The jury ceased during the later Middle Ages to be a (mainly) self-informing institution.").

[39] See R.G. Bloemberg, The Development of the 'Modern' Criminal Law of Evidence in English Law and in France, Germany and the Netherlands: 1750–1900, 59 Am. J. Legal Hist. 358, 365 (2019) (arguing that jurors evolved into passive fact-finders, expected to base their verdicts solely on the evidence formally introduced at trial).

[40] See id.

proceedings.[41] This new dependency on formal presentation of external evidence necessitated evidentiary rules to govern what could be admitted and how it should be evaluated. Moreover, now hearing the same evidence as the jurors, trial judges could assume a more active role vis-à-vis the jury—offering commentary on the evidence, guiding the jury, and ultimately overseeing and regulating witness testimony.[42]

It was through the transformations from local knowledge to in-court testimony and from active inquiry and investigation to passive assessment and adjudication that evidence law began to emerge as a distinct legal domain. Once juries ceased to function as self-informed and self-informing bodies and were instead required to base their decisions solely on evidence presented during trial, the need for a systematic framework to govern the introduction and evaluation of such evidence became imperative. Wigmore identified the advent of this more formalistic, instructional trial as the pivotal moment in the evolution of the law of evidence. In his words, "[T]he constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern [evidence law] system."[43]

To conclude, according to Wigmore's historical account, the transition from self-informed and self-informing jurors to the formal, instructional trial made evidentiary regulation a central concern. As I wish to highlight, this account exposes a fundamental link between the emergence of the institution of evidence law and the jury's loss of unmediated access to relevant facts. It was this shift away from jurors' direct engagement with the case at hand and toward the separation of investigative and adjudicative functions that created the conditions necessitating evidentiary regulation and gave rise to evidence law as a distinct legal domain.

The principal weakness in Wigmore's historical account of evidence law's origins is rooted in his treatment of the documentary record. Most sources referencing modern evidentiary doctrine in the Anglo-American world date back to the late eighteenth or early nineteenth century, nearly

[41] See Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 137–38 (1986).

[42] See Zhuhao Wang, The Peculiarity of American Evidence Law: An Outsider's Observation and Reflection, 26 Int'l J. Evidence & Proof 271, 273 (2022) (linking the institution of evidence law to the division of labor between judge and jury).

[43] Wigmore, supra note 28, at 692.

two centuries after the jury's transformation from a self-informed and self-informing body to a passive trier of fact.[44] Wigmore attributed this temporal gap to incomplete historical recordkeeping, rather than viewing it as indicative of a deeper truth about the emergence of evidence law.[45] Under his account, evidentiary rules were operative well before they were recorded. Langbein and others challenge this assumption, arguing that the timing of the documentary record is not incidental. For Langbein, the emergence of sustained writing on evidentiary doctrine in the late eighteenth and early nineteenth centuries signifies the actual formation of evidence law as a distinct legal corpus.[46] Section I.B turns to Langbein's account, which offers a competing, and equally foundational, theory of the historical origins of modern evidence law in the Anglo-American world.

B. Adversarialism as Catalyst: Langbein on the Origins of Modern Evidence Law in the Common Law

According to John Langbein in his seminal book *The Origins of Adversary Criminal Trial*, the emergence of evidence law was prompted by the development of the lawyer-dominated adversarial trial in the late eighteenth century.[47] Prior to this transformation, during the sixteenth and seventeenth centuries, English criminal trials were generally devoid of lawyers and took the form of "altercations" between the victim-prosecutor and the accused.[48] Judges actively examined witnesses and steered juror discussions to ensure the "correct" verdict (initially through fines and imprisonment—a practice curtailed after *Bushell's Case* in 1670[49]—and later through judicial pronouncements).[50]

[44] See Langbein, Ryder Sources, supra note 35, at 1171.

[45] See id. ("Wigmore knew that most of the sources for the law of evidence were no older than the late eighteenth or early nineteenth century. However, Wigmore treated this chronology as an accident of the history of the sources rather than an insight about the underlying history of the law of evidence.").

[46] Id. at 1172.

[47] Langbein, Adversary Criminal Trial, supra note 29, at 5. As Langbein argues, "[E]ven into the middle of the eighteenth century, the modern law of evidence was not yet in operation." Langbein, Ryder Sources, supra note 35, at 1170.

[48] Langbein, Adversary Criminal Trial, supra note 29, at 2, 13.

[49] Bushell's Case (1670) 124 Eng. Rep. 1006, 1009; Vaughan 135, 142 (C.P.).

[50] See Langbein, Ryder Sources, supra note 35, at 1190 & n.106; see also Andrea McKenzie, Book Review, 27 Law & Hist. Rev. 195, 195 (2009) (reviewing Langbein, Adversary Criminal Trial, supra note 29) (characterizing criminal trials in this era as "judge-dominated").

Prosecution was considered a private affair.[51] While no formal restrictions were placed on the use of legal representatives by those initiating proceedings, counsel was rarely employed.[52] Throughout much of this era, felony prosecutors had legal representation in only about four percent of trials.[53] Defendants, for their part, were considered "informational resources"[54] and expected to personally respond to the allegations and advocate for themselves. In accordance with what Langbein terms this "accused speaks"[55] system, defense counsel was barred from factual matters, and "could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements."[56] The underlying rationale was that legal counsel would hinder the court's ability to extract truthful information from the defendant.[57]

The infamous treason trials under the later Stuart monarchy, particularly those surrounding the Popish Plot (1678–80), the Rye House Plot (1683), and the Bloody Assizes (1685), were a turning point.[58] These trials led to grave miscarriages of justice.[59] They exposed the

[51] See Randolph N. Jonakait, The Rise of the American Adversary System: America Before England, 14 Widener L. Rev. 323, 325 (2009) ("A public official whose job it was to prosecute did not exist.").

[52] See T.P. Gallanis, The Mystery of Old Bailey Counsel, 65 Cambridge L.J. 159, 162 (2006) ("Despite having the right to employ counsel, prosecutors rarely did so, perhaps believing that lawyers were unnecessary or perhaps desiring to avoid the expense.").

[53] For reference to this data as well as certain doubts raised with respect to it, see id. at 161 (citing J.M. Beattie, Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries, 9 Law & Hist. Rev. 221, 227 (1991)).

[54] John H. Langbein, The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors, 58 Cambridge L.J. 314, 315 (1999) [hereinafter Langbein, Origins of Defence Counsel] ("[T]he rule against defence counsel pressured the accused to respond on the merits to the charges against him, hence to become an informational resource for the trial court.").

[55] John H. Langbein, The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, *in* R.H. Helmholz et al., The Privilege Against Self-Incrimination: Its Origins and Development 82, 83 (1997).

[56] Jonakait, supra note 51, at 325 n.2 (quoting Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 83 (1995)).

[57] Langbein, Adversary Criminal Trial, supra note 29, at 2 ("Part of what motivated the rule against defense counsel was the fear (fully justified in hindsight) that defense counsel would interfere with the court's ability to have the accused serve as an informational resource."); id. at 20 ("Because the accused conducted his own defense at trial, he necessarily made himself an informational resource for the court.").

[58] See id. at 3.

[59] Id. (characterizing these prosecutions as "venomous" and describing them as cases in which "perjured evidence resulted in the conviction and execution of innocent persons").

vulnerabilities of a system that denied effective legal representation, generating widespread discontent.[60] In response, Parliament enacted the Treason Trials Act of 1696, which granted treason defendants the right to legal counsel.[61] The Act's framers considered treason cases exceptional, as they were prosecuted with extraordinary zeal by the Crown, often with the assistance of professional attorneys.[62] Furthermore, judges, who at the time served at the Crown's discretion, frequently exhibited bias against treason defendants.[63] To counteract these imbalances, the Act permitted defendants accused of treason to secure legal representation so that they could effectively challenge the prosecution's case, marking a pivotal moment in establishing the precedent of defense counsel.[64] Initially, however, the right to guidance by defense counsel was confined to treason trials and did not extend to other common felony cases.[65]

The 1730s marked a gradual shift away from the long-standing ban on defense counsel in the general class of cases.[66] Judges began permitting felony defendants to be represented by attorneys.[67] This trend accelerated in the late eighteenth century, fueled by the increasing presence of prosecution counsel, by rewards for prosecuting serious property crimes (which encouraged false accusations), and by the broader use of accomplice testimony (which raised concerns about perjury).[68] In London especially, professional prosecutors and

[60] See id.

[61] See id. at 3, 86–87; Treason Act 1695, 7 & 8 Will. 3 c. 3 (Eng.) (commonly called the Treason Trials Act of 1696).

[62] See Langbein, Adversary Criminal Trial, supra note 29, at 105 ("[T]he drafters of 1696[] [were] convinced that the problem of safeguard was special to treason . . . . Consistent with their goal to remedy the miscarriages in treason trials, the drafters of the 1696 Act carefully confined defense counsel to treason."); id. at 3 ("The framers of the Act believed that treason prosecutions were uniquely problematic. Unlike trials for ordinary crime, in which the interest of the crown was slight, and in which prosecution counsel virtually never appeared, in treason cases the crown conducted the prosecution with partisan vigor and always through counsel. Furthermore, the bench, which still served at the pleasure of the crown, had not behaved impartially to treason defendants."). This was in stark contrast to the above-mentioned absence of counsel for the prosecution in ordinary criminal cases.

[63] Id. at 105.

[64] Treason Act 1695, 7 & 8 Will. 3 c. 3, § 1 (Eng.).

[65] See Langbein, Adversary Criminal Trial, supra note 29, at 86.

[66] See Jonakait, supra note 51, at 325–26 (discussing the shifts in English criminal trials during the 1730s).

[67] See Langbein, Adversary Criminal Trial, supra note 29, at 106.

[68] See id. at 109–10.

opportunistic "thieftakers" were increasingly influencing trials.[69] By authorizing defense counsel to cross-examine prosecution witnesses, judges echoed the Treason Trials Act of 1696, with both reforms aiming to redress injustices by enabling defendants to effectively contest dubious accusations.[70]

The emergence of defense counsel in felony cases eventually led to lawyer-dominated proceedings across the board, introducing a fundamental shift in courtroom dynamics.[71] Because of the growing prevalence of counsel for both sides, responsibility for collecting, presenting, and challenging evidence in the courtroom increasingly fell upon them. Judges, correspondingly, stepped back from their earlier direct involvement in investigating and fact-gathering, instead adopting the role of passive and impartial arbiters. Trials transformed from unstructured contests between the prosecutor and the accused into carefully regulated proceedings, designed to scrutinize the prosecution's case and to shield the factfinding process from unreliable or prejudicial information.[72] Rules of evidence relating to character evidence, corroboration requirements, confessions, and hearsay were developed and refined.[73]

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[69] See Langbein, Origins of Defence Counsel, supra note 54, at 320 (discussing the practice of "thieftak[ing]" and characterizing thieftakers as a "mercenary proto-police" force, motivated by the city's reward mechanisms to apprehend criminals for bounties). Langbein further notes that thieftakers "lived close to the London underworld on which they preyed." Id.

[70] See Langbein, Adversary Criminal Trial, supra note 29, at 4 ("The judges of the 1730s fell back upon defense counsel to even up the scales, as Parliament had done in the Treason Trials Act of 1696. Defense counsel would be allowed at trial to help the defendant probe accusing evidence and expose potential perjury, especially by cross-examining prosecution witnesses."); Amanda Lilley, Comment, The Right to Have a Fool for a Client: Oklahoma's Standard for Self-Representation as Applied in *Mathis v. State*, 38 Okla. City U. L. Rev. 161, 164 (2013).

[71] See Phil Handler, Book Review, 63 Cambridge L.J. 517, 517 (2004) (reviewing Langbein, Adversary Criminal Trial, supra note 29). For further discussion of parallel developments in the American legal system, see Jonakait, supra note 51, at 327–28.

[72] Langbein, Adversary Criminal Trial, supra note 29, at 5–6 ("Defense counsel worked a structural change in the criminal trial . . . . Whereas the old altercation trial had been understood as an opportunity for the accused to speak in person to the charges and the evidence against him, adversary criminal trial became an opportunity for defense counsel to test the prosecution case.").

[73] Id. at 179 ("Four main rules of evidence were articulated in the criminal trials of the eighteenth century . . . : the character rule, the corroboration rule, . . . the confession rule . . . [, and] the hearsay rule . . . ."); see Orna Alyagon Darr, Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England 30 (2016) ("[T]he newly introduced involvement of lawyers and their various objections to different kinds of evidence, and the

Langbein's thesis thus emphasizes the role of legal professionals in shaping the adversarial turn upon which evidence law emerged. He argues that the 1696 Treason Trials Act marked an early first step toward the establishment of an adversarial model,[74] but that it was not until the mid-to-late eighteenth century that the defense bar began to significantly influence trial practices.[75] And it was only by the late eighteenth century that trials had assumed full-fledged adversarial characteristics, necessitating the development of rules governing the admissibility and evaluation of evidence.[76]

While Langbein's account highlights the role of professionalized trial advocacy in the introduction of evidentiary regulation, the shift toward adversarialism entailed a deeper structural transformation. The emergence of the adversarial model introduced a functional and procedural divide between investigation and adjudication. Prior to the adversarial turn, the investigating judge unified these functions, exercising continuous oversight from the initiation of inquiry through final judgment.[77] This previously unified structure minimized the risk of external or partisan influences distorting the adjudicative process. The judge's direct involvement mitigated concerns about unreliable or prejudicial evidence affecting outcomes and rendered rigid evidentiary constraints less necessary.[78] The adversarial turn, in contrast, fractured factfinding into discrete phases and divested judges of their investigative capacities. Evidentiary rules emerged as compensating mechanisms for the judge's loss of investigative capacities within the distinct and insulated phase of trial.[79] Langbein's account, in other words, not only

manner of their arguments and examinations in turn, contributed to the development of . . . evidence rules."). According to Alyagon Darr, the evolution of evidence law can also be attributed to the witch trials at the time, which presented acute proof challenges. Id. at 29.

74 Langbein, Adversary Criminal Trial, supra note 29, at 68.

75 Id. at 254.

76 See id. at 257.

77 Id. at 28–29.

78 See 1 John Henry Wigmore, Evidence in Trials at Common Law § 8c, at 632 (Peter Tillers ed., 1983) ("The jury of laymen must be reckoned with. Our system of admissibility is based on the purpose of saving the jurors from being misled by certain kinds of evidence. Their inexperience in analyzing evidence and their unfamiliarity with the chicanery of counsel distinguish them from the judge in this respect."); Langbein, Ryder Sources, supra note 35, at 1195 ("The judge-operated calculus of admission and exclusion is designed to prevent error from infecting adjudication.").

79 In discussing the interplay between the institution of evidence law and the separation of investigative and adjudicative functions, Langbein asserts the following:

traces the historical emergence of modern evidence law but also reveals that it is a necessary corollary of investigative deficit and of the functional and institutional fragmentation between investigation and adjudication. This account grounds the logic, scope, and application of evidence law firmly within the trial setting.

C. Jury Revolution or Adversarial Evolution?

What, then, is the correct historical account of evidence law's genesis? Is it Wigmore's version of jury transformation or Langbein's version of the lawyer-dominated adversarial trial? The most plausible answer seems to be that both accounts hold truth and that, despite their juxtaposition, they capture complementary moments in the emergence and evolution of evidence law as a legal institution. Thus, there is broad consensus that the sixteenth and seventeenth centuries, emphasized in Wigmore's account, marked a pivotal shift in the role of jurors from sources of evidence themselves to passive triers of fact expected to base their verdicts on courtroom evidence, thereby rendering evidentiary regulation a necessary concern.[80] This might be a critical first step in the emergence of evidence law. Yet, until the mid-eighteenth and nineteenth centuries, evidentiary doctrine remained quite nascent.[81] As Carleton Allen observed, it amounted to little more than a disjointed collection of *nisi prius* practices, or tactical tools, rather than a principled legal

> The great chasm that separates the modern Continental legal systems from the Anglo-American systems is largely about the conduct of fact-finding. On the Continent, professional judges take the main responsibility for investigating and adjudicating . . . .
>
> A fundamental consequence of these radically different arrangements for the conduct of fact-finding has been the difference in attitude toward what Anglo-American lawyers call the law of evidence.

Langbein, Ryder Sources, supra note 35, at 1168–69.

[80] See Klerman, supra note 32, at 123–24 ("For nearly two centuries, legal historians have believed that the medieval English jury differed fundamentally from the modern jury. Its members hailed from the immediate vicinity of the dispute and came to trial already informed about the facts. . . . The idea of the self-informing jury has provided a powerful explanation for many legal developments. James Bradley Thayer and John Henry Wigmore used it to explain the late development of rules regulating oral evidence at trial. No such rules were necessary in the Middle Ages because witness testimony was rare.").

