FROM TRANSPLANT TO DISINTEGRATION? A COMPARATIVE STUDY OF THE JUDICIAL ROLE

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Abstract

The study uncovers how judges implement transplanted constructs related to settlement reform in three legal systems—Italy, Israel, and England and Wales. It does so with a view towards the U.S. legal system, from which many of the transplants originated.

Observing judges in action in the Florence, Tel-Aviv, and London first-instance courts, it finds that settlement-related transplants (including ADR transplants) that could be interpreted as broadening the judicial role and providing meaningful modes of dispute resolution for disputants, in fact, often constrict the judicial role, causing both the courtroom and court-related alternative dispute resolution ("ADR") processes to become forums for efficiency-based negotiation. In England, the disintegration of the judicial role is most apparent as the promotion of settlement has led to obligatory measures preceding the filing of a claim, leaving judges only a marginal percentage of disputes to deal with.

Analyzing the historical context and formants underlying settlement-promoting reforms, the study shows how each legal culture molded them, and demonstrates that the impetus for accepting a transplant may have a central effect on its eventual trajectory. It shows that the three observed legal systems may be viewed in general terms as presenting three sequential stages of the judicial role, with a possible trend toward disintegration. In addition, the legal systems may offer three transitional views of the tension between efficiency and justice and the way it unfolds.

I. INTRODUCTION

One of the important characteristics of a comparative study is the journey beyond written rules to their context and actual mode of implementation: uncovering "the law machine."[1] The same letter of law can have diverse practical meanings in different legal cultures, and transplanting a concept from one legal culture to another involves more than the passing of legislation.[2] Transplants in practice undergo transformations influenced by those who are called upon to implement the changes—perhaps most often, the judges.[3]

However, research on legal transplants does not usually include an on-the-ground study of related judicial practices. Moreover, a comparative study of the effects of transplants on the judicial role in different legal systems has not been conducted. The following comparative analysis of transplanted ADR-related legal reforms is based on, among others, courtroom observations and interviews with first-instance judges (the first line of judges to implement changes) in London, Tel-Aviv, and Florence. The first-instance courts in these cities were chosen as centrally situated courts in three legal systems with different traditional roots: England and Wales (common law), Italy (civil law), and Israel (mixed). The research can open the way for further studies to uncover whether judges in other legal systems from the same families operate

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[1] John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT'L & COMPAR. L. REV. 771, 777 (1998). *See also* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)* 39 AM. J. COMPAR. L. 1, 21–22 (1991) (calling the different elements of living law "legal formants" and further explaining that "[w]ithin a given legal system with multiple 'legal formants' there is no guarantee that they will be in harmony rather than in conflict." *Id.* at 23.).

[2] Richard S. Kay, *Gunter Frankenberg, Comparative Constitutional Studies: Between Magic and Deceit*, 67 AM. J. COMPAR. L. 694, 696 (2019); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L. & COMPAR. L.Q. 52, 64 (1996) (stating that the same letter of law can have diverse practical meanings due to the social background upon which law it is formulated.).

[3] Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 328 (1978) (stating that law is strongly influenced by the knowledge of the legal elite, comprising legislators and judges, its "imagination and training and by its experience of the world and of legal ideas."); *see also* Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 4 GLOB. JURIST [i] (2004); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 1–64 (2004).

similarly.[4]

In addition, the research uncovers what could be a linear trend toward disintegration of the judicial role. In all three legal systems, legislative changes have been made to allow judges not only to refer cases to ADR but also to use ADR tools themselves to help parties resolve their cases. Though these tools could be viewed as broadening the judicial role, they are in fact being used in very narrow ways with the aim of limiting and sequestering the judicial role to a different extent in each legal system. Since most of the relevant transplants were found in the study to originate in the U.S. (e.g., judicial referral to ADR, pretrial as a forum for judicial settlement practices, and problem-solving courts), the U.S. model is also included in this study to follow how the transplants have been altered in each receiving legal culture.