[81] Even Wigmore characterized this later era as a "spring-tide" of evidentiary development. Wigmore, supra note 28, at 695–96; see also Bloemberg, supra note 39, at 358 (arguing that, before this time, criminal evidence law lacked systematic development and jurors received no consistent guidance on how to assess proof).

regime.[82] The body of exclusionary rules now closely associated with evidence law, as well as the "beyond a reasonable doubt" standard of proof, emerged in tandem with the rise of the lawyer-dominated adversarial trial, consistent with Langbein's account.[83] The appearance of written documentation and treatises on the criminal law of evidence, which as mentioned above were virtually nonexistent before this time, further underscores the historical moment Langbein identified as a constitutive second step in the emergence of evidence law.[84]

At any rate, it is not essential for purposes of this Article to pinpoint the precise historical moment at which evidence law "emerged"—whether in accordance with Wigmore's account, Langbein's account, or a synthesis of the two. What matters is their convergence on a critical insight: both accounts attribute the rise of evidence law to the adjudicator's—be it juror or judge—loss of investigative authority and unmediated access to facts, alongside the functional and structural separation between investigation and adjudication. For Wigmore, this transformation is marked by the shift from self-informed and self-informing jurors to passive triers of fact.[85] For Langbein, it reflects a parallel shift in judicial function, from the investigating or inquisitorial judge to the adversarial judge, confined to passively presiding over courtroom adjudication.[86] What unites both accounts is the recognition that evidence law's emergence was historically catalyzed by investigative disempowerment—where truth could no longer be presumed to surface organically but required a legal framework that

[82] Carleton Kemp Allen, Legal Duties and Other Essays in Jurisprudence 277 (reprt. 1977) (1931) (noting that, even as late as 1794, Edmund Burke mocked evidence law's simplicity, saying that a parrot could learn and repeat its scant maxims within minutes).

[83] See id. at 278 (describing nineteenth-century doctrinal and statutory developments in evidence—the allocation of the burden of proof and the presumption of innocence—as expanding alongside evolving criminal trial practices); John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1048 (1994) ("In the later eighteenth century and especially in the nineteenth century, a radically different view of the purpose of the criminal trial came to prevail. Under the influence of defense counsel, the criminal trial came to be seen as an opportunity for the defendant's lawyer to test the prosecution case. The privilege against self-incrimination entered common law procedure (together with the beyond-reasonable-doubt standard of proof and the exclusionary apparatus of the modern law of criminal evidence) as part of this profound reordering of the trial.").

[84] See Langbein, Ryder Sources, supra note 35, at 1171.

[85] See supra note 83.

[86] See supra note 71 and accompanying text (emphasizing the increasing dominance of attorneys in courtroom proceedings, as contrasted with the prior hegemony of judges).

governed how information was to be presented, challenged, and assessed. Evidence law, in other words, came into being as a mechanism designed to compensate for the loss of investigative capacities and to maintain epistemic credibility and normative integrity in a system where the act of adjudication became divorced from investigation. It was never designed to regulate factfinding in the abstract, but to govern a courtroom setting stripped of investigative integration. In this sense, evidence law's very emergence was premised on the presupposition of trial as an insulated forum. Under both historical accounts, the origins of evidence law and its trial-centric nature are fundamentally intertwined. In each account, trial-centricity is not an incidental feature of evidence law, but its historical *raison d'être*.

D. Past as Prologue: From Historical Contingency to Jurisprudential Orthodoxy

The discussion hereto has attempted to chronicle the history of evidence law's emergence and trial-centricity. While the historical record offers valuable insight, it is only one data point and should not be conflated with analytical or normative inquiries. Nonetheless, understanding the historical trajectory remains essential, as it continues to inform contemporary legal consciousness.[87] Far from serving as a mere historical artifact, these past contingencies have crystallized into jurisprudential paradigms that limit our legal imagination, set the

[87] Damaška made the following observation as to the connection between two approaches to evidence law, (1) the historical and (2) the analytical and interpretive (and, by extension, normative):

> [I]n addressing the character of Anglo-American fact-finding, two distinctive approaches are usually conflated and separate lines of inquiry often confused. The first approach is historical: it tries to ascertain causative factors that brought about particular fact-finding doctrines and practices. The second line of inquiry is analytical and interpretive: it is concerned with the study of factors that provide fact-finding arrangements with a plausible justification. The two approaches are closely connected . . . .

Damaška, Evidence Law Adrift, supra note 21, at 3; see also Richard O. Lempert, Damaška: *Evidence Law Adrift*, A Book Review, 49 Hastings L.J. 397, 397 (1998) ("*Evidence Law Adrift* draws strength from Professor Damaška's . . . awareness of the constraints imposed by history, in the sense of path dependence . . . . These elements are, as Professor Damaška demonstrates, essential in understanding the situation of evidence systems today, the strains they face and their likely futures." (emphasis omitted)).

disciplinary boundaries of evidence law, and reinforce the deep doctrinal association between evidence law and the trial setting to this very day.[88]

An illustrative example is the Supreme Court's uneven treatment of Sixth Amendment rights. In its landmark decisions in *Lafler v. Cooper* and *Missouri v. Frye*, the Court recognized the centrality of plea negotiations to the modern criminal justice system and logically extended the procedural right to effective assistance of counsel to pre-plea stages.[89] Yet when it came to the evidentiary right underlying the Confrontation Clause, the Supreme Court pointedly arrested this logic at the courthouse door.[90] In *Crawford v. Washington*,[91] the Court interpreted "witness" to mean "witness at trial."[92] This doctrinal choice reflects a deep rigidity in how the boundaries of evidence law are understood. Limiting the right of confrontation to the trial itself is emblematic of a wider doctrinal inertia—a refusal to reimagine evidence law beyond the parameters and rituals of trial, despite the erosion of trial's centrality in practice.

But this problem is not limited to the courts. The restriction of evidence law's boundaries to trial proceedings is so pervasive that it endures even among experts who challenge other trial-centric orthodoxies. This is perhaps nowhere more apparent than in the path-breaking work of William Ortman, who simultaneously recognizes the post-trial reality of modern criminal justice while drawing rigid boundaries around evidentiary doctrine itself. Even as he persuasively argues for pre-plea confrontation protections, as is further expounded in Part IV, his analysis ultimately reflects the enduring influence of trial-centric assumptions regarding the proper domain of evidence law.

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[88] See Pardo, supra note 18, at 444 (calling attention to the evidentiary dimensions of non-trial contexts).

[89] Lafler v. Cooper, 566 U.S. 156, 165–66, 169–70 (2012); Missouri v. Frye, 566 U.S. 134, 144 (2012).

[90] For a detailed argument opposing this interpretation of the Sixth Amendment, see Ortman, Confrontation, supra note 26, at 453–55. For an alternative characterization, see Alex Stein, Constitutional Evidence Law, 61 Vand. L. Rev. 65, 66 (2008) (arguing that, under current doctrine, the Supreme Court has constitutionalized the defendant's participatory right to a particular mode of testing evidence while leaving unprotected the adequacy and reliability of proof itself).

[91] 541 U.S. 36, 50–53 (2004) (defining "witnesses" as those who "bear testimony"—i.e., formal, testimonial statements such as ex parte examinations used at trial, which the Confrontation Clause was designed to regulate).

[92] See Ortman, Confrontation, supra note 26, at 454 ("If only 'trial witnesses' count as 'witnesses,' then in a world without trials there can be few 'witnesses' and very little confrontation.").

Ortman expressly anchors his argument for pre-plea confrontation rights in the view that such rights are fundamentally non-evidentiary in nature. In his words:

> Before we get there, we need to do some doctrinal brush clearing. The Supreme Court has long treated the Confrontation Clause (as it pertains to information from people not testifying live in court) as a rule governing the admissibility of evidence. It construes the Confrontation Clause, that is, as giving defendants the right to have certain hearsay excluded under certain circumstances. John Douglass calls this the Court's "exclusionary thinking" about confrontation. It is an obstacle in our path. If the Confrontation Clause is merely a rule of admissibility, it plainly has nothing to say about what goes on outside of courtrooms.[93]

This reasoning is telling. Ortman acknowledges that we inhabit "a post-trial world"[94] and calls for "updating the Confrontation Clause"[95] to meet that reality by "taking it beyond the courtroom."[96] Yet his theoretical framework depends entirely on severing confrontation rights from their evidentiary character.[97] The implicit logic is clear: if confrontation were truly an evidentiary doctrine, it would necessarily remain confined to trial proceedings. In other words, even a scholar who recognizes the outdated nature of trial-centric criminal safeguards continues to treat evidence law as necessarily confined to the trial forum. Ortman's effort to project confrontation rights beyond the courtroom is premised on his antecedent claim that such rights are not evidentiary in nature.

This example illuminates how deeply embedded the trial-centric conception of evidence law has become in legal thought. Even those who most clearly perceive the inadequacy of trial-focused constitutional protections in a plea-dominated system continue to operate within a framework that treats evidence law itself as necessarily and properly confined to formal trial proceedings. The assumption runs so deep that it shapes the very terms of reform proposals, requiring advocates, like

[93] Id. at 470 (footnotes omitted).
[94] Id. at 460.
[95] Id. at 470.
[96] Id.
[97] Id.

Ortman, to deny the evidentiary character of rights in order to justify their extension beyond the courtroom.

Another well-known example from the literature is Damaška's *Evidence Law Adrift*, which explores the institutional features that set the Anglo-American model apart from its civil law counterpart and underpin its unique system of evidence law, a body of law largely absent from civil law traditions.[98] Damaška identifies three interlocking pillars that mark the distinctiveness of the common law and argues that they jointly establish the case for and contours of evidence law in the Anglo-American tradition[99]: (1) the organization of trial and jury-based decision-making, (2) the temporal compression of trial proceedings, and (3) the control exerted by parties and their counsel in the adversarial setting.[100] By grounding the entire logic of evidence law in the unique architecture of courtroom and trial, Damaška's account demonstrates how the historical path has hardened into contemporary legal thinking.

An early indication of academic pushback against the evidence-law-trial linkage appears in Edward Imwinkelried's influential work, which challenges the strict compartmentalization between evidence law's regulation of trial and procedural law's pre-trial regulation.[101] This strict dichotomy, he maintains, impedes meaningful reform by failing to account for the deep and often unpredictable interplay between the two legal domains.[102] Changes in evidence law, he observes, frequently generate ripple effects pre-trial in the criminal procedure realm, and vice versa.[103] This can produce unintended and sometimes counterproductive consequences.[104] Against the backdrop of a legal academy that has

[98] See Wang, supra note 42, at 272 ("[I]t is not an overstatement to say that the law of evidence simply never developed at all in civil law countries.").

[99] Damaška, Evidence Law Adrift, supra note 21, at 4.

[100] Id. But see Ronald J. Allen & Georgia N. Alexakis, Utility and Truth in the Scholarship of Mirjan Damaška, *in* Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška 329, 336–37 (John Jackson, Máximo Langer & Peter Tillers eds., 2008) (presenting empirical evidence that challenges Damaška's key assertions, particularly those relating to the decline of jury trials).

[101] Edward J. Imwinkelried, The Need for Truly Systemic Analysis of Proposals for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in "Litigation" Reform, 32 Rev. Litig. 201, 205–06 (2013).

[102] Id. at 213.

[103] Id. at 217.

[104] Id. at 229–30. For a parallel argument about the ways in which evidence law and substantive criminal law intersect and generate mutual externalities, see Richard A. Bierschbach & Alex Stein, Mediating Rules in Criminal Law, 93 Va. L. Rev. 1197, 1199 (2007) (arguing that rules of evidence skew errors in the application of substantive law to

largely reinforced this division, Imwinkelried proposes a holistic approach that better anticipates the effects of evidentiary developments on the pre-trial phase and on the criminal procedure corpus.

While Imwinkelried's analysis compellingly highlights the unintended consequences of evidentiary reform vis-à-vis the investigation and pre-trial phases, he stops short of challenging the broader trial-centricity of evidence law. His thesis remains rooted in the prevailing association of evidence law with the regulation of trial proceedings, without fully exploring its potential with respect to pre-trial (and especially pre-plea) stages. Rather than questioning the deeper underlying assumption that evidence law's applicability should be confined to trial, Imwinkelried merely urges us to acknowledge the "unintended" spillover effects of evidentiary regulation at trial on processes unfolding in the pre-trial phase.[105] Nonetheless, Imwinkelried's critique remains a valuable starting point for rethinking the broader structure of evidence law. His insistence on an integrated legal framework reinforces the notion that evidence law should be understood as situated within the wider continuum of the criminal process, encompassing both the trial and pre-trial stages.

II. THE VANISHING CRIMINAL TRIAL AND EVIDENTIARY REGULATION

Mirjan Damaška was not alone in recognizing that the criminal trial, long considered the cornerstone of Anglo-American adjudication, has undergone a marked eclipse. A growing body of literature chronicles the

alleviate the tensions underlying criminal law's deterrence and retributivist objectives); Gideon Parchomovsky & Alex Stein, The Distortionary Effect of Evidence on Primary Behavior, 124 Harv. L. Rev. 518, 521 (2010) (describing how the pursuit of favorable evidence can negatively impact primary behavior). In *The Right to Remain Silent Helps Only the Guilty*, now-Judge Stephanos Bibas criticizes Professors Daniel Seidmann and Alex Stein's game-theoretic account of the right to silence for its trial-centric premises, including its treatment of interrogation as a "mere prelude" to adjudication and its assumption that rational suspects calibrate their choices primarily to maximize trial outcomes rather than to shape investigation and plea bargaining. See Stephanos Bibas, The Right to Remain Silent Helps Only the Guilty, 88 Iowa L. Rev. 421, 421–22 (2003) (citing Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, 114 Harv. L. Rev. 430 (2000)). Judge Bibas's intervention incisively exposes the empirical and behavioral shortcomings of trial-centric models in evidence law, but it remains focused on suspect incentives and investigative dynamics, rather than on the deeper institutional reconfiguration of evidentiary regulation demanded by a plea-dominated system. Id. at 421–23.

[105] See Imwinkelried, supra note 101, at 206.

recession of criminal trials, both bench and jury, throughout the Anglo-American world.[106] Writing over two decades ago, Patricia Refo famously observed that federal courts were conducting fewer criminal trials (in absolute numbers) in 2002 than they had forty years earlier, notwithstanding a dramatic increase in criminal caseload.[107] Marc Galanter similarly identified a sustained and systemic decline in criminal trial rates at both the federal and state levels, characterizing this shift as a structural reconfiguration of the criminal justice system.[108]

Even in cases that ultimately proceed to trial, an expanding portion of factfinding now occurs in forums that are only lightly governed by the rules of evidence. Sentencing proceedings illustrate the shift: with the rise of sentencing guidelines, central factfinding has moved to the sentencing phase, a site that remains only tenuously bound by evidentiary safeguards.[109] This displacement is intensified by the growth of extended pre-trial detention. As Russell Gold writes, "Pretrial detention decisions . . . churn through the criminal legal system at breakneck speed—affording defendants only a matter of minutes to explain why they should be permitted to enjoy their freedom pending trial. Factual disputes are 'resolved' without evidence."[110] Pamela Metzger and Janet Hoeffel document how delays in filing formal

[106] Andrew W. Grindrod, Bottom-Up Federal Sentencing Reform, 65 Wm. & Mary L. Rev. 785, 804–05 (2024); William Ortman, Second-Best Criminal Justice, 96 Wash. U. L. Rev. 1061, 1062–63 (2019) [hereinafter Ortman, Second-Best Criminal Justice]; Michal Alberstein & Nourit Zimerman, Constructive Plea Bargaining: Towards Judicial Conflict Resolution, 32 Ohio St. J. on Disp. Resol. 279, 281 (2017); Susan R. Klein, Aleza S. Remis & Donna Lee Elm, Waiving the Criminal Justice System: An Empirical and Constitutional Analysis, 52 Am. Crim. L. Rev. 73, 74 (2015). For purposes of this Article, I do not distinguish between bench and jury trials, as the central focus lies in the bifurcation between investigation and adjudication, rather than in the bifurcation between judge and jury. The professional or lay character of the decision-maker is of limited relevance to my core argument.

[107] Patricia Lee Refo, The Vanishing Trial, 30 Litig., Winter 2004, at 1, 1.

[108] Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 510 (2004) ("From 1976 to 2002, the overall rate of criminal trials in courts of general jurisdiction in the 22 states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent. . . . The patterns of attrition resemble those in the federal courts, where criminal trials fell from 15.2 percent to 4.7 percent of dispositions in those years.").

[109] See Edward R. Becker & Aviva Orenstein, The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 885–90 (1992).

[110] Russell M. Gold, Jail as Injunction, 107 Geo. L.J. 501, 514 (2019).

charges can leave individuals incarcerated for "weeks, months, and even years" without the evidentiary protections associated with a charged case.[111] Delays in formal charging can hinder the defense's ability to identify, preserve, and challenge perishable evidence.[112] Critical components of criminal adjudication are thereby migrating beyond the robust evidentiary scrutiny associated with trial.

The above-mentioned contraction of the criminal trial and its evidentiary regulation has accompanied, and indeed has been driven by, the ascendance of plea bargaining as the dominant mechanism of criminal case disposition.[113] Empirical data displays the magnitude of this transformation. In 2004, the U.S. Bureau of Justice Statistics reported that ninety-seven percent of felony convictions in the seventy-five most populous counties were obtained through guilty pleas.[114] More recent estimates place plea rates even higher, with some jurisdictions resolving up to ninety-nine percent of all criminal cases through plea agreements.[115] In at least one jurisdiction, no criminal trials were held at all during an entire calendar year, a striking data point that signals not merely decline, but sheer disappearance.[116] Reports from federal courts offer especially vivid illustrations of this transformation. Criminal jury trials have become so scarce that in four years serving on the federal bench, Judge Jesse Furman of the Southern District of New York

[111] See Pamela R. Metzger & Janet C. Hoeffel, Charging Time, 108 Iowa L. Rev. 1723, 1723–25 (2023) (describing the case of Roberto Antonio Castillo, who spent nearly one thousand days in an El Paso jail awaiting the filing of formal charges, and noting that his experience reflects a broader national pattern); see also Gold, supra note 110, at 514 (noting the haste with which the pre-trial detention decisions that enable such prolonged detention are pushed through the courts).

[112] See, e.g., Serna v. Superior Ct., 707 P.2d 793, 800 (Cal. 1985) (en banc) (discussing the prejudicial impact of delays in formal charges for defendants but noting that such delays are not often constitutionally proscribable).

[113] See William Ortman, Probable Cause Revisited, 68 Stan. L. Rev. 511, 515 (2016) [hereinafter Ortman, Probable Cause Revisited] ("By the second half of the twentieth century, it had become clear to all that plea bargains, not trials, had become the primary mechanism of criminal adjudication.").

[114] Carodine, supra note 12, at 516; Kyckelhahn & Cohen, supra note 12, at 3.

[115] Brown, supra note 12, at 62.

[116] This jurisdiction was Santa Cruz County, Arizona, during the year 2011. Cynthia Alkon, Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?, 17 Nev. L.J. 401, 403 (2017) (citing Marisa Gerber, Santa Cruz Valley Sun, No Criminal Trials Held in Santa Cruz County Since 2010, Nogales Int'l (Nov. 21, 2012), https://www.nogalesinternational.com/santa_cruz_valley_sun/news/no-criminal-trials-held-in-santa-cruz-county-since-2010/article_2651fbde-5269-11e1-b903-0019bb2963f4.html [https://perma.cc/G4UA-4H3P]).

presided over only a single such trial.[117] Former U.S. District Judge Shira Scheindlin linked the declining frequency of trials to her decision to retire, remarking that "[t]rials are way, way down" and that "[t]he building's quite dead."[118] Inga Ivsan made the observation that "[t]rial lawyers are evolving into 'plea lawyers' " and that "[j]ury trials are seen primarily in the movies."[119]

Plea bargaining is not a novel phenomenon.[120] It emerged in the United States in the aftermath of the Civil War, but it was not until the 1920s that its widespread use was recognized, and not until the mid-to-late twentieth century that it came to be seen as normal and necessary.[121] The emergence of plea bargaining in the 1920s has been described as a response to rising caseloads, increased procedural complexity, and growing access to defense counsel, who could negotiate on behalf of clients.[122] Plea bargaining resurfaced as a significant social and legal issue in the 1960s against the background of a crime wave and surge in victimless crimes, which significantly expanded criminal caseloads.[123]

[117] Debra Cassens Weiss, Criminal Trials Have Become So Scarce That Federal Judge Had Only One in His 4 Years on the Bench, ABA J. (Aug. 11, 2016, at 07:45 CT), https://www.abajournal.com/news/article/criminal_trials_become_so_scarce_that_federal_judge_had_only_one_in_his_fou#google_vignette [https://perma.cc/9JFL-MRNS].

[118] Id.

[119] Ivsan, supra note 15, at 136.

[120] George Fisher catalogued the rise of plea bargaining in nineteenth-century Middlesex County, Massachusetts, the same jurisdiction that gave rise to probation. See George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 860–61, 864 (2000). Initially manifested through charge reductions in liquor and murder cases, plea bargaining persisted even after formal constraints emerged. Id. at 893, 936. Prosecutors increasingly exploited probation as a tool to entrench this covert practice, while judicial resistance waned amid mounting civil dockets. See id. at 860, 989–1001, 1044.

[121] See generally William Ortman, When Plea Bargaining Became Normal, 100 B.U. L. Rev. 1435 (2020) (recounting the twentieth-century normalization of plea bargaining). Ortman identifies three critical stages: (1) the initial recognition and ambivalent reception of plea bargaining by "crime commissions" in the 1920s, (2) its reframing by Legal Realists in the 1930s, and (3) its ultimate endorsement by scholars and courts in the 1950s and 1960s. Id. at 1455, 1485–87.

[122] See id. at 1441–43 ("One theory is that plea bargaining was the result of rising caseloads. . . . Closely related to the caseload theory is the 'trial complexity' theory . . . . A third explanation ties the rise of plea bargaining to the contemporaneous professionalization of police and prosecutors."); Malcolm M. Feeley, Court Reform on Trial: Why Simple Solutions Fail 20–21 (1983) (describing the impact of heavy caseloads and access to defense counsel on the rise of plea bargaining).

[123] Jeff Palmer, Note, Abolishing Plea Bargaining: An End to the Same Old Song and Dance, 26 Am. J. Crim. L. 505, 510 (1999) (tracing the revival of plea bargaining in the 1960s to increased youth crime following the postwar baby boom and to the growing prevalence of drug and other victimless offenses).

In 1971, in *Santobello v. New York*, the U.S. Supreme Court recognized the constitutionality of plea bargains.[124] The Court's decision institutionalized the practice, elevating it from an informal prosecutorial tool to an integral and judicially endorsed component of criminal case disposition. Since then, plea bargains have become the dominant mode of criminal case disposition. Robert Scott and William Stuntz memorably captured this by writing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[125] And Lawrence Friedman similarly argued that "[p]lea bargaining has pushed the jury trial into a small corner of the criminal process."[126]

Scott, Stuntz, and Friedman highlighted the fact that the contemporary criminal justice system does not simply tolerate pleas—it revolves around them. It is a system of pleas not merely because defendants overwhelmingly engage in such deals, but because the volume of criminal charges and the constraints of the courts institutionalize the continued marginalization of trial.[127] The deep entrenchment of plea bargaining has, as Carol Steiker has observed, fundamentally reconfigured the constitutional criminal landscape.[128] The most salient consequence is that the rights guaranteed by the Constitution in the context of criminal adjudication are seldom invoked.[129] A guilty plea functions as a sweeping waiver of evidentiary and procedural protections, extinguishing nearly all constitutional claims.[130] Only a narrow margin of legal rights persists, most notably the right to contest the voluntariness of the plea itself.[131]

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[124] 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.").

[125] Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992).

[126] Lawrence M. Friedman, American Law: An Introduction 194 (rev. & updated ed. 1998).

[127] Ortman, Second-Best Criminal Justice, supra note 106, at 1068.

[128] Carol S. Steiker, Criminal Procedure, *in* The Oxford Handbook of the U.S. Constitution 651, 659 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (characterizing plea bargaining as a "revolution from within" with respect to the American criminal justice system).

[129] See Klein et al., supra note 106, at 74; see also Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387, 1389 (1970) ("[T]he primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized.").

[130] See, e.g., United States v. Garcia, 339 F.3d 116, 117 (2d Cir. 2003) (per curiam) ("It is well settled that a defendant who knowingly and voluntarily enters a guilty plea waives all

Against this backdrop, it is hardly surprising that the scholarly literature on plea bargaining is both voluminous and deeply divided, reflecting ongoing tensions over the institution's legitimacy. While some commentators defend plea bargaining as a mechanism that promotes efficiency and respects defendant autonomy, others portray it as inherently coercive and as eroding foundational principles of justice.[132] Accepting plea bargaining as a given,[133] this Article shifts attention from the well-trodden debate over the legitimacy of plea bargaining to a related, but distinct, inquiry—namely, how the entrenchment of plea bargaining raises concerns about the legitimacy of the institution of evidence law itself. It invites deeper exploration of how the migration of effective adjudicative authority into the prosecutorial domain affects the rationale for, and justification of, evidentiary regulation.

To further clarify: the shift from trials to pleas effectively (re)consolidates investigative and adjudicatory powers in the hands of a

non-jurisdictional defects in the prior proceedings."). Federal circuit courts have included procedural and evidentiary defects within the compass of "all non-jurisdictional defects." See, e.g., Salazar v. Rodriguez, 371 F.2d 726, 729 (10th Cir. 1967) ("[A] voluntary plea of guilty waives prior procedural defects and constitutional infirmities."); Marin v. Brewer, No. 16-2420, 2017 WL 4677506, at *2 (6th Cir. Apr. 28, 2017) ("A defendant who enters an unconditional guilty plea waives the right to raise an objection to the sufficiency of the evidence."); see also Tollett v. Henderson, 411 U.S. 258, 266–67 (1973) (finding that criminal defendants waive all pre-plea constitutional objections upon pleading guilty).

[131] Steiker, supra note 128, at 659.

[132] See, e.g., Albert W. Alschuler, The Changing Plea Bargaining Debate, 69 Calif. L. Rev. 652, 676–78 (1981) (refuting utilitarian defenses of plea bargaining); John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3, 12–19 (1978) (comparing modern American plea bargaining to medieval European torture law); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 2003–08 (1992) (arguing for plea bargaining's abolition); see also Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 309 (1983) (justifying plea bargaining on utilitarian grounds); Scott & Stuntz, supra note 125, at 1913 (defending plea bargaining as a right inherent in the ability to plead guilty); Ortman, Second-Best Criminal Justice, supra note 106, at 1074 & nn.68–69 (collecting articles defending plea bargaining).

[133] Judge Frank Easterbrook offers a compelling rationale for treating plea bargaining as an integral feature of the criminal justice system: prohibiting it would not eliminate the practice but merely drive it underground. In his view, attempts to suppress bargaining between the prosecution and the defense would simply create black-market equivalents marked by reduced transparency, greater opportunities for fraud, and weaker assurances of voluntariness. See Frank H. Easterbrook, Plea Bargaining Is a Shadow Market, 51 Duq. L. Rev. 551, 551–52 (2013).

single institutional actor—this time, the prosecutor.[134] As Daniel Epps has observed, the prosecutor now exercises significant control over much of the critical decision-making in criminal cases[135]—an observation further underscored by Ivsan, who notes that in a world of plea bargaining, "the prosecutor assumes the dual role of fact finder and ultimate decision-maker, selecting who to indict, what charges to bring, and what sentence to impose."[136] Stuntz similarly argues that "the law that determines who goes to prison and for how long . . . is chiefly written by prosecutors, not by legislators or judges."[137] In this landscape, judges frequently play a nominal role as a mere "stamp of approval,"[138] while prosecutors, as Máximo Langer observes, have assumed the role of "de facto adjudicators of U.S. criminal procedure."[139]

Such consolidation of influence in the hands of the prosecutor effectively dissolves the functional and structural divide between investigation and adjudication, as discussed in previous sections of this Article.[140] What emerges is a de facto adjudicator, who is no longer constrained by the investigative limitations that once underpinned the rationale for evidentiary regulation, such as restricted access to unmediated evidence and reliance on secondhand accounts.[141] For evidence law, long-grounded in this now-dissolved separation, the transformation is nothing short of foundational. Evidence law's core rationale as a compensatory mechanism for the adjudicator's

[134] See Erik Luna & Marianne Wade, Prosecutors as Judges, 67 Wash. & Lee L. Rev. 1413, 1415 (2010) ("In many (if not most) American jurisdictions, the prosecutor *is* the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences.").

[135] See Daniel Epps, Checks and Balances in the Criminal Law, 74 Vand. L. Rev. 1, 55, 74 (2021) (discussing plea bargaining's relocation to the executive branch, where it functions as an administrative process and prosecutors assume executive, judicial, and even legislative functions).

[136] Ivsan, supra note 15, at 136–37.

[137] William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2549 (2004).

[138] Nathan Winshall, Note, Private Attorney or Public Defender?: Negotiating Plea Deals in an Age of Mass Incarceration, 35 Geo. J. Legal Ethics 1213, 1214 (2022).

[139] Máximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 Am. J. Crim. L. 223, 225 (2006).

[140] See supra notes 109, 113, 134–35 for further explanation of the consolidation of power in prosecutors' hands and the effect of this consolidation on the criminal justice system.

[141] See supra notes 41–42 and accompanying text.

investigative deficits and as a constraint on adversarial imbalance presumably risks becoming obsolete.[142]

If the adjudicative moment now occurs upstream, at the site of investigation, then the logic of and justification for evidence law must be reexamined. It is to this reexamination that the Article now turns.

III. THE NORMATIVE CASE FOR EXTENDING EVIDENCE LAW BEYOND TRIAL

The consensus in the literature is that plea bargaining's fusion of investigative and adjudicative capacities within the prosecutor's office signifies a departure from the adversarial model toward inquisitorialism.[143] Abraham Blumberg captures this sentiment in his depiction of plea bargaining as the "twilight of the adversary system,"[144] and Ivsan likewise contends that "[m]odern day plea bargaining in America resembles the inquisitorial system of justice in continental Europe."[145] Such an inquisitorial turn, when viewed through the prisms developed throughout this Article, emerges as an apparent challenge to the legitimacy of the institution of evidence law. As mentioned earlier, Damaška provides a particularly forceful expression of this view, asserting that the weakening of the adversarial trial has led to the decay

[142] See supra text following note 79. For further discussion of the role of evidence law in mitigating adversarial imbalance, see Zhuhao Wang, The Fate of Evidence Law: Two Paths of Development, 24 Int'l J. Evid. & Proof 329, 334 & n.8 (2020).

[143] The inquisitorial model, predominant in civil law jurisdictions, is structurally defined by the judge's central and active role in judicial proceedings. See Michael Pawlik, Review Essay, The Criminal Judge as a Modern Inquisitor, 10 German L.J. 1274, 1274–76 (2009); Amalia D. Kessler, Toward an Account of the Nineteenth-Century Emergence of the Comparative Accusatorial/Inquisitorial Divide, 71 Am. J. Compar. L. 296, 297 (2023). Unlike the adversarial system's reliance on party-driven evidence production, the inquisitorial judge occupies a near-hegemonic role in the factfinding process, effectively collapsing the traditional boundaries between investigator, prosecutor, and adjudicator, as well as between investigation and trial. Pawlik, supra, at 1274. This functional synthesis empowers the judiciary to proactively curate the evidentiary record and direct witness examinations, shifting the focus to a centralized, state-led search for the truth. Id. at 1276. For further discussion, see id. at 1274–76.

[144] Abraham S. Blumberg, Criminal Justice 13 (1967).

[145] Ivsan, supra note 15, at 144; see also Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2121 (1998) (observing that the American criminal justice system "actually looks . . . far more like . . . an inquisitorial system than like the idealized model of adversary justice described in the textbooks").

of the strong argumentative rationale for evidence law, stripping it of a compelling normative basis.[146]

I categorically reject these claims. Far from signaling a retreat to the inquisitorial model, plea bargaining epitomizes a radicalization of adversarialism, pushing the adversarial model's core normative commitments to their most extreme instantiation.[147] And far from remedying the investigative deficit of the de facto "adjudicator" (namely, the prosecutor), plea bargaining perpetuates the deficit in a new guise. The following Part makes the normative case for reconstituting evidence law within a criminal justice system dominated by plea bargaining. It begins by challenging the assumption that plea bargaining imports inquisitorial features and argues instead that it embodies a distilled, largely unregulated adversarialism that reshapes and constrains prosecutorial investigation in consequential ways. It then theorizes that this intensification of adversarial dynamics engenders a profound structural pathology within the criminal justice process, demonstrating how such radicalized adversarialism magnifies prosecutorial partisanship and precipitates an upstream investigative deficit. The discussion concludes by critically engaging with the principal objections that can potentially be levelled against the extension of formal evidentiary regulation to the pre-plea phase.