ADR, which began as an alternative movement in the U.S. in the 1970s, has been transplanted into the three legal systems, resulting in new divergences, which put into question how close the legal systems have in fact become. While this reinforces the concept of transplants as irritants,[5] which produce far-reaching change through a ripple effect, we show that the transformation of transplants in receiving cultures may not be entirely unforeseeable or random. Whether the differences are merely temporal, rooted in a specific context, or reversible is a question that is explored in this study. The role of legal culture, the tension between ideals and efficiency considerations, and insights relating to the impetus for such transplants are also discussed.

The article will begin with a brief overview of a vanishing trial phenomenon in common law countries and the transition to the "settlement judge" in the U.S., where most of the transplants discussed in this article

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[4] It is important to note that while all systems are mixed today, they are often mixed in different ways, remaining distinct from each other. Langer, *supra* note 3, at 11 (stating that adversarial and inquisitorial constructs are identifiable in hybrid systems. "It is possible to identify adversarial and inquisitorial systems because the legal actors of the Anglo-American and civil law jurisdictions constantly make use of adversarial and inquisitorial structures of interpretation and meaning in conscious and unconscious ways." Langer prefers the "translation" terminology because it reflects the fact that the receiving language of the legal system has an important influence on the end product). Holger Spamann et al., *Judges in the Lab: No Precedent Effects, No Common/Civil Law Differences*, 13 J. LEGAL ANALYSIS 110 (2021) (describing how, in lab conditions, providing judges with the same case and precedent material led to different results according to the legal system, though not along civil/common law lines).

[5] *See generally* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 (1998) (suggesting that transplants produce change in legal systems not through smooth reception of the borrowed concepts but rather through the reaction of the receiving legal culture to them, which creates numerous effects along a multitude of legal factors in the system).

originated (Section II). It will then describe reforms in civil justice and their implementation as uncovered by this study in Italy (Section III), Israel (Section IV) and England and Wales (Section V). These sections will uncover the way transplants have had the effect of limiting the judicial role to a different extent in each legal system, with England and Wales experiencing this phenomenon in its most acute form. Section VI will describe reforms in criminal justice in the three legal systems, showing that some of the same trends of transplants leading to disintegration of the judicial role can be found there. Section VII will provide insights into transplants that rise from the comparative analysis. It will specifically address the tension between efficiency and justice and the way it unfolds in each legal system when incorporating transplants. Section VIII will capture the comparative narratives as they emerge from the previous sections and the journey of ADR and judicial reforms in the different legal cultures. The possible implications of this study on the future of the judicial role will also be explored.

II. THE VANISHING TRIAL PHENOMENON

A. *Transition to the Settlement Judge in the U.S.*

The view of the judicial function as the deciding of cases according to their legal merit has long come under intensive scrutiny, with legal realism making its debut in the 19th century in Europe and the U.S.[6] In the 1970s, the ADR movement was offering an alternative view of justice, emphasizing the need for broader, consensual resolutions to conflict. At around the same time, criticism of the judicial role peaked with the development of the Critical Legal Studies movement, which viewed adjudication as inextricably tied with politics and underlying biases.[7] At the same time, the U.S. legal system was searching for ways to stem high caseloads. Thus critical, and alternative views of the judicial process merged with efficiency concerns to deflect cases from adjudication.

Some scholars have proposed that the "litigation explosion" of the 1970s in fact was not an explosion at all,[8] and that one had to look elsewhere to explain the falling rate of adjudication—perhaps to the judges themselves,

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[6] G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); Heikki Pihlajamaki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMPAR. L. 469 (2004).