A. Plea Bargaining as Radicalized Adversarialism

To demonstrate that plea bargaining constitutes a radicalized form of adversarialism, one must first uncover the structural foundations and normative commitments that animate the adversarial tradition. As extensively argued in the literature and reiterated throughout this

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[146] See supra note 24; Damaška, Evidence Law Adrift, supra note 21, at 142.

[147] Beyond the conceptual link between plea bargaining and the adversarial model, which will be addressed in the text, it is also important to acknowledge their historical connection, reflected in scholarly accounts that depict plea bargaining as a byproduct of the adversarial tradition. In *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, Malcolm Feeley contends that plea bargaining emerged as a historical derivative of the legal system's intensified adversarial capabilities. See Malcolm M. Feeley, Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining, 31 Isr. L. Rev. 183, 186, 192 (1997). The heightened adversarialism, propelled by the expanding role of lawyers and by the development and honing of evidentiary rules refined by those lawyers (as previously discussed), culminated in a more sophisticated trial. Id. at 192. But the very rigor of lawyer-dominated adversarial proceedings generated pressure for more expedient, lawyer-driven alternatives to trial, in the form of plea bargains. Id.

Article, the adversarial model rests on the principle of party sovereignty over the trial process, with judges relegated to the now-iconic role of passive arbiters.[148] Within this framework, it is the prosecution and defense who are vested with the authority to delineate the boundaries of the dispute and to present the evidence supporting their respective positions.[149] This authority extends even further, allowing them to shape the procedural and evidentiary landscape of trial through stipulation.[150] These hallmarks of party control are deeply woven into the fabric of the adversarial model.[151]

Such allocation of authority over the contours and conduct of trial can be viewed as a form of privatization. As Darryl K. Brown argues, "[T]he adversarial model privatizes responsibility for the facts and law on

[148] See Gary Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. Crim. L. & Criminology 118, 119 (1987) ("There are several determinative features of adversary trial systems. These features include: the roles of the judge and other decision-makers (active or passive); the role of the parties or party representatives in controlling presentations; the manner in which 'facts' are proven; the obligations of the parties to one another; and informational and decisional side constraints which directly or indirectly skew final decision-making."). Damaška depicts adversarialism as "a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive." Damaška, Evidence Law Adrift, supra note 21, at 74; see also John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 830 (1985) (explaining how parties' control over the evidence that is presented relegates the judge to the role of "passive and ignorant trier"); Jessica K. Steinberg, Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice, 2016 BYU L. Rev. 899, 901 (describing the "classic portrayal of American adversary procedure" as including a judge who is a "passive and impartial arbiter[]," though arguing that that description is incomplete in the face of cases with unrepresented parties).

[149] Mirjan Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 510–12 (1973) [hereinafter Damaška, Evidentiary Barriers] (contrasting adversarial and non-adversarial models by explaining that, in common law systems, the presentation of evidence is conducted by the parties, and the scope of the dispute and type of proceeding are shaped through the defendant's use of pleadings and the exercise of waiver); see also Keith A. Findley, Adversarial Inquisitions: Rethinking the Search for the Truth, 56 N.Y.L. Sch. L. Rev. 911, 914 (2012) ("The adversary system operates on the fundamental belief that the best way to ascertain the truth is to permit adversaries to do their best to prove their competing version of the facts.").

[150] As Damaška claims, "Since the proceeding is essentially a contest, devices such as pleadings and stipulations are not only acceptable but, indeed, essential because they establish the existence of a contest and delineate its borders." Damaška, Evidentiary Barriers, supra note 149, at 563.

[151] For further discussion of the central role of evidentiary waivers in the adversarial system, see John W. Strong, Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in the Adversary System, 80 Neb. L. Rev. 159, 161 (2001).

which courts make judgments."[152] This privatization dynamic is particularly evident in civil litigation, yet it persists even in criminal cases, where the state prosecution—though a public institution—adopts the role of partisan advocate.[153] Underlying such privatization is a dual commitment: *first*, to the epistemic virtue and social utility of partisan advocacy,[154] and *second*, to a conception of defendant autonomy that requires giving those whose liberty or vital interests are implicated the fullest possible control over the proceedings that govern their fate.[155]

This, in turn, gestures toward the liberal underpinnings of the adversarial model, which encompass, but are not exhausted by, the commitment to defendant autonomy as an expression of self-determination.[156] More broadly, the adversarial tradition reflects a classical liberal suspicion of concentrated state power and a corresponding insistence on its restraint, especially in matters involving coercive authority and monopolization of truth and normativity. As Mirjan Damaška observes, the "ideological matrix of the adversary model" is rooted in "Lockean liberal values, with distrust of the state and freedom from its restraint."[157] Accordingly, rather than casting the state as the exclusive arbiter of truth, the adversarial model treats truth production as a shared enterprise, accessible to private actors, including defendants.

The liberal impulse toward restraint is further institutionalized in the adversarial model through the structural parity that the model demands between prosecution and defense. The state is positioned as only one litigant in a regulated contest and must justify its normative claims

[152] Darryl K. Brown, Does It Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process, 98 Tex. L. Rev. 625, 626 (2020).

[153] Id.

[154] Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1470 (1966) (arguing that the disciplined confrontation of rival positions under the adversarial model is especially conducive to revealing the full factual picture and rendering it the most reliable route to truth-finding).

[155] Sward, supra note 33, at 317–18 ("[S]ome of the most passionate defenders of the adversary system now focus on another justification[:] . . . that the adversary system best preserves the autonomy of the individual by allowing him free rein in making his case to the court.").

[156] For further discussion of the liberal foundations of the adversarial model, see Benjamin Newman, The Liberal Tension of the Adversarial Criminal Trial: A Liberal Institution in the Administration of Criminal Justice 20–22 (Dec. 2024) (Ph.D. dissertation, Tel Aviv University) (on file with author).

[157] Damaška, Evidentiary Barriers, supra note 149, at 565.

through public, contestable procedures. Criminal condemnation thus derives legitimacy not from mere status but from the state's willingness to have its assertions exposed to scrutiny and rebuttal. Adversarial adjudication becomes a continuing check on political power, treating state allegations as provisional until they survive regulated contestation.[158] David Barnhizer extends this insight, arguing that adversarialism harnesses conflict as a productive force and that, as political life grows more polarized, the adversarial model's mechanisms for channeling social conflict become increasingly indispensable.[159]

Beyond its liberal grounding, the adversarial model is also molded by a distinct market ethos. As Amalia Kessler's historical account suggests, the adversarial model emerged from the legal profession's successful efforts to align its self-empowering procedural forms with the imperatives of a burgeoning market economy, synthesizing civic republican lawyering with market-oriented logic.[160] Indeed, both the market and adversarial systems operate on the premise of resource allocation through structured competition and the assumption of rational, self-interested agents.[161] In the market, individuals are private utility maximizers, strategically pursuing outcomes through calculated choice.[162] The adversarial model mirrors this logic, casting litigants as self-interested actors who engage in the allocation of the risks and costs associated with trial and its outcome through strategic decision-making within a regulated competition. Both frameworks treat society as a collection of such agents, with broader social benefits emerging as unintended byproducts. Thus, just as the market relies on the "invisible hand" to transform private gain into public utility, the adversarial model

[158] See Goodpaster, supra note 148, at 137 ("[Adversarial] trial design incorporates a fundamental political decision to circumscribe the power of the government to punish or harass people through criminal proceedings.").

[159] See David Barnhizer, The Virtue of Ordered Conflict: A Defense of the Adversary System, 79 Neb. L. Rev. 657, 660–63 (2000) (arguing that the adversarial model compels justification of claims within a framework of structured contestation).

[160] See Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture 1800–1877, at 199 (2017) (contending that adversarialism prevailed because lawyers successfully framed it as perfectly aligned with the expanding market economy, the common law's libertarian pedigree, and a popular commitment to American exceptionalism).

[161] See generally Browne et al., supra note 33, at 426 ("The adversary system and the market are American institutions with deep-rooted histories. . . . [A] particularly tenuous assumption of both systems . . . [is] the belief in a rational decision maker . . . .").

[162] See Amitai Etzioni, The Moral Dimension: Toward A New Economics 1 (1988).

similarly presumes that the pursuit of self-interest in the courtroom inadvertently advances the public objectives of trials, chief among them the discovery of truth.[163]

Plea bargaining signifies an intensification of each of the above-mentioned core features of adversarialism, beginning with its ethos of privatization. While adversarial trials privatize the *process* by vesting control in the hands of the parties, plea bargaining extends this logic further still, effectively privatizing case *outcomes*. It recasts the resolution of criminal cases as a form of private ordering, effectively transferring the determination of guilt and the imposition of punishment from the public, courtroom-centered arena to a privatized realm of negotiation.[164] This shift to private ordering is further entrenched by the courts' deregulatory stance, which, as Lisa Kern Griffin observes, permits the criminal justice arena to function with minimal judicial oversight, largely shielded from effective public scrutiny.[165] Moreover, if in the setting of the adversarial trial truth is viewed as a contingent byproduct of structured contestation, in plea bargaining it is rendered irrelevant. Truth itself, in other words, undergoes a marked privatization under plea bargaining, recast not as a public good, but as a negotiated asset, with factual narratives repurposed as bargaining chips in a bilateral exchange.[166]

A further axis of adversarial intensification is evident in plea bargaining's reconstitution of fundamental legal rights as transactional goods, entrenching the practice firmly within a juridical economy of

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[163] Truth itself assumes an instrumental role within the adversarial tradition. It is not pursued as an intrinsic objective but rather emerges as a contingent byproduct of partisan contestation, aimed primarily at dispute resolution. See Kent Roach, Wrongful Convictions: Adversarial and Inquisitorial Themes, 35 N.C. J. Int'l L. & Com. Reg. 387, 444 (2010) ("[T]he adversary system places less of a premium on the discovery of truth about allegations of criminality and more on resolving disputes in a manner where parties have a formal opportunity to present their case and make decisions in their own self-interest.").

[164] Scott & Stuntz, supra note 125, at 1910 ("Plea bargains are, as the name suggests, *bargains* . . . .").

[165] See Lisa Kern Griffin, State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense, 80 Law & Contemp. Probs., no. 1, 2017, at 83, 88–89 (claiming that courts have long taken a hands-off stance toward plea bargaining and the imbalances that shape it).

[166] See Thea Johnson, Fictional Pleas, 94 Ind. L.J. 855, 891 (2019) ("The fictional plea lays bare the soul of an institution where everything has become a bargaining chip: not merely collateral consequences, but truth itself. Rather than a grounding principle, truth is nothing more than another factor to negotiate around.").

exchange and within a market framework.[167] Judge Frank Easterbrook famously argued that plea bargaining operates at the crossroads of criminal adjudication and market exchange.[168] In the realm of plea bargaining, he claims, core legal rights no longer function as constitutional guarantees to be preserved and vindicated, but rather as transactional assets and bargaining chips whose value lies in their tradability. Rights, such as the Fifth Amendment privilege against self-incrimination, are strategically traded away. Prosecutors, constrained by finite resources, offer sentencing discounts in exchange for guilty pleas and evidentiary and procedural waivers, while defendants, recognizing the diminished utility of trial rights in practice, leverage them for reduced punishment. The agreed-upon punishment, in this context, functions as a pricing mechanism, quantifying the "cost" of a conviction and the "price" of waiving constitutional protections. "It's as if there were an invisible hand . . . ,"[169] Easterbrook writes, gesturing explicitly to the logic of the market, guiding both sides toward mutually beneficial exchange.

The market ethos, already a foundational element of the adversarial system, thereby finds an intensified expression in plea bargaining. By allowing prosecution and defense to reallocate not merely the costs and uncertainties *within trial*, but those associated with the very prospect *of trial* itself, plea bargains represent a more radical extension of the adversarial system's reliance on market-like mechanisms of resource allocation. Plea bargaining crystallizes the criminal justice system into a more overt marketplace, governed by resource optimization, in which procedural and evidentiary safeguards function as currency. The foundations of the criminal justice system accordingly shift from a forum of principled rights-based adjudication to a transactional arena governed by crude cost-benefit calculation. In other words, plea

[167] Of course, the currency in this marketplace is not money but, rather, liberty. Defendants trade the probability of acquittal for a reduction in prison time. See Easterbrook, supra note 133, at 553.

Such exchange of intangibles is not without parallel; insurance contracts similarly deal in risks rather than tangible goods. Id.

[168] See Easterbrook, supra note 132, at 289 (claiming that "prosecutorial discretion, plea bargaining, and sentencing discretion . . . may be understood as elements of a well-functioning market system" and further that "[t]hese three parts of the criminal justice system set the 'price' of crime, and they set it in the traditional market fashion" (footnote omitted)).

[169] Easterbrook, supra note 133, at 551–53 (ellipsis in original).

bargaining represents a structural evolution that lays bare the adversarial system's implicit market rationality.

Plea bargaining also radicalizes the adversarial model's liberal commitments. Damaška stresses that the capacity of defendants to control case outcomes through plea bargains eclipses their influence in trial settings, such that "the prominence of the parties could be said, on the whole, to have increased."[170] By affording defendants greater control and a broader range of choices, plea bargaining purports to enhance defendant autonomy and enable a heightened form of self-determination. Moreover, plea bargaining can be said to intensify the adversarial system's liberal commitment to restraining state power by recasting the state's prosecutorial authority in negotiable terms. Prosecutors are expected to bargain and occasionally concede, transforming their authority from an instrument of command into a transactional form of leverage. This shift can be said to represent a radicalized response to the liberal suspicion of concentrated state authority, reconfiguring coercive power into an even more decentralized and ostensibly consensual mode of interaction. To conclude, plea bargaining emerges not as an aberration or retreat from adversarialism, but as the model's most unmediated expression and as a radicalization of its deepest ideological commitments.

B. Adversarial Excess (Investigatory Deficit) and Evidence Law

Plea bargaining's adversarial intensification reveals a core pathology. Plea bargains radicalize the attributes of the adversarial model while jettisoning the mechanisms that once gave adversarial testing its epistemic and normative force, chief among them evidentiary regulation. In this environment, unchecked prosecutorial narrative—which Kent Roach characterizes as a form of "tunnel vision"—flourishes and becomes "the epistemological opposite of the adversary system."[171]

[170] Damaška, Evidence Law Adrift, supra note 21, at 134.

[171] Roach, supra note 163, at 401. For a sophisticated and pathbreaking experimental demonstration of these dynamics, see Doron Teichman, Eyal Zamir & Ilana Ritov, Biases in Legal Decision-Making: Comparing Prosecutors, Defense Attorneys, Law Students, and Laypersons, 20 J. Empirical Legal Stud. 852, 877–78 (2023). Comparing laypersons, law students, prosecutors, and defense attorneys, the authors examine how training, experience, and professional role shape susceptibility to cognitive biases and criminal case judgments. Id. at 877. They find that prosecutors, far more than defense attorneys, are ready to draw factual inferences favoring conviction, a pattern consistent with role-induced evidentiary tunnel vision. Id. at 875–78.

What emerges is a distinctive form of investigative deficit that is not borne of evidentiary inaccessibility, as in earlier eras of uninformed juries and passive judges, but of prosecutorial incentives skewed by the adversarial role and oriented toward conviction.[172] This is an investigative deficit rooted in *motivation*, not *means*: a structural reluctance, embedded in the adversarial prosecutorial posture, to seek impeachment or exculpatory evidence even when it is readily available.[173] This Section now turns to these dynamics.

Though formally cast as "ministers of justice," prosecutors in the United States have long found the gravitational pull of adversarialism compelling.[174] They frequently engage in conduct that privileges conviction, including exploiting juror emotion and tolerating police misconduct.[175] Recent years have made the partisan orientation of prosecutors even more transparent, with some openly criticizing juries for returning acquittals, thereby exposing a self-conception increasingly aligned with securing convictions.[176] American prosecutors tend to

[172] Unlike the inquisitorial judge, whose role is institutionally anchored in neutral factfinding, and unlike the self-informing jurors of the past, whose decisions were constrained by communal embeddedness and reputational accountability, today's prosecutor remains a partisan actor. See supra notes 34–36, 49 and accompanying text. She is professionally detached and institutionally insulated from both role morality and social restraint, while being structurally oriented toward adversarialism and the pursuit of convictions. For further discussion of how earlier jurors were influenced by social pressures and expectations, see Alyagon Darr, supra note 73, at 52.

[173] See Kevin C. McMunigal, Prosecutorial Disclosure Violations: Punishment vs. Treatment, 64 Mercer L. Rev. 711, 716–17 (2013) ("Once a prosecutor has committed to the belief that a particular person is guilty of a crime, she will tend to escalate that commitment rather than re-examine it. Then, the prosecutor will often look for and see only information that confirms this position and ignore information contrary to it. . . . If one expects guilt, one will expect that exculpatory evidence does not exist, thus reducing the incentive to look for and the capacity to recognize it.").

[174] See Lempert, supra note 87, at 400 ("Prosecutors in the United States have long seemed to find the pull of adversariness easier to comply with than any neutral obligation to do justice."); see also Daniel Epps, Adversarial Asymmetry in the Criminal Process, 91 N.Y.U. L. Rev. 762, 764 (2016) ("Prosecutors too eagerly embrace their role as defendants' opponents and often exceed the outer limits of permissibly zealous advocacy . . . .").

[175] See Lempert, supra note 87, at 400–01 ("[Prosecutors] are not reluctant to take advantage of whatever emotion might lead jurors to find for the state . . . and nondisclosure of exculpatory evidence and the suborning of perjury, especially police perjury about search and seizure issues, are familiar behaviors.").

[176] Id. at 401.

operate with an ambivalent and strategic understanding of their function, shaped more by competition than impartiality.[177]

This is not merely a product of individual misconduct. It reflects the deeper structural commitments and implications of adversarial design. American prosecutors are trained and socialized within a legal profession that promotes the adversarial model's ethic of party control—namely, the idea that lawyers should cater to their clients' choices.[178] But prosecutors lack a client in the conventional sense. "The State" is less a real actor than an abstract label for diffuse institutional authority.[179] In practice, this indeterminacy pushes prosecutors to construe their mandate through the metric most readily available to them: winning cases. Conviction becomes the operative proxy for fulfilling their duty.[180] These structural dynamics help explain what Daniel Richman and William Stuntz identify as a pervasive pattern of pretextual prosecution.[181] William Ortman illuminates this idea further by pointing to instances where prosecutors openly admit to being "agnostic" about a defendant's guilt when bringing charges.[182] And Stanley Fisher offers an even more worrying assessment, describing the

[177] See, e.g., Langer, supra note 139, at 252–53 ("[U]nlike inquisitorial adjudicators who are socialized and tend to perceive themselves as impartial officials who must seek both inculpatory and exculpatory evidence and should impartially adjudicate the case after finishing their investigation, . . . American prosecutors . . . have a much more ambivalent self-perception of their role.").

[178] William Ortman, The Prosecution Bar, 101 Wash. U. L. Rev. 123, 125–26 (2023) [hereinafter Ortman, The Prosecution Bar] ("The profession's prime directive . . . is the rule of 'client control,' which provides that clients, not lawyers, make the most important normative choices for lawyers' work on their behalf.").

[179] Id. at 126 ("Like all agents, prosecutors have interests that imperfectly align with those of their principals. But unlike a lawyer's client, a sovereign is an abstraction that cannot direct the normative (or any other) dimensions of its agent's work.").

[180] See, e.g., Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 327–31 (documenting the array of pressures that steer prosecutors toward securing convictions rather than pursuing justice); see also Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1339 n.99 (2018) (compiling other literature and cases speaking to this phenomenon).

[181] Daniel C. Richman & William J. Stuntz, Essay, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583, 584 (2005) ("It is common in the United States and especially common in the federal justice system for law enforcers to go after a criminal defendant because they suspect him of one crime . . . and then to charge and convict him of a different crime, unrelated to and less severe than the first.").

[182] Ortman, Probable Cause Revisited, supra note 113, at 561 ("While many prosecutors discharge [their] duty vigilantly, prosecutors occasionally acknowledge bringing charges about which they are 'agnostic.' ").

"prevailing view" in practice that prosecutors may proceed to trial without a personal belief in the defendant's culpability.[183] On this point, he invokes Albert Alschuler's account of a prosecutor who adhered to a personal rule that he would proceed to charge only when he himself was persuaded of guilt beyond a reasonable doubt. The stance was so out of step with office culture that coworkers labeled him the "best defense lawyer in the office," and he was soon forced to resign.[184] These dynamics foster structural myopia. When conviction becomes the institutional goal, impeachment or exculpatory evidence may be discounted, overlooked, or rationalized away.[185]

These dynamics have the potential to become particularly acute in plea bargaining.[186] Plea bargaining may amplify the prosecutorial drive to win by recasting conviction as a personal endeavor—and thus achievement as a direct product of the prosecutor's skill, strategy, judgment, and authority. The very process of bargaining generates a self-perpetuating dynamic for the prosecutor, one that reaffirms the defendant's presumed guilt and the case's apparent solidity. Doubt functions as a distraction, and alternative explanations may be sidelined, not out of bad faith but because they do not serve the logic of negotiation.[187] Plea bargaining, in other words, does not merely reflect prosecutorial tunnel vision, but cultivates it. The prosecutors' adversarial posture, unburdened by the demands of public proof, strengthens the uncritical, conviction-oriented lens through which information is processed.

The foregoing analysis underscores plea bargaining's potential to subvert the foundational logic of the adversarial model, by preserving (and even intensifying) prosecutorial partisanship while dismantling the evidentiary safeguards designed to contain it. The prosecutor's role

[183] Stanley Z. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 Am. J. Crim. L. 197, 230 n.144 (1988).

[184] Id. (citing Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 64 n.42 (1968)).

[185] See Findley & Scott, supra note 180, at 331.

[186] See, e.g., Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 883 (2009) (describing plea bargaining as effectively placing prosecutors in the position of adjudicating their own cause, an archetypal danger to the rule of law under Locke).

[187] Ortman, Probable Cause Revisited, supra note 113, at 561 (noting that many prosecutors conducting plea negotiations routinely rely on the investigating law enforcement agency without undertaking an independent assessment of the underlying evidence, a pattern he depicts as "shirking").

morphs from partisan advocate within a disciplined forum to a partisan "adjudicator." This profound transformation cultivates a novel and disturbing investigative deficit, stemming not from a lack of accessibility to relevant evidence, but rather from a deep-seated structural disincentive to rigorously test the evidence at one's disposal. In the plea environment, the prosecutor's role as de facto adjudicator has thus become distinct from both its ancestors. No longer tethered to the evidentiary constraints of trial, nor to the role morality of the inquisitorial judge or the socially embedded juror, today's prosecutor operates in a system that fosters biased belief formation. Plea bargaining, in other words, does not mark a return to pre-evidentiary forms of adjudication. It represents their inversion. If adversarialism is to remain the organizing principle of the criminal process, its evidentiary and institutional foundations must be reimagined, and to this the discussion now turns.[188]

As analyzed in previous sections of the Article, the architecture of evidence law was historically designed to stabilize a fragmented adversarial process, in which investigation and adjudication were institutionally severed. Evidence law substituted for lost investigative authority of the adjudicator. The logic was straightforward: when knowledge was no longer embedded in adjudication, it had to be externally validated.[189] That logic persists to this day, even if its institutional locus has shifted. It is in this context that evidence law must be reclaimed, not as a rigid framework tied to trial formalities, but as a dynamic regulatory tool capable of constraining investigatory deficit and adversarial excess where they now flourish.

Evidence law facilitates adversarial testing and restrains adversarial excess[190] (or its mirror image of investigative deficit).[191] In this way, it

[188] Various proposals have been advanced to address the systemic pathologies of the prosecutorial stance. Ortman, for instance, recommends the establishment of a prosecution-specific licensing regime, or "prosecution bar," intended to instill a professional ethic oriented toward justice rather than adversarial success. See Ortman, The Prosecution Bar, supra note 178, at 128. While such a reform is warranted, in my opinion it remains insufficient. As discussed in the text above, the investigative deficit at stake is not simply a matter of prosecutorial role morality; it reflects deeper structural distortions embedded in the very logic of the adversarial model. See supra text accompanying notes 178–85.

[189] See supra notes 40–42 and accompanying text.

[190] See Wang, supra note 142, at 334 (discussing the truth-distorting effect of excessive adversarialism).

[191] See supra text following note 79.

serves to restrain the truth-distorting effects of partisan strategy.[192] The problem is that these constraints have been stripped away upstream of trial. What emerges is a widening investigative deficit in which partisan narratives dominate. Just as the historic separation between investigation and adjudication prompted the development of formal evidentiary rules, the current landscape demands a similar response. If convictions and criminal punishment are to retain epistemic and moral legitimacy, they must be re-anchored to a set of evidentiary norms that apply beyond the courtroom. Reorienting evidence law in this manner is not a break from its origins but rather a continuation of its foundational purpose under altered institutional conditions.

Moreover, the upstream investigative deficit fuels a structural feedback loop that accelerates the marginalization of trial. Under current practices, plea bargaining functions as a mechanism for avoiding evidentiary scrutiny, which in turn diminishes the salience of evidence law itself. The more evidentiary regulation is confined to the trial, the more the trial is circumvented;[193] the more the trial is circumvented, the less capacity evidence law has to restrain adjudicative outcomes and legitimize criminal convictions and punishment in society. To interrupt this trajectory, evidence law must follow the migration of adjudication, extending to the pre-plea phase where the critical determinations of guilt and punishment now routinely occur. Such an expansion would not only reestablish meaningful evidentiary oversight at the point of factual resolution but would also begin to reverse the erosion of trial as a social site for setting criminal accountability and allocating punishment.

Before turning to the specifics of the proposed reform, it is essential to address key counterarguments that may be raised against extending

[192] Ronald J. Allen and his co-authors, who view evidence law through the rationality prism, argue that it is intended to secure minimal rationality in the adversarial system. See Ronald J. Allen, Michael S. Pardo, William J. Lawrence & Christopher K. Smiciklas, Minimal Rationality and the Law of Evidence, 115 J. Crim. L. & Criminology 269, 270–71 (2025). In such a system, they contend, equal access to information becomes imperative. See id. at 275. Today's prosecutors operate within a system that skews their incentives away from rational evidence assessment; criminal defendants face severely limited access to relevant information; and judicial oversight no longer ensures the conditions necessary for testing and authenticating factual claims. See id. at 314; supra note 180. This reality demands a recalibration of evidentiary regulation.

[193] See, e.g., Jenia I. Turner, Plea Bargaining, *in* 3 Reforming Criminal Justice: Trial and Pre-Trial Processes 73, 93 (Erik Luna ed., 2017) ("It is precisely in cases with weak evidence that . . . prosecutors are most likely to grant enormous plea discounts to induce a plea.").

evidentiary regulation beyond the confines of the courtroom. Confronting these anticipated objections, however hypothetical, serves to clarify the normative and conceptual terrain on which the proposal rests.

C. Principal Objections to Pre-Plea Evidence Law

One possible line of resistance is that the proposed reform is redundant, since plea negotiations already occur in the so-called "shadow of trial," implying that the evidentiary standards and constraints of a potential trial already exert effective (indirect) discipline over the bargaining process. A second, related objection might emphasize the continued centrality of trial as the principal site of adjudication, even within a plea-dominated system, by virtue of the formal in-court confession that concludes the plea process. On this view, the relevance of traditional evidentiary frameworks persists even when criminal cases are overwhelmingly resolved through plea bargains because adjudication still takes place at trial. A third hypothetical objection could pose the mirror image challenge—namely, that plea decisions are voluntary agreements, rather than factfinding exercises. As such, they derive their legitimacy from the defendant's consent rather than from evidentiary integrity. The last cluster of possible objections advances a more structural line of resistance, according to which extending evidentiary regulation to the pre-plea stage threatens the equilibrium of the criminal justice system by introducing system-wide distortions. I take each of these objections in turn.

1. The Shadow of Trial: Evidence Law's Implicit Regulation of the Pre-Plea Stage

The "shadow of trial" theory of bargaining was originally articulated in the context of divorce negotiations in a seminal article written by Robert Mnookin and Lewis Kornhauser.[194] The two argued that negotiations between divorcing parties are guided by the projections of trial outcome, that the parties negotiate with an eye to the legal

[194] Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 (1979). Mnookin and Kornhauser's theory of bargaining "in the shadow of the law" was later recast by now-Judge Stephanos Bibas as bargaining "in the shadow of trial." Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2467 (2004).

framework that would regulate their rights and obligations if the case were litigated, and that this backdrop structures the terms and trajectory of the negotiation.[195] This theory was later adapted to the criminal realm,[196] portraying the trial as the central gravitational force of the criminal process and as the reference point against which the prosecution and defense structure plea negotiation. According to this account, evidentiary rules maintain their regulatory power not by directly operating at the bargaining table, but by indirectly shaping the expectations that inform the negotiation process: the prosecutor's sense of what can be proved in court, the defendant's sense of what can be contested, and both sides' sense of the likely outcome of trial.[197]

In other words, the "shadow of trial" thesis holds that, despite their rarity, criminal trials and their underlying rules of evidence still exert a disciplining force on plea negotiations. Evidence rules need not formally apply during bargaining because their influence is already embedded in the parties' strategic calculations. Though formally applicable only at trial, they effectively govern plea negotiations, as they define the relative bargaining positions and perceived strengths of each side. So long as trial remains a credible threat, evidence law is understood to retain its functional relevance and operative force during the pre-plea stages.

At first glance, the claim that evidence law effectively governs the pre-plea stage carries intuitive appeal. Upon closer examination, however, the argument proves unconvincing. The "shadow of trial" model has increasingly come under scrutiny in recent years by scholars

[195] Mnookin & Kornhauser, supra note 194, at 968, 970.

[196] See Scott W. Howe, The Value of Plea Bargaining, 58 Okla. L. Rev. 599, 601 (2005) (arguing that those who endorse plea bargaining often point to the justification that its outcomes purportedly replicate the results a fully regulated trial would generate, adjusted only to reflect uncertainty and the costs of adjudication). These proponents, in other words, portray the plea as a projection of trial outcome rather than a deviation from it. For further elaboration of this view, see Glinda S. Cooper, Vanessa Meterko & Prahelika Gadtaula, Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases, 31 Fed. Sent'g Rep. 234, 234 (2019) ("The decision-making process around plea offers has been described as 'bargaining in the shadow of the trial,' incorporating perceptions of the likelihood of the trial outcome (probability of conviction) and the size of the trial penalty or plea discount (the difference between a sentence received through a trial and the sentence offered in a plea)."); Bibas, supra note 194, at 2465 ("In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains."); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61, 99 (1971).

[197] See Howe, supra note 196, at 601.

who highlight systemic deviations from its rational-choice assumptions. Critics contend that plea outcomes are shaped not merely by expected evidentiary outcomes. Judge Stephanos Bibas, for instance, has famously argued that plea bargaining often takes place "outside the shadow of trial," due to a combination of structural and psychological influences affecting the negotiation process and placing defendants at a markedly weakened bargaining position.[198] The structural forces he discusses include pervasive information asymmetries[199] and lawyers' coercive pressures, tactics, and incentives.[200] The psychological biases include framing effects and denial.[201] To this, one can add the regressive effects associated with uncertainty as to the status of evidence at trial and as to trial projection.[202] Numerous empirical studies attribute systemic inequities in the outcomes of plea bargaining to various biases[203] and coercive pressures.[204]

A particularly revealing challenge to the "shadow of trial" thesis emerges from the Supreme Court's decision in *United States v. Mezzanatto*[205] and the now-routine deployment of *Mezzanatto* waivers in plea negotiations.[206] In *Mezzanatto*, the Court recast the protection afforded by Federal Rule of Evidence 410, which excludes statements made during plea discussions,[207] as a waivable default, thereby permitting defendants to agree in advance to the use of such statements

[198] Bibas, supra note 194, at 2467 ("My thesis is that many plea bargains diverge from the shadows of trials. By 'the shadows of trials,' I mean the influence exerted by the strength of the evidence and the expected punishment after trial. Structural forces and psychological biases sometimes inefficiently prevent mutually beneficial bargains or induce harmful ones.").

[199] Id. at 2493–96.

[200] Id. at 2470–73.

[201] Id. at 2467.

[202] See Uri Weiss, The Regressive Effect of Legal Uncertainty, J. Disp. Resol., no. 1, 2019, at 149, 182.

[203] Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining 24–31 (2020), https://www.vera.org/publications/in-the-shadows-plea-bargaining [https://perma.cc/PGN6-RSYN].

[204] Id. at 10–18.

[205] 513 U.S. 196 (1995). I am grateful to Justice Alex Stein for drawing my attention to this issue.

[206] See Christopher B. Mueller, "Make Him an Offer He Can't Refuse"—*Mezzanatto* Waivers as Lynchpin of Prosecutorial Overreach, 82 Mo. L. Rev. 1023, 1029 (2017) (describing this case as "a modern Pandora's Box").