[7] For background on the Critical Legal Studies ("CLS") movement, which emerged during the 1970s, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

[8] Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

who had lost faith in their own profession.[9] As one judge put it, "We should at least consider the idea that judges, told often enough that their decisionmaking is crucially informed by their politics, will begin to believe what they hear and to respond accordingly."[10] The decades-long criticism may have in itself been enough to persuade judges that settlement was the better outcome, to be promoted and sought in the courtroom.[11]

By the time the "vanishing trial"[12] phenomenon was observed and commented upon, the rate of trial in the U.S. was 1.8% of filed cases.[13] In his 2004 landmark article, Marc Galanter documented a general decline of adjudicated cases from the early 20th century, and a more precipitous decline in the 1980s and 90s. In 2019, the trial rate was below 1%.[14] Settlement is the "modal civil outcome,"[15] and the pretrial has become the main court setting for the discussion of cases.[16] The pretrial, which began as a forum to prepare cases for trial and clarify the main issues, became with time a forum for judicial settlement practices, a role formally introduced into legislation in 1983

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[9] Marc Galanter, *A World Without Trials*, J. DISP. RESOL. 7, 10, 16–17 (2006) (Galanter notes, "One such factor is the ascendance of a judicial ideology that commends intensive judicial case management and active promotion of settlements, which are defined as a superior result. The primary role of courts, in this emerging view, is less enunciating and enforcing public norms and more facilitating the resolution of disputes. Elements of this perspective had been around for decades, but in the 1970s it was embraced by administrators in the federal judiciary and soon became the dominant view." The primary force behind this change of vision, in his opinion, consists of corporate and government repeat players that seek to evade accountability); Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 559 (2017).

[10] Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 855 (1991).

[11] Marc Galanter, *The Vanishing Trial*, 10 DISP. RESOL. MAG. 3 (2004).

[12] *Id.*

[13] *Id.*

[14] *Table C-4—U.S. District Courts—Civil Judicial Business,* UNITED STATES COURTS, https://www.uscourts.gov/statistics/table/c-4/judicial-business/2019/09/30 (Sept. 30, 2019).

[15] T. Eisenberg & C. Lanvers, *What is the Settlement Rate and Why Should We Care*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009).

[16] Galanter, *supra* note 11; Edson R. Sunderland, *Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937).

after decades of practice.[17]

The tactics pretrial judges (i.e., federal judges, state judges and magistrates) use to encourage parties to reach settlement are varied, from leveraging procedure and time schedule to negotiating the case themselves.[18] Judges may meet with the parties separately in their chambers (with the agreement of the parties), taking offers from one party to another until reaching an agreed upon offer.[19] One study, based on interviews and surveys of lawyers and judges, documented more than 70 judicial settlement practices.[20]

Settlement is the modal criminal outcome as well. In criminal justice, plea bargaining constitutes the most common form of case disposition. In 2018, only 2% of criminal cases resolved in federal court went to trial, and the

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[17] Cheryl L. Roberto, *Limits of Judicial Authority in Pretrial Settlement under Rule 16 of the Federal Rules of Civil Procedure*, 2 OHIO ST. J. DISP. RESOL. 311 (1987). In 1983, the United States Supreme Court formalized judicial intervention in settlement, approving an amendment to Rule 16 of the Federal Rules of Civil Procedure to specifically include the discussion of settlement possibilities during pretrial conferences. Rule 16 lists settlement of the case as a purpose for calling a conference: "In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as . . . (5) facilitating the settlement of case." Fed. R. Civ. P. 16(a). Rule 16(c) provides: "The participants at any conferences under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." Fed. R. Civ. P. 16(c).

[18] For a description of judicial settlement practices and the questions they raise, see Ellen E. Deason, *Beyond Managerial Judges: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017); William P. Lynch, *Why Settle for Less: Improving Settlement Conferences in Federal Court*, 94 WASH. L. Rev. 1233 (2019); Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. SOC'Y 1 (1985); Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016).

[19] The U.S. Code of Judicial Conduct allows judges to engage in ex parte communications with parties when discussing settlement, with the consent of the parties. ADMIN. OFF. OF THE COURTS, CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES CANON 3(A)(4) (2014).