[207] Fed. R. Evid. 410.

against them at a subsequent trial if negotiations fail.[208] In other words, instead of evidence law at trial governing plea negotiations indirectly through anticipated outcomes, plea negotiations now govern trial directly by determining in advance what evidence will be admissible if negotiations fail. The normative direction of influence is reversed: the plea stage casts the shadow over trial, not the other way around. Moreover, the prevalence of *Mezzanatto* waivers indicates that prosecutors do not experience trial evidentiary constraints as an exogenous "shadow" structuring bargaining behavior, but rather as obstacles to be contractually dismantled ex ante.[209] As a result, plea negotiations themselves become sites of adjudicative risk. The dynamics of bargaining, rather than anticipated trial outcomes, come to drive the distribution of coercive pressure within the system.[210]

Plea bargaining also reshapes the shadow of trial in a deeper sense. As Ronald J. Allen and Nicolas Elliott-Smith persuasively argue,[211] by functioning as a gatekeeping mechanism that channels most defendants out of the adjudicative process, plea bargaining alters the composition of the residual trial pool.[212] This screening effect transforms the epistemic baseline against which guilt is assessed at trial. The legal standard of proof of "beyond a reasonable doubt," for example, is thus redefined, applied to a skewed subset of cases that does not necessarily reflect the broader population of accused individuals.[213]

Building on the preceding analysis, I suggest that the familiar "shadow of trial" thesis requires a more differentiated account. It is helpful to distinguish between two analytically distinct manners in which the trial might be said to cast a shadow over plea bargaining. The

[208] *Mezzanatto*, 513 U.S. at 210.

[209] See Mueller, supra note 206, at 1026 ("Prosecutors had begun to get defendants to sign waivers before the decision in *Mezzanatto*, but that decision so strongly reinforced this technique that it quickly became commonplace in the federal system and spread to many states as well.").

[210] See Ronald J. Allen, David S. Schwartz, Michael S. Pardo & Alex Stein, An Analytical Approach to Evidence: Text, Problems, and Cases 313–14 (7th ed. 2022) (discussing the effects of *Mezzanatto* waivers on plea bargaining).

[211] Ronald J. Allen & Nicolas Elliott-Smith, Proof Beyond a Reasonable Doubt Doesn't Exist: Except as an Emergent Property of a Complex Adaptive System, 115 J. Crim. L. & Criminology 783, 813–14 (2025).

[212] Id.; see also id. at 789 n.27 (arguing that "discretionary decisions by politicians and local prosecutors" such as "plea bargaining" will affect "the proportion of innocent and guilty defendants that proceed to trial").

[213] Id. at 820.

first, conventionally invoked in the scholarly literature and traceable to Mnookin and Kornhauser, refers to the constraining force that trial-stage evidence rules are thought to exert on prosecutorial conduct during the pre-trial and pre-plea phases.[214] The second, developed in earlier sections of this Article, concerns the subtler ways in which prosecutorial motivations and posture are shaped by the adversarial logic of the trial itself.[215] Even if evidentiary rules at trial do little to discipline pre-plea bargaining, the adversarial structure of trial can nonetheless imprint itself on prosecutorial incentives, cultivating a system-wide orientation toward conviction. In other words, the adversarial trial may indeed cast a shadow on pre-plea negotiation, but paradoxically, it may not be one that facilitates the external governance of evidence law.

2. The Continued Centrality of Trial in a Plea-Dominated System: Evidence Law and the Fixation of the Adjudicative Moment

Another possible line of resistance to the proposed reform might emphasize the continued centrality of trial as the principal site of adjudication, even within a plea-dominated system, by virtue of the in-court confession that often concludes the plea process. On this formalist view, the relevance of the trial-based evidentiary framework endures even in a system dominated by plea bargains, because pleas are ultimately formalized in court.[216] Proponents of this view may contend that while the act of in-court confession may not be tantamount to a full-fledged trial, it is nevertheless a moment of adjudication where the defendant's guilt is validated by the court. The court's role in accepting the plea is not merely ceremonial but serves as a judicial endorsement of the underlying admission of guilt and the case's evidentiary basis. According to this view, then, the adjudicatory moment remains confined to the trial arena and has not migrated upstream to the pre-plea stages, rendering any extension of evidence law's reach to the pre-plea domain unnecessary. Evidentiary principles continue to exert relevance and

[214] See supra notes 194–97 and accompanying text.
[215] See supra notes 171–73 and accompanying text.
[216] See Brandon L. Garrett, Why Plea Bargains Are Not Confessions, 57 Wm. & Mary L. Rev. 1415, 1418 (2016) ("[P]lea bargaining is often justified as, at its core, a process involving confessions.").

function, albeit in attenuated form, at the trial's moment of formal adjudication.[217]

This hypothetical objection, however, fails to account for several salient features of in-court confessions, their accompanying plea bargains, and the structure of their judicial oversight. In *Why Plea Bargains Are Not Confessions*, Brandon L. Garrett contends that plea agreements' admissions of guilt do not function as confessions in any meaningful evidentiary sense because they are typically legally calibrated and minimally sufficient to satisfy the elements of the offense.[218] Unlike confessions, which typically emerge from police interrogations and provide a factually textured account of the underlying conduct, plea bargain admissions of guilt often entail formulaic acknowledgments, which lack comprehensive elaboration. Garrett critiques the Supreme Court's early depiction of pleas as "more than a confession,"[219] arguing that this characterization has also skewed policy formulation.[220]

Moreover, the assertion that the in-court confession component of plea bargains maintains the centrality of evidentiary review is, in many cases, an idealized fiction. As noted earlier, judicial review of plea bargains typically concentrates on procedural formalities, such as whether defendants comprehend the rights they are waiving and whether the plea was entered into voluntarily, rather than on the evidentiary foundations of guilt.[221] On many occasions, the in-court confession essentially functions as a formalistic ritual meant to conclusively dispose of the criminal case. The hollowness of this ritual is further underscored by the widespread acceptance of *Alford* plea bargains.[222] In *North Carolina v. Alford*, the Supreme Court upheld the validity of a

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[217] It should be emphasized that Garrett is responding not to a scholarly consensus advancing this view, but rather to remarks made in Supreme Court opinions justifying pleas as confessions. See id.

[218] Id. at 1417 ("[W]hatever their other merits and defects, plea bargains are not confessions—they do not even typically involve detailed admissions of guilt.").

[219] Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[220] Garrett, supra note 216, at 1419 ("Policymakers have similarly treated guilty pleas as tantamount to admissions of guilt by, for example, denying postconviction DNA testing to those who had pleaded guilty, and generally leaving unclear the extent to which those who have pleaded guilty are even eligible for postconviction relief." (footnote omitted)).

[221] See supra text accompanying note 131.

[222] See Stephanos Bibas, Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of *Alford* and Nolo Contendere Pleas, 88 Corn. L. Rev. 1361, 1375–76 (2003) (providing some evidence on the acceptance of *Alford* pleas).

plea agreement despite the defendant's explicit protestation of innocence, underscoring the extent to which plea bargains can be severed from confession and truth-seeking.[223] The mere fact that plea bargains conclude in court does not transform them into an evidentiary event in any meaningful sense.

3. Contract over Judgment: The Non-Adjudicative Foundations of Plea Bargaining

Another hypothetical objection to extending evidence law into the pre-plea stage serves as the conceptual mirror image of the formalist critique addressed above. It proceeds from a particular depiction of plea bargaining as a purely consensual, non-adjudicative enterprise.[224] On this view, plea bargaining's contractual character renders it effectively immune to evidentiary regulation. The legitimacy of plea bargains, as well as the derivative conviction and punishment, stems not from regulated factfinding or adversarial testing, but from the defendant's voluntary consent.[225] Under this contract-based framing, plea bargaining is governed by principles of defendant autonomy and mutual consent rather than by epistemic or evidentiary integrity. Because no adjudication or factfinding purportedly occurs in this space, there is, by definition, no investigatory deficit for evidence law to address. Extending evidence law to the pre-plea phase would therefore be deemed unnecessary and conceptually misplaced, importing adversarial truth-seeking tools into a domain imagined to be operating through private contractual ordering.

My response to this objection is twofold. First, even under the most contractually inflected conceptualizations of plea bargaining, it is a categorical error to treat the process as wholly divorced from the functions of public adjudication. Pleas perform a central public act of allocating criminal guilt and punishment in society. Since they generate deprivations of liberty, reputational harms, and civic exclusion, they

[223] 400 U.S. 25, 37–38 (1970).

[224] See, e.g., Scott & Stuntz, supra note 125, at 1915 (portraying plea bargains as contracts and arguing that evidentiary entitlements, once granted, may be exercised to their fullest and, consequently, may be bargained away).

[225] See Joseph Goldstein, For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain, 84 Yale L.J. 683, 685 (1975) (framing plea bargaining in terms of the legal system's "basic commitment . . . to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him").

necessarily implicate the public values associated with criminal adjudication. The absence of a full-fledged trial does not diminish these values; it makes them harder to achieve. And that is precisely why evidence law must intervene. An enterprise that translates factual allegations into state-sanctioned deprivations of liberty is, by definition, an adjudicative one and must be subjected to certain evidentiary constraints.

Second, even if one were to endorse an exclusively contractual framing of plea bargaining, the coherence of that model would still rest on the integrity of the defendant's autonomous choice.[226] Autonomy, however, is not satisfied by the veneer of voluntariness. It requires informed consent. A defendant must have meaningful access to the prosecution's evidence and a realistic ability to assess its weight.[227] In the specific case of illegally obtained evidence, the challenge extends even further and goes beyond the kind of informational deficit that defeats informed consent: the defendant's autonomy cannot legitimize a plea-based conviction where the State itself has dismantled the conditions that make autonomous choice meaningful—as with the use of illegitimate and coercive investigative tactics. It is profoundly incoherent, verging on the cynical, for the state to invoke defendant autonomy as its source of legitimacy, after having deprived the defendant of that very autonomy through use of coercive tactics.[228] Recasting evidence law for the pre-plea stage is thus essential not merely as a mechanism for unraveling truth, but because it plays a critical role in safeguarding defendant autonomy.

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[226] Beyond the implications for evidentiary regulation addressed in this Article, broader critiques of the contractarian narrative of plea bargaining focus on the inherently coercive nature of the criminal justice system itself. As Robert E. Toone argues, the criminal justice system is infused with coercion and cannot serve as a meaningful venue for the exercise of autonomy. See Robert E. Toone, The Incoherence of Defendant Autonomy, 83 N.C. L. Rev. 621, 657 (2005). This critique can be extended to plea bargaining, where it applies with particular force. A negotiation between two parties, one of whom is authorized to threaten the other with incarceration, cannot plausibly be characterized as an exercise in free choice. Such a setting renders the ideal of defendant autonomy fundamentally incoherent.

[227] Steven L. Friedman, Note, Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial, 119 U. Pa. L. Rev. 527, 528 (1971) ("[T]o make a fully informed decision to plead guilty or stand trial, [a defendant] must also be able to assess knowledgeably the likelihood of conviction at trial.").

[228] See H. Mitchell Caldwell, Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System, 61 Cath. U. L. Rev. 63, 83–85 (2011) (arguing that prosecutors overcharge to coerce defendants in plea negotiations).

4. Systemic Distortions: Error-Allocation, Incentives and Judicial Economy

A final cluster of hypothetical objections presses a more structural and institutional line of resistance. Critics might contend that extending evidentiary regulation to the pre-plea stage risks introducing profound system-wide distortions along three interrelated axes: the distribution of error in the criminal justice system, the incentives governing core actors in the field, and the imperatives of judicial economy.[229] On this view, the front-loading of evidentiary scrutiny would fundamentally recalibrate the architecture of criminal adjudication, threatening to undermine accuracy and to overwhelm institutional capacity.[230]

Starting with the critique relating to optimal error-allocation, one might argue that formalizing evidentiary regulation upstream would redistribute error in ways that are normatively opaque. The concern is that shifting evidentiary obligations earlier may inadvertently privilege defendants' informational and substantive interests at the expense of victims, witnesses, and society at large. This would create an undesirable shift in both the risk and cost of error and destabilize the current system's carefully evolved distribution of proof and error burdens.

A further structural concern is that embedding evidentiary safeguards at the pre-plea stage may inadvertently reshape the incentive structure of principal institutional actors. Specifically, early hearings might induce resource-constrained prosecutors toward strategic under-charging. Early disclosure, in turn, may exacerbate the risks associated with premature theory-fixation, thereby (and somewhat ironically) entrenching the investigative tunnel vision[231] that pre-plea evidentiary regulation is designed to mitigate in the first place. Likewise, multiplying evidentiary touchpoints could invite strategic timing or signaling games around the production of proof. The overarching concern, then, is that front-loading evidentiary obligations may inadvertently amplify the investigative distortions the reform aims to correct, effectively imposing an "adversarial distortion premium" on the pre-plea process.

[229] For further discussion of the functions of evidence law in promoting the optimal distribution of error and systemic efficiency within the criminal justice system, see Alex Stein, The New Doctrinalism: Implications for Evidence Theory, 163 U. Pa. L. Rev. 2085, 2088 (2015).

[230] I thank Ron Allen for his illuminating observations on these issues.

[231] See supra note 180.

Another hypothetical objection turns on judicial economy and systemic overload. The concern here is that mandatory pre-plea evidentiary scrutiny and hearings would overwhelm already-strained courts, retard case processing, and fundamentally undermine the efficiency gains that institutionally justify plea bargaining. On this view, front-loading judicial scrutiny would merely replicate the resource-intensive burdens of trial without securing its corresponding legitimating function.

The collective force of these structural objections identifies genuine points of friction but, in my opinion, ultimately rests on a mistaken predicate—namely, that the status quo necessarily represents a normatively defensible and stable baseline. It does not. The existing regime allocates epistemic risk, sets incentives, and designates institutional labor in ways that are oftentimes devoid of principled justification. The more granular implications of these claims, and their interaction with concrete doctrinal manifestations of pre-plea evidence law, are addressed in greater detail in Part IV. For present purposes, it is sufficient to underscore the broader point: there is no compelling basis to presume a priori that confining evidence law's direct regulatory reach to the trial somehow fosters a superior normative equilibrium.

Thus, current practices offer no assurance that their distribution of false convictions versus false acquittals is remotely optimal. Indeed, the informational scarcity endemic to the plea stage constitutes a mechanism of epistemic capture, a structural source of false convictions.[232] Moreover, to the extent that extending evidentiary regulation shifts error risk marginally toward acquittal, this shift must be evaluated against long-standing commitments within the Anglo-American tradition which place a thumb on the scale against the systemic production of wrongful convictions.[233]

The incentive-based critique similarly fails to account for the endogeneity of current distortions. As discussed at length above, the

[232] See Daniel S. McConkie, Structuring Pre-Plea Criminal Discovery, 107 J. Crim. L. & Criminology 1, 4 (2017) ("Innocent defendants need evidence in the prosecution's possession that tends to demonstrate their innocence. Without that information, they may plead guilty to cut their losses."); Kaitlin Morgan, Note, Betting Against the House: Why Prosecutors Have an Ethical Disclosure Obligation Prior to Plea Negotiations, 31 Geo. Mason U. C.R.L.J. 31, 39 (2020) (discussing the prosecution's control over the disclosure of information as creating conditions conducive to wrongful convictions).

[233] See, e.g., 4 William Blackstone, Commentaries *358 ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

status quo already institutionalizes pressures favoring premature theory-fixation, investigative tunnel vision, and prosecutorial over-charging.[234] Evidence-timing games and selective disclosure strategies can work precisely because evidence rules attach so late in the day. Properly designed pre-plea mechanisms would realign the incentive landscape by imposing a cost on weak or tainted evidence before it can be utilized in the plea market. Treating the trial as the exclusive site of evidentiary regulation is, in effect, an abdication of the system's capacity to precisely calibrate incentives. It is an artificial barrier that does not allow for such fine-tuning.

The claim of judicial overload is likewise contestable, as it misconstrues the system's true cost structure by focusing exclusively on the initial judicial effort. Early engagement can yield substantial downstream savings if only for the fact that weak cases can be dismissed before resources are further expended, and tainted evidence can be excluded before it calcifies into bargaining leverage or wrongful convictions.[235] What passes for efficiency in the prevailing system is often little more than a mirage, sustained by the deferred costs of unreviewed evidence and unaccounted for externalities.

More fundamentally, even if the deferral of evidentiary scrutiny were to yield marginal gains in judicial economy and administrative efficiency, there is room to claim that such a utilitarian trade-off would remain misplaced, as the defendant's liberty and the evidentiary safeguards that preserve it can be said to lie outside any straightforward utilitarian calculus. From a deontological standpoint, the criminal process is not merely an institutional mechanism for maximizing aggregate welfare or managing caseloads. Its core function is to provide the moral and legal basis for the state's exercise of its most coercive power—that of depriving an individual of liberty and imposing the stigma of criminal conviction.[236] The sole question at a criminal trial is

[234] See supra notes 180, 228.

[235] See, e.g., Yvon Dandurand, Criminal Justice Reform and the System's Efficiency, 25 Crim. L.F. 383, 421–23 (2014) (discussing the efficiency of one exercise in early case disposition in pre-trial intervention).