[20] James A. Wall, Dale E. Rude & Lawrence F. Schiller, *Judicial Participation in Settlement*, 1984 MO. J. DISP. RESOL. 25 (1984); *see also* John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. DISP. RESOL. 569 (2006).

percentages for most state courts were comparable.[21] The merits of plea bargaining lie in clearing high caseloads, though some studies have found that actual caseloads do not impact the number of pleas. Reducing even a small fraction of pleas, it is believed, would "crash the system."[22]

State judges can actively partake in the plea bargaining process between the prosecutor and defendant, making the pretrial a central forum for disposing of criminal cases, other than in a handful of states that prohibit such judicial practice; federal judges are prohibited from doing so, though some attempts have been made to change legislation in this regard.[23] In problem solving courts, which are relevant usually for minor offenses, the judge acts as a team manager with a host of specialists (e.g. social workers). This rare alternative, which is part of the plea system as it can be accessed only by defendants who have pled guilty, focuses on rehabilitating the defendant. It is difficult to speak of broad judicial conflict resolution in this framework, as the victim, if there is one, is often not a part of the process.

Due to the emphasis on settlement in both civil and criminal justice, the judicial role has become more managerial, overseeing the case if needed until the parties decide on the outcome themselves, usually in the pre-trial

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[21] For federal court figures, see UNITED STATES COURTS, U.S. DISTRICT COURTS: JUDICIAL BUSINESS (2018). For state court figures, see NICOLE WATERS ET AL., COURT STATISTICS PROJECT DATA VIEWER (2019). Compare an earlier report, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING RESEARCH SUMMARY (2011), where a plea bargain rate of 90-95% was estimated. *See also* Galanter, *supra* note 9, at 10 ("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 pattern of attrition resembles those in the federal courts, where criminal trials fell from 15.2 percent to 4.7 percent of dispositions in those years.").

[22] RAM SUBRAMANIAN ET AL., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING, VERA INSTITUTE OF JUSTICE, 35–38 (2020), *https://www. vera. org/downloads/publications/in-the-shadows-pleabargaining.pdf.*

[23] Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 331–334 (2016). Fed. R. Crim. P. 17.1 (The criminal pretrial was set in Article 17.1 of the U.S. Federal Rules of Criminal Procedure in the 1960s. "On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.").

phase.[24] Though not all pretrial judges subscribe to the role of the settlement or managerial judge, this mainstream phenomenon has been gaining ground and intensity in the past decades, raising common dilemmas related to undue pressure in promoting settlement[25] and the appropriateness of the pretrial judge continuing to preside over the case in trial (where this is permitted). In criminal cases, the pretrial judge will not usually preside on the case, but this can happen in small localities.[26] The active stance of the pretrial judge has been reminiscent to some of the inquisitorial judge in continental legal systems, and scholars have interpreted it as a divergence from adversarialism.[27] The pros and cons of the settlement judge have been widely debated.[28]

As the judicial role has moved from adjudication to negotiation, ADR has moved in the same direction. ADR in some common law countries has generally gone through a similar process of fall from ideals to a bargaining reality. Much like the court system that has frequently adopted it, ADR (through institutionalization and cooptation) often places efficiency concerns above its core values, such as face-to-face dialogue between the parties, which,

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[24] Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982); King, *supra* note 23; *Cf.* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059 (1976) (studying judicial involvement in settlement decades ago and finding that open involvement in settlement was not common); *see also* John Paul Ryan & James J. Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479 (1979).

[25] Cratsley, *supra* note 20; Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, ARIZ. ST. L.J. 1–38 (1994); King, *supra* note 23.

[26] King & Wright, *supra* note 23.

[27] King & Wright, *supra* note 23; Resnik, *supra* note 24. Yet, traditionally, inquisitorial judges actively manage cases to reach the truth rather than to lead the parties to settle. By clarifying the issues to facilitate settlement, judges in (traditionally adversarial) common law systems may do the same.

[28] *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); *See generally* Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U. L. REV. 145 (2011) (explaining and analyzing the rise of alternative dispute resolution in Australian courts); *See also* Cratsley, *supra* note 20; Floyd, *supra* note 25; Resnik, *supra* note 24.

with the popularity of caucusing, is quite rare.[29]

Thus, neither the positivist vision of the judge meting out justice nor the idyllic vision of mediation creating meaningful dialogue and agreement has materialized. Instead, the most prevalent form of case disposition is often a bargain-like process ending in settlement. This is taken to the most extreme with the rise of "settlement mills"[30]—legal practices that deal with claims of their clients against insurance companies without involvement of courts on a massive scale, often with no involvement of the clients other than the signing of the settlement agreement.[31]

B. *The Vanishing Trial in Common Law and Civil Law Systems*

The vanishing trial is apparent in many common law systems.[32] In the United States under 1% of civil cases follow through to a verdict;[33] in England only 3% of civil cases are decided by trial (due to pre-filing requirements and other disincentives to litigation that can prevent the filing of cases, the

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[29] Patrick G. Coy & Timothy Hedeen, *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 SOC. Q. 405, 405 (2005) (noting that "community mediation has become increasingly institutionalized and has undergone various degrees of co-optation in its evolving relationship with the court system."); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 136–37 (2004); Tamara Relis, *Consequences of Power,* 12 HARV. NEGOT. L. REV. 445 (2007) (noting that in malpractice mediation, the presence of the physician defendant is the exception rather than the rule); William R. Wood and Masahiro Suzuki. *Four Challenges in the Future of Restorative Justice*, 11 VICTIMS & OFFENDERS 149, 154–55 (2016) ("the future of restorative justice as we see it depends significantly on whether a focus on interactions between parties who have caused harm and those who have been harmed remain central to such a definition...Perhaps the most frequently cited problem is the risk of restorative justice goals and 'best practice' being co-opted for other institutional or system goals and outcomes.")." This is not to say that deeper forms of mediation do not exist at all, but rather they are not the common form. For different, deeper experiences, see TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS (Joseph P. Folger et al. eds., 2010).

[30] Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).

[31] Floyd, *supra* note 25.

[32] Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective,* 1 J EMPIRICAL LEGAL STUD. 735 (2004); Galanter, *supra* note 9 (mentioning examples of common law countries); Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURRENT LEGAL PROBS. 84, 87 (J. Holder, et al. eds., 2004).

[33] This is true for federal and state cases, see *supra* note 14.

percentage of disputes ending in trial in England is actually smaller).[34] The large majority of cases are either abandoned or negotiated (specific figures for our studies in the three jurisdictions follow). In Israel, whose legal system has strong common law origins, as it was modeled mainly on English law and later influenced by U.S. law (though it is considered mixed due to additional influences),[35] 5–10% of cases are decided by trial.[36]

Civil law judges, on the other hand, commonly decide cases on their merits, as settlement is not as embedded in the legal culture as in common law jurisdictions.[37] Judges in civil law countries have been encouraged through relatively recent reforms in civil justice to encourage parties to settle and refer them to mediation when appropriate. Whether this practice gathers momentum and turns into a full-fledged vanishing trial phenomenon remains to be seen.

Despite the above distinction between common law and civil law judges, much borrowing occurs between legal systems, as has been widely commented upon in comparative literature.[38] Today systems are mixed. The common law judge increasingly can make decisions on production of evidence, interrogate witnesses, and broaden discovery so that the adversarial nature of proceedings is modified, and the facts are more easily discerned.[39] In continental Europe, various adversarial transplants as well as the introduction of abbreviated trials, have modified the inquisitorial nature of the judicial role, and shortened it significantly.[40]

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[34] *Statistics at Ministry of Justice*, U.K. MINISTRY OF JUST., https://www.gov.uk/government/organisations/ministry-of-justice/about/statistics (last visited June 1, 2020).