[236] Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 216 ("In contrast to consequentialist approaches such as utilitarianism, nonconsequentialist theories tend to focus on the 'right' rather than the 'good.' In other words, institutions should produce morally correct decisions regardless of ultimate effects on society. . . . Retributivism thereby incorporates limiting principles and affirmative obligations on systems of criminal justice.").

thus whether the defendant is guilty, and it must be resolved with requisite certainty. The primary aim of the rules of evidence and criminal procedure must be to shield the innocent from wrongful conviction. Any departure from these principles undermines the legitimacy of the process, reducing the defendant from a subject to a mere object of the criminal process.[237]

The legitimizing function of evidence law and criminal adjudication imposes categorical constraints on institutional and evidentiary design. Evidentiary safeguards are not mere instrumental tools valued for their contribution to systemic efficiency. They mark the limits of state power. To treat these protections as interests that may be discounted for efficiency's sake is to abandon the commitment to justice and reduce the criminal process to a system of administrative management. Postponing or weakening evidentiary safeguards, particularly by deferring meaningful evidentiary scrutiny until trial, based on utilitarian considerations, can be said to misapprehend the proper normative structure of the criminal process and of the law of evidence.

IV. BEYOND THE COURTROOM: EXPANDING EVIDENTIARY IMAGINATION

As this Article approaches its final stage, the focus shifts from critique to construction. Having interrogated the historical and normative premises that confine our legal imagination and restrict evidence law to the realm of trial, the discussion now turns to consider the fundamental questions: What might evidence law look like if it were liberated from the confines of the courtroom? How might its rules and principles operate in the pre-plea stage?

With the aim of igniting rather than circumscribing legal imagination, the analysis that follows does not offer a comprehensive blueprint or an exhaustive catalogue of doctrinal reforms. Instead, it sketches three preliminary and open-ended proposals meant to serve as starting points for further reflection. The proposals are deliberately modest in scope and designed to minimize doctrinal disruption. They draw, in large part, on existing practices, serving as pre-plea analogues to established mechanisms like preliminary and suppression hearings. They also draw on proposals already advanced in the literature—albeit within frameworks that retain a trial-centric orientation, as manifested in the

[237] See Immanuel Kant, The Metaphysical Elements of Justice 100 (John Ladd trans., 1965) (1797).

work of William Ortman discussed above.[238] The purpose of these provisional proposals is to illustrate the potential feasibility and normative desirability of reorienting evidence law beyond trial, while leaving space for more ambitious, radical, or refined proposals to emerge in due course.[239]

A. Pre-Plea Evidentiary Hearings

The first reform calls for the institution of pre-plea evidentiary hearings, designed to secure both the "admissibility" and "sufficiency" of the evidence forming the basis for plea bargains. At the outset, it is important to acknowledge the ways in which this proposal builds upon existing practices, as well as its significant departures. Consider preliminary hearings, commonly referred to as "prelims," which serve as pre-trial adversarial proceedings intended to test the legal sufficiency of felony charges. Although procedures vary across jurisdictions, these hearings typically require the prosecution to introduce evidence to demonstrate probable cause.[240] Failure to meet this evidentiary threshold may result in the charges being downgraded or dismissed altogether. Yet, because they are waivable and anchored to trial, prelims are often circumvented. Prosecutors frequently seek to avoid the evidentiary exposure these hearings entail by offering defendants early plea bargains conditioned on waiving the hearing, a strategy that allows the state to preserve questionable cases without judicial oversight.[241]

Suppression hearings are structured to assess the admissibility of evidence prior to trial, most notably whether such evidence was obtained in violation of the defendant's constitutional rights under the Fourth, Fifth, or Sixth Amendments. Illegally obtained evidence is

[238] See supra note 26.

[239] These might include: a prosecutorial duty to provide reasons for evidentiary decisions underlying plea bargains; restrictions on reliance on prior convictions or propensity material absent a heightened showing of relevance; and pre-plea scrutiny of expert and scientific evidence.

[240] Michael D. Cicchini, Preliminary-Hearing Waivers and the Contract to Negotiate, 2023 Pepp. L. Rev. 35, 42 ("[G]enerally speaking, the prelim is a pretrial, adversarial hearing at which the state must present evidence, subject to cross-examination, to establish probable cause that the defendant committed a felony.").

[241] Id. at 43 ("Given . . . the risk that the defense could discover the state's strategy or theory of the case, . . . prosecutors would rather not have prelims. Consequently, prosecutors often give defendants early plea offers, called prelim waiver offers, to induce them to waive their hearings.").

excluded, rendered inadmissible to prove guilt. Yet, as with prelims and as argued above, suppression hearings can be preempted by plea deals, allowing prosecutors to avoid judicial review of contested evidence.[242]

Under the current regime, both prelims and suppression hearings remain conceptually tied to the trial. The proposal is to depart from this framework by anchoring evidentiary scrutiny to the pre-plea stage (namely, shifting it from pre-trial to pre-plea). Additional variations may include transforming these safeguards from waivable to mandatory and from selectively applied in felony cases to universally applicable throughout the criminal realm. Building on existing legal frameworks, these proposals seek to fortify the effects of evidentiary safeguards by shifting them to the critical pre-plea juncture and securing their enforcement. I shall briefly explain:

Exclusionary rules, the locus of evidence law, operate as normative filters that render certain categories of state-obtained information unfit for grounding conviction and punishment. Yet, as noted earlier,[243] their functional efficacy is deeply compromised in a system where most cases are resolved outside the courtroom. The prosecution is often able to rely on evidence of questionable legality during plea bargaining.[244] Constitutional objections that would be fully applicable at trial are oftentimes effectively sidelined in the negotiations, permitting the state to benefit from evidence that may have been obtained in violation of fundamental rights.[245] This sequencing creates perverse incentives on behalf of the prosecution, as the more vulnerable its evidence is to suppression, the stronger the motivation to secure a plea before any judicial scrutiny can take place.

Implementation of a pre-plea suppression hearing would allow for any evidence likely to be outcome-determinative to undergo initial judicial scrutiny prior to the entry of a plea. This mechanism would serve to empower exclusionary doctrines at the critical juncture where factual allegations are converted into legal outcomes. Evidence that fails to meet constitutional or legal standards would be excluded from serving

[242] See Parker, supra note 15, at 204–05 (describing how plea bargaining is used to "cover[] up" inadmissible evidence).

[243] See supra note 16 and accompanying text.

[244] See Parker, supra note 15, at 204 ("[A] prosecutor whose case rests upon evidence of dubious admissibility . . . may seek to avoid a challenge to his evidence by offering the defendant a particularly attractive 'deal.' ").

[245] Carissa Byrne Hessick, Punishment Without Trial: Why Plea Bargaining Is a Bad Deal 171–75 (2021).

as the basis for conviction and punishment in plea agreements. Pre-plea hearings would recalibrate the flow of information, enhancing both parties' understanding of the evidentiary terrain, and mitigating evidentiary uncertainty with all its associated regressive effects.[246] By subjecting key evidence to preliminary judicial scrutiny, the mechanism may compel the prosecution to reevaluate its case and, in exceptional instances, abandon the charges altogether. Even where plea bargaining continues, the process would unfold under conditions more closely approximating the shadow cast by a potential trial. Making such pre-plea hearings non-waivable could further ensure that neither party would be able to bypass essential judicial scrutiny.[247]

Beyond their role in effectively excluding unlawfully obtained evidence, the proposed pre-plea evidentiary hearings would also perform the broader function of ensuring that the prosecution's case satisfies a minimal standard of proof before any conviction, including a negotiated one, is finalized. The aim, in other words, is to establish a structured pre-plea mechanism for scrutinizing not only the *admissibility* but also the *sufficiency* of the evidence used to induce guilty pleas. A foundational principle of evidence law is that criminal liability must rest on proof that satisfies a prescribed standard of persuasion.[248] While the trial standard is proof beyond a reasonable doubt, a lower threshold (ranging from probable cause to a preponderance of the evidence) may be suitable at the more preliminary pre-plea stage. Regardless of where the line is drawn, the prosecution would be required to affirmatively demonstrate that its evidence consists of admissible and sufficient support for each element of the charged offense under the applicable standard of proof. Such a mechanism could help close the widening gap between the formal burdens of proof and the practical reality of a plea-based system—where, in theory, the government must prove guilt beyond a reasonable doubt, but, in practice, need only persuade the defendant that it could plausibly do so.

[246] See Weiss, supra note 202, at 182 (concluding that "legal uncertainty transfers wealth from the poor to the rich" and "from women to men").

[247] The mandatory nature would also facilitate broader social aims by bringing systemic, wide-scale violations, such as racially discriminatory practices, within the court's adjudicative reach.

[248] See In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

As mentioned before, critics might contend that mandatory pre-plea hearings would overwhelm the judicial system and impede the swift resolution of cases. Yet such concerns overlook the fundamental role these hearings are intended to play in safeguarding constitutional rights. And even from a narrower, efficiency-focused perspective, the case against pre-plea hearings may prove less compelling. As argued above, early determination of inadmissibility may lead to the dismissal of cases before they proceed further, thereby conserving judicial and prosecutorial resources.[249] In cases that do proceed to trial, such preliminary hearings can streamline subsequent proceedings and restore a measure of bifurcation to the judicial decision-making process, a structural feature that is largely absent in the current context of bench trials.[250] Moreover, the mere possibility of preliminary judicial scrutiny may deter the prosecution from initiating proceedings in the first place where the evidence is questionable or marginal. Thus, rather than imposing an undue burden, the proposed reform could allow for a more principled reallocation of institutional effort, one that could also enhance system efficiency.

A second, more pragmatic objection might posit that imposing evidentiary obligations at the pre-plea stage could reduce the appeal of plea bargaining for prosecutors, potentially resulting in fewer negotiated resolutions and thus, paradoxically, disadvantaging defendants who might otherwise benefit from such agreements. However, this objection rests on a narrow conception of what constitutes a "benefit" to defendants. Plea agreements entered into under conditions of evidentiary uncertainty and attenuated constitutional safeguards may appear advantageous, but in reality, they offer little more than the illusion of a meaningful gain. At a more systemic level, the practice of unscrutinized plea bargaining disadvantages the broader class of defendants by generating a race to the bottom, one in which they are induced to accept increasingly unfavorable terms and in which the factual basis of negotiated convictions is increasingly undermined.[251] This, in turn, enables the prosecution to obtain a higher volume of convictions and to

[249] See supra note 235.

[250] See Walter Sinnott-Armstrong, Which Evidence Law? A Response to Schauer, 155 U. Pa. L. Rev. 129, 130 (2006) (discussing the possibility of a second judge determining the admissibility of expert evidence).

[251] See Albert W. Alschuler, A Nearly Perfect System for Convicting the Innocent, 79 Alb. L. Rev. 919, 920–22 (2016).

secure longer cumulative sentences across the board than would likely be attainable under a system anchored in more rigorous evidentiary testing.

To conclude, today's plea bargaining landscape may permit negotiated convictions to be shaped by evidence that is inadmissible or that fails to meet sufficient evidentiary thresholds.[252] The proposed pre-plea hearings would neither supplant trial nor resolve the ultimate question of guilt, but they would enforce preliminary evidentiary criteria designed to anchor plea negotiations to a legally cognizable factual foundation. This reform would allow a return to first order principles: that the imposition of criminal liability and punishment must be grounded in evidence that is both legally admissible and minimally sufficient.[253]

B. Pre-Plea Confrontation Rights: Extending Crawford *Beyond Trial*

The logic of reconfiguring evidence law upstream may similarly implicate the confrontation right and its corollary, the right to cross-examination. Enshrined in the Sixth Amendment, these rights entitle criminal defendants to challenge the credibility of adverse witnesses through direct questioning.[254] They serve to ensure the reliability of inculpatory evidence through the mechanism of adversarial testing. Yet, as earlier sections have shown, prevailing doctrine confines their invocation to the trial itself.[255] A further doctrinal manifestation of the effort to front-load evidentiary safeguards and to shift evidence law's center of gravity away from trial thus lies in reexamining the trial-bound

[252] See Garrett, supra note 218, at 1428–31; Palmer, supra note 123, at 524 ("'[P]lea bargaining has undercut the goals of legal doctrines as diverse as the fourth amendment exclusionary rule . . . .' The prosecutor may secure convictions that could not otherwise be obtained because he may bluff the defendant with inadmissible evidence, such as evidence gained by an unlawful search or hearsay statements." (first alteration in original) (quoting Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 934 (1983))); F. Andrew Hessick III & Reshma M. Saujani, Article, Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge, 16 BYU J. Pub. L. 189, 196 (2002) ("Even if the evidence is inadmissible, the prosecutor can use it as leverage over the defendant in plea bargaining . . . .").

[253] For additional measures aimed at promoting transparency and strengthening judicial oversight of the plea bargaining process, see Jenia I. Turner, Transparency in Plea Bargaining, 96 Notre Dame L. Rev. 973, 1000–22 (2021).

[254] U.S. Const. amend. VI.

[255] See supra notes 89–92 and accompanying text.

limits of these rights and considering whether their protections might extend into the pre-plea stage. It is to this prospect that this Section now turns.

In the landmark case of *Crawford v. Washington*, the Supreme Court interpreted the Sixth Amendment's Confrontation Clause as guaranteeing defendants the opportunity to subject the prosecution's case and testimonial statements to cross-examination.[256] Notwithstanding the case's textual and theoretical rigor, the rights to confrontation and cross-examination recognized in *Crawford* were circumscribed by the foundational assumption that they can be asserted exclusively at trial.[257] William Ortman forcefully critiques the trial-centered framework that governs the Supreme Court's confrontation doctrine, arguing that it strips the doctrine of practical significance in the overwhelming majority of criminal cases, which are resolved through plea bargains. He maintains that the trial limitation lacks grounding in both the text and the underlying rationale of the Confrontation Clause.[258]

To address this doctrinal distortion, Ortman proposes a mechanism of Sixth Amendment depositions. According to Ortman's proposal, at the point of charging, prosecutors would be required to disclose the individuals whose testimonial statements formed the basis for initiating the case. These charging witnesses would be identified through a formal mechanism, such as the "minutes of evidence" practice in certain states.[259] Defendants would have a right to depose these witnesses before trial. Depositions would proceed under oath in the presence of a court reporter—with defense counsel conducting direct examination and with prosecutors entitled to attend, raise objections, and pose questions of their own. To ensure compliance, Ortman recommends an exclusionary rule whereby, absent special justification, any testimonial witness not disclosed would be barred from testifying at trial.[260]

[256] 541 U.S. 36, 68 (2004).

[257] See Ortman, Confrontation, supra note 26, at 453 ("[T]he confrontation right the Court articulated in *Crawford* is one that defendants can claim only at *trial* . . . .").

[258] Id. at 454 ("If only 'trial witnesses' count as 'witnesses,' then in a world without trials there can be few 'witnesses' and very little confrontation. The Court's restrictive gloss on 'witnesses' is also inconsistent with the Sixth Amendment's text, which attaches the confrontation right to those facing 'criminal prosecution,' not just those in trial.").

[259] Id. at 487.

[260] Id. at 487–88, 492–93. Given the sophistication and granularity of Ortman's analysis and given that this Article represents an effort to broaden the legal imagination rather than to

Ortman's Sixth Amendment deposition proposal could be reconceptualized and strengthened through integration with the mandatory pre-plea evidentiary hearing outlined above.[261] One version of such integration would preserve the deposition format in advance of the pre-plea hearing. The resulting record would form the basis for judicial scrutiny, furnishing a structured foundation upon which the prosecution's case could be interrogated prior to any plea. Alternatively, rather than treating depositions as a freestanding procedural mechanism, the confrontation right could be realized through live examination of key prosecution witnesses during the pre-plea evidentiary hearing. Under this version, confrontation would occur not through closed-door discovery but in a judge-supervised setting. Unlike cross-examination at trial, which is expansive, open-ended, and directed at resolving ultimate questions of guilt, pre-plea cross-examination would serve a narrower screening function. It would be calibrated to assess whether the prosecution's testimonial evidence meets baseline standards of credibility and legal sufficiency, without inviting full-scale impeachment or probing the prosecution's case in its entirety. To preserve the pre-plea hearing's distinct role and prevent its collapse into a trial surrogate, procedural constraints could be imposed, including strict time limitations.