[35] Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324 (1975).

[36] As found in the JCR–ERC project led by Prof. Michal Alberstein at Bar–Ilan University (on file with authors); *see also* Ayelet Sela & Limor Gabay-Egozi, *Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice*, 47 J. LAW SOC. 468 (2020) (using national statistics).

[37] *See* Pablo Cortés, *A Comparative Review of Offers to Settle—Would an Emerging Settlement Culture Pave the Way for Their Adoption in Continental Europe?*, 32 CIV. JUST. Q. 42 (2012) (stating that the greater cost efficiency of continental law systems translates into a less pressing need to settle. Common law systems, in which litigation is usually more costly, incentivize litigants to avoid trial due to the large expenses involved in trial.).

[38] Watson, *supra* note 3; Langer, *supra* note 3; Riccardo Montana, *Procedural Tradition in the Italian Criminal Justice System: The Semi-adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles*, 20 INT'L. J. EVIDENCE & PROOF 289 (2016).

[39] Resnik, *supra* note 24.

[40] Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, WASH. U. GLOB. STUD. L. REV. 4 (2005).

The following sections will show three different implementations of settlement-related transplants. Though the three legal systems transplanted the same ideas, implementation varies greatly, and in each, the judicial role is positioned differently to accommodate a settlement culture. In Italy, where settlement has begun to make its mark only in the recent decade or so, the judicial role is still central. In Israel, settlement reforms have resulted in an emphasis on the pretrial stage, resulting in a narrow role for judges. In England and Wales, the judicial role has become marginal in dealing with disputes, as cases are prevented from reaching court through a variety of means. Whether the judicial role will gradually disintegrate in the three jurisdictions is a question that is probed in Sections VI and VII.

III. ITALY: DAWN OF A JUDICIAL SETTLEMENT CULTURE

A. *Lightening the Load*

The preferred outcome for cases in Italy has until recently been viewed as a judicial verdict.[41] This is changing with reforms introduced mainly since 2010 to reduce the huge backlog of cases in Italy.[42] In 2009, Italy had nearly six million civil pending cases.[43] The legal system was slow and every year the state had to pay millions of euros to citizens as compensation for the violation of L. 89/2001 (so called "Legge Pinto") that provides for a reasonable duration of trial. Italy was condemned several times by the

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[41] Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT'L & COMP. L. REV. 213, 280, 230 (2010) (noting that "settlement procedure still remains a 'dead' instrument that is rarely used by the parties. . . . Both the lack of a settlement culture and the lack of any real duty of the judge to try to settle the case between the parties, at the beginning or throughout the proceedings, make the Italian proceedings inefficient."); *see also* Cortés, *supra* note 37, at 59 (stating that most civil law countries have not incorporated settlement into court procedures and citing lower litigation costs on the continent as an impetus for litigation).

[42] Elisabetta Silvestri, *ADR Italian Style: Panacea or Anathema?, in* CIVIL JUSTICE BETWEEN EFFICIENCY AND QUALITY: FROM IUS COMMUNE TO THE CEPEJ, 249, 250 (C.H. van Rhee & A. Uzelac eds., 2008) ("In a country where political parties disagree virtually on everything, there was an extraordinary convergence on the usefulness of ADR mechanisms to relieve the courts' caseloads. With a view to reaching this goal, the focus of the political debate centered on how to develop effective out-of-court ADR procedures and encourage their use. Not much thought was really given to the advantages or to the disadvantages of ADR methods; their allure as a cheap and relatively easy way out of the crisis affecting adjudication was too tempting.").

[43] Jacqueline M. Nolan-Haley, *Is Europe Headed down the Primrose Path with Mandatory Mediation,* 37 J. INT'L L. COM. REG 981, 983 (2011); Paola Lucarelli, *Il Paradosso dell'Obbligatorietà del Tentativo fra Limiti e Virtù della Scelta Normativa, in* MEDIAZIONE DEI CONFLITTI. UNA SCELTA CONDIVISA (Paola Lucarelli, ed., 2019).