Pre-plea confrontation would introduce adversarial testing earlier in the criminal process and mitigate information asymmetries that systematically advantage the prosecution. Beyond these functions, as Ortman astutely observes, it could also serve as a strategic signaling mechanism: by enabling both sides to witness firsthand how pivotal witnesses respond to adversarial cross-examination, the hearing would convey to each of them important cues regarding the evidentiary strength of their respective cases and the risks they bear by proceeding to trial.[262]

A principal concern with extending confrontation and cross-examination rights to the pre-plea stage is the potential chilling effect on

foreclose debate through a comprehensive set of doctrinal reforms, the discussion will not purport to offer an exhaustive account of pre-plea confrontation rights.

[261] Id. at 486 n.224 (discussing the possibility of repurposing preliminary hearings as vehicles for pre-plea confrontation rights, the structural obstacles such a shift would entail, and the concern that public proceedings may impose greater burdens on vulnerable victims than private depositions, even as they provide corresponding transparency benefits).

[262] Id. at 490–91.

witnesses and the risk of their harassment, bribery, or manipulation prior to trial.[263] Ortman acknowledges the weight of this argument but contends that it is endemic to the adversarial model, and that "these concerns look like thin pretexts for denying criminal defendants the information-gathering tools possessed by civil litigants."[264] Moreover, current safeguards such as protective orders may already suffice to manage some of these risks. Additional objections, grounded in financial or administrative burdens, are likewise overstated according to Ortman, as parallel practices demonstrate that deposition procedures can be administered effectively without imposing undue strain on the system.[265]

In sum, there is room to claim that carrying *Crawford*'s confrontation framework into the pre-plea phase would not only refresh an aging doctrine but also restore confrontation's essential role as an instrument of adversarial testing and a check on prosecutorial power.

C. Extension of Brady *Requirements to the Pre-Plea Stage*

Before proposing to extend *Brady* obligations, it bears emphasizing why *Brady* is invoked within a project concerned with reimagining evidence law. As mentioned above,[266] although *Brady* is conventionally situated within the realm of criminal procedure rather than evidence law, and although it is understood as a disclosure right rather than a trial right, these classifications illustrate the prevailing assumption that evidence law begins and ends with trial. The distinction between criminal procedure and evidence law, and between disclosure rights and trial rights, reflects the rigid and historically contingent division of labor that has confined evidentiary doctrine to the formal setting of trial, and

[263] Id. at 499 ("Witnesses may be 'discouraged' . . . from reporting crimes to police if they know that they will have to undergo a deposition.").

[264] Id.

[265] Id. at 496–97 (arguing that the objection that criminal depositions are costly proves little, because virtually every component of the criminal justice process, from warrant preparation to indigent defense and trials, imposes substantial costs). The mere fact that a procedure is not free therefore provides no meaningful basis for rejecting it. Moreover, Sixth Amendment depositions would resemble discovery depositions, which a few states already permit in criminal cases without apparent dysfunction. Id. at 497–98 (listing Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont as states allowing criminal defendants to depose prosecution witnesses as a matter of right). These jurisdictions show that such procedures are manageable and do not overwhelm the system.

[266] See supra note 13.

that has been challenged throughout this Article. Hereto, this Article has sought to unsettle that architecture by extending evidentiary principles to the pre-plea stage, and the proposed expansion of *Brady* represents yet another expression of that broader reorientation.

This Article opened with the seminal case of *Brady v. Maryland*, recognizing that due process obligates the prosecution to disclose favorable evidence that is material to guilt or punishment.[267] Since *Brady*, the Court has repeatedly affirmed that this duty encompasses both impeachment and exculpatory material.[268] But, while *Brady* stands as a cornerstone of the constitutional architecture of criminal adjudication, its reach has remained largely limited to the trial. As Jenia I. Turner and Allison D. Redlich eloquently put it, despite the dominance of plea bargains, "The Supreme Court has expressly held that prosecutors need not turn over impeachment evidence before a guilty plea, and a number of lower courts have applied this holding to factually exculpatory evidence as well."[269]

In *United States v. Ruiz*, the Court explicitly held that the Constitution does not require the disclosure of material impeachment information prior to the entry of a guilty plea.[270] In that case, the prosecution conditioned its plea offer on Angela Ruiz's waiver of her right to receive "impeachment information relating to any informants or other witnesses."[271] The Court upheld the waiver, reasoning that impeachment material bears primarily on trial fairness rather than on the voluntariness of the plea itself.[272] Although the Court declined to require pre-plea disclosure of impeachment evidence, it did not definitively resolve whether affirmative exculpatory evidence must be disclosed before a plea is finalized. In the absence of clear guidance from *Ruiz*, lower courts have diverged on this issue. Some circuits, like the Fifth, have adopted a narrow view, holding that a prosecutor need not disclose such

[267] 373 U.S. 83, 87 (1963).

[268] See Brown, supra note 8, at 9 ("[T]he *Brady* rule covers not only affirmative exculpatory but also 'impeachment' evidence.").

[269] Jenia I. Turner & Allison D. Redlich, Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison, 73 Wash. & Lee L. Rev. 285, 301 (2016) (footnote omitted).

[270] 536 U.S. 622, 629 (2002).

[271] Id. at 625.

[272] Id. at 633.

evidence pre-plea.[273] Others have indicated that failing to disclose this evidence may implicate due process concerns.[274] The result is a patchwork of regimes that vary significantly in both scope and timing.[275]

The Supreme Court's reasoning in *Ruiz* and the broader doctrinal stance that limits *Brady* obligations to the trial context have come under sustained scholarly scrutiny. In a recent article, Sela Brown argues that while anchoring *Brady* rights to trial may have been doctrinally coherent in 1963, when trials still structured the criminal process, that logic collapses in a system where criminal convictions overwhelmingly occur through guilty pleas.[276] In this new procedural landscape, restricting access to exculpatory and impeachment evidence until trial effectively denies the vast majority of defendants the informational foundation necessary to make informed, consensual, and fair plea decisions. The trial-centric framing of *Brady* disclosure rights, she claims, unjustifiably excludes most defendants from due process protections that are essential to the legitimacy of their convictions.[277]

John G. Douglass identifies another fundamental flaw within *Brady* beyond the temporal question. He argues that even at trial, *Brady* falls short of adequately ensuring well-informed defendants, for it does not require disclosing all (or even most) information favorable to the defense.[278] Instead, it mandates the disclosure of evidence that is both "favorable" and "material" to guilt or punishment, a standard the Court has interpreted narrowly.[279]

In light of these and other critiques, a notable trend has emerged within the legal landscape: a growing number of state legislatures are

[273] See Turner & Redlich, supra note 269, at 287 n.2 (citing Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000)).

[274] See, e.g., McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003).

[275] Turner & Redlich, supra note 269, at 288 (describing how some jurisdictions adopt an "open-file" model, requiring prosecutors to provide broad discovery early in the criminal process, while others employ a more restrictive "closed-file" approach that permits the prosecution to withhold key evidence entirely or until the eve of trial).

[276] Brown, supra note 8, at 4 (arguing that *Brady*'s linkage of disclosure obligations to the trial phase reflected the legal landscape of 1963, when trials were still the dominant mode of adjudication).

[277] Id.

[278] John G. Douglass, Fatal Attraction? The Uneasy Courtship of *Brady* and Plea Bargaining, 50 Emory L.J. 437, 442 (2001).

[279] Id. (describing the Court's narrow view of "materiality" under *Brady* as "one of the largest disappointments of the last quarter century").

now gradually, but consistently, shifting toward enhanced discovery practices by requiring prosecutors to disclose evidence both earlier in the process and with greater breadth than in the past.[280] This legislative push towards more robust discovery is further bolstered by numerous proposals within legal scholarship. Miriam H. Baer proposes a mandatory early disclosure framework requiring prosecutors to identify and specify at the outset of a criminal case the existence and location of key categories of evidence, without necessitating immediate production of the evidence itself.[281] This initial disclosure would occur in open court and be accompanied by ongoing judicial oversight: as the case progresses, the prosecutor would be obligated to reaffirm, under court scrutiny, the accuracy and completeness of earlier disclosures.[282] By structuring disclosure obligations in this way, Baer's proposal is meant to directly target the two vulnerabilities that often underlie *Brady* violations—namely, delayed disclosure and prosecutorial gamesmanship.[283]

Building on the evolving doctrinal trends and the insights of John Douglass, Miriam Baer, Janet Moore,[284] and others, I propose an open-file regime that would apply across all jurisdictions as a precondition to finalizing any guilty plea. This regime would obligate prosecutors to disclose their current case file before any plea is entered, effectively transforming *Brady* from a narrowly construed trial right into a comprehensive pre-plea obligation. This regime could also further expand *Brady*'s scope to encompass evidence regardless of whether it satisfies the dual criteria of being both "favorable" and "material" to guilt or punishment. By obligating prosecutors to reveal all relevant information in their possession prior to plea finalization, the framework would ensure that defendants have a more complete foundation for making informed and voluntary plea decisions, reducing opportunities for strategic withholding of evidence.

[280] Miriam H. Baer, Timing *Brady*, 115 Colum. L. Rev. 1, 3 (2015) ("State legislatures are increasingly adopting more generous discovery regimes, many of which impose earlier and more rigorous disclosure requirements on prosecutors.").

[281] Id. at 61–63.

[282] Id. at 62.

[283] Id. at 63–64.

[284] Janet Moore, Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*, 77 Brook. L. Rev. 1329, 1332–33 (2012) (proposing broad statutory reform requiring full and automatic disclosure of all investigative materials in every criminal case).

To complement this framework, it may be advisable to endorse Baer's proposed mechanism, requiring prosecutors to disclose the existence and location of key categories of evidence in advance, even if complete disclosure is deferred.[285] This initial disclosure would occur in open court and would be coupled with periodic prosecutorial attestations affirming the accuracy and completeness of prior representations.

Potential objections to such a comprehensive open-file discovery regime mirror the critiques raised in response to reform proposals discussed above. Scholars such as R. Michael Cassidy have questioned whether the frequency of cases in which defendants lack sufficient evidence to assess their culpability justifies the institutional burden of expanded pre-plea discovery. As Cassidy notes, "There may be rare situations where an accused does not remember the incident with sufficient clarity to make an honest assessment of his legal responsibility. But the critical question is whether those situations are common enough to warrant a major resource commitment to enhanced preplea discovery."[286] Echoing this concern, Judge Frank Easterbrook argues that broadening *Brady* rights to encompass the pre-plea stage would effectively dismantle the efficiency of fast-track plea options.[287]

While these efficiency-based objections merit consideration, they are not supported by empirical evidence. As Jenia I. Turner and Allison D. Redlich have demonstrated in their comparative study of discovery regimes, defense attorneys and prosecutors view open-file discovery as more efficient, not less.[288] Their findings indicate that early and expansive disclosure of evidence is viewed as expediting case disposition,[289] all while facilitating more informed and reliable guilty

[285] Baer, supra note 280, at 61–63.

[286] R. Michael Cassidy, Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures, 64 Vand. L. Rev. 1429, 1468 (2011) (footnotes omitted).

[287] Easterbrook, supra note 133, at 555 ("Defendants who want more information can insist on it; prosecutors want pleas, indeed need pleas, so information will be forthcoming if there is a demand for it. But forcing information on the defense won't help.").

[288] Turner & Redlich, supra note 269, at 382. Their article employs a comparative empirical design, surveying prosecutors and defense attorneys in Virginia and North Carolina—two demographically similar states with sharply contrasting discovery rules. Using a structured questionnaire, the authors demonstrate that early and comprehensive disclosure enhances defendants' informational access, supports more grounded and deliberate plea decision-making, diminishes discovery-related disputes, and expedites case disposition. Id. at 297, 315, 380–82.

[289] Id. at 382 ("A large number of prosecutors and defense attorneys . . . noted that open-file . . . speeds up case dispositions.").

pleas.[290] Moreover, they found no meaningful increase in risks to witness safety under open-file regimes.[291] Taken together, these findings suggest that far from burdening the system, open-file discovery can both enhance efficiency and address the investigative and informational deficits that currently plague plea bargaining.

CONCLUSION

The safeguards that might have protected Troy Mansfield from wrongful conviction, including confrontation and cross-examination rights, access to exonerating and impeaching evidence, and evidentiary scrutiny, were all confined to the trial setting. They were therefore unavailable at the critical moment before he finalized his plea. His story illustrates that the power of evidence rules lies not merely in their substance, but in their timing and location. Rights that materialize too late or in the wrong setting are stripped of their protective force. Against this backdrop, this Article set out to demonstrate that the marginalization of evidence law in the age of plea bargaining is not simply a consequence of the trial's decline, but a symptom of a deeper crisis. In confronting it, this Article sought to reimagine the boundaries of evidence law, challenging its persistent and increasingly untenable tethering to the criminal trial. The argument unfolded along four interwoven strands: historical, descriptive, normative, and prescriptive.

Part I began by interrogating the historical foundations of the institution of evidence law in the Anglo-American world, which have naturalized its confinement to the trial setting. Drawing on the historical accounts of Wigmore and Langbein, traditionally cast as competing but here shown to converge, this Part demonstrated that evidence law did not arise to govern factfinding in the criminal system at large, but rather as a doctrinal framework specifically calibrated to the architecture of trial. Both accounts ultimately trace the emergence of modern evidence law in the Anglo-American world to the divide between investigation and adjudication, and to the corresponding loss of unmediated investigative capacities by the adjudicator. This Part concluded by showing how evidence law's historically contingent trial-centricity has

[290] Id. at 325 ("We find that statutorily mandated open-file discovery results in broader disclosure of almost all types of evidence . . . .").

[291] Id. at 383 ("Our survey also found little evidence to suggest that open-file discovery increases risks to the safety of witnesses.").

been reified into a jurisprudential orthodoxy that continues to shape legal doctrine and inform legal thought to this day.

Shifting from the historical to the descriptive, Part II of this Article charted the sharp and sustained decline of both bench and jury trials across the American criminal justice system. This seismic shift, driven by the ascendancy of bargaining, has transformed a system once centered on trials into a system of pleas. In the process, it has reconsolidated investigative and adjudicative authority in the hands of the prosecutor, collapsing the functional separation upon which evidence law was originally premised and prompting a reevaluation of its normative justification.

This reevaluation set the stage for this Article's normative turn in Part III, which rejected the dominant view that plea bargaining's fusion of investigative and adjudicative powers signals a retreat into inquisitorialism and offered a contrary account. It showed that plea bargaining epitomizes a radicalization of adversarialism, and that rather than remedying the investigatory deficit of the de facto adjudicator, plea bargaining perpetuates adversarialism in new guise. Plea bargaining intensifies the adversarial system's foundational commitments to market rationality and liberal individualism. What begins in adversarial trials as party control over the presentation of evidence and procedure culminates in plea bargaining as party control over *outcome*. Similarly, the privatization of the enterprise of collecting and presenting evidence in adversarial trials reaches its logical conclusion in plea bargaining in the form of private ordering. The institution of plea bargaining also reflects a deepening of adversarialism's market ethos, effectively transforming constitutional rights into transactional assets.

These dynamics breed adversarial excess all while dismantling the very mechanisms that once kept the adversarial model in check, chief among them evidentiary regulation. Prosecutors, now functioning as de facto adjudicators, operate within an unchecked, conviction-oriented mindset that fosters a new kind of investigative deficit, rooted not in lack of access to impeaching evidence but in a lack of institutional incentives to seek such evidence. Evidence law, long tasked with correcting the adjudicator's investigative deficit and anchoring the integrity of adversarial factfinding, must now be reimagined for a system where adjudication effectively happens at the plea stage, and where the prosecutor holds decisive power. Reorienting evidentiary regulation upstream is not an abandonment of evidence law's historical and jurisprudential mission but its renewal in light of transformed realities.

In Part IV, this Article concluded by translating the normative framework into concrete doctrinal prescriptions intended to bring evidence law into alignment with the realities of a plea-driven climate. Among the proposed reforms were mandatory pre-plea evidentiary hearings, the extension of *Crawford*'s confrontation and cross-examination rights to the pre-plea stage, and a reconfiguration of *Brady* obligations to ensure that the prosecution's case file is "admitted" into the plea bargaining process itself. These proposals are not meant to be exhaustive or fixed solutions but are rather invitations to rethink the complacency of a trial-centric evidence law. They are designed to meet the criminal justice system where it is, not where we wish it to be.

If the architecture of criminal justice is shifting, so too must the rules that regulate how the factual bases effectively underlying conviction and punishment are constructed. Evidence law must resist the urge to calcify around a forum that is no longer central to the system. What is needed now is not doctrinal modesty nor a cautious adherence to rigid disciplinary and doctrinal boundaries, but rather a bold reimagining—one commensurate with the stakes. After all, it is the epistemic and normative legitimacy of a vast majority of criminal convictions that hangs in the balance. And so, this Article concludes with a plea of its own, a call for further reflection and reform. In a world of vanishing trials, the question is no longer merely whether evidence law ought to operate beyond the courtroom, but whether it can survive as law at all if it does not.