European Court of Justice for violation of the principles of due process due to the length of trials.[44]

The backlog and external pressure led to the introduction of ADR-based reforms. Before describing these changes, a little background about the ADR movement in Europe is needed. ADR gained a foothold in Europe in the late 1980s, around a decade after the 1976 Pound Conference promulgating ADR in the United States, and close in time to the spread of ADR to Australia, Canada, and New Zealand.[45] Following a long line of decisions encouraging mediation to deal with backlog and simplify transnational disputes, the EU published a Mediation Directive in 2008[46] (The goals of EU directives are binding, yet the means of realizing them are left to the states.).[47]

Going further than the EU Mediation Directive, in the effort to curb its backlog of cases, Italy legislated a Mediation Directive in 2010, *mandating* mediation for certain types of conflict before filing a case in court. Due to public uproar, and consternation on the part of Italy's Bar Association, the directive was challenged in the Court of Cassations (Italy's High Court) and consequently toned down.[48] A revised 2013 Mediation Directive narrowed the types of cases for which mediation was mandatory (around 10% of civil cases), declared that only one introductory meeting was mandatory, ensured that lawyers must be present during the mediation attempt, and shortened the time limit on the mediation attempt to three months from four.

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[44] *See, e.g.*, Apicella v. Italy, 64890 Eur. Ct. H.R. 1 (2006).

[45] Nadja Marie Alexander, International and Comparative Mediation: Legal Perspectives 42 (2009).

[46] Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 1 2, 2008 O.J. (L 136). *See* Nolan-Haley, *supra* note 43, at 982–83 ("Over the last two decades, the European Union (EU) has intentionally promoted mediation and other forms of ADR to advance access to justice goals, and it has done so with a high degree of intensity. The European Union has funded mediation and ADR projects in both commercial and public justice areas; issued several consultation papers, ADR directives, and resolutions; conducted public consultations on the use of ADR and online dispute resolution (ODR); and promulgated a code of conduct for mediators.").

[47] The Treaty Establishing the European Community Part Five, Title I, Chapter 2, which authorizes the issuance of directives, states at Article 249 that "[a] Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Nolan-Haley, *supra* note 43, at 991–92 ("Directives are one of the most common types of legislative acts in the European Union. They are issued, in part, to harmonize the entrance of new Member States into the Union.").

[48] Giovanni Matteucci, *Mandatory Mediation, the Italian Experience*, REVISTA ELETRÔNICA DE DIREITO PROCESSUAL 16, 189, 206 (2015) (stating: "Italian judges . . . considered [and still consider] mediation as the 'Child of a Lesser God.'").

Reforms pertaining to judicial function were introduced through the Mediation Directive and changes to the Civil Procedure Code ("CPC"). Judges, who adjudicated the large majority of cases (in contrast to their counterparts in common law systems), were given specific settlement-promoting authorities. They could demand that parties, rather than just their legal representatives, appear for a *conciliation hearing* (article 183 *bis* CPC)—civil hearings in the Florence first-instance court were usually attended by lawyers, without the parties—during which the judge could encourage conciliation between the parties.[49] At any point during legal proceedings, until the end of the evidentiary phase, judges could offer a *conciliation proposal* (which the sides could reject, as stated in article 183 CPC). In addition, they could demand that the parties attempt mediation, issuing a *mediation order* according to the Mediation Directive or send them to a *court-appointed technical expert*, who, in addition to having the authority to give an expert opinion on an issue arising in the case could also conciliate between the parties (article 696 CPC).

While these highly specific authorities differ from the usually expansive authority to settle cases given to U.S. judges throughout their long history of settling cases, as set out in the general settlement authority given to judges in Rule 16 and practiced even earlier,[50] they represent a departure from the generally accepted adjudicative role of judges in Italy. Judges in Italy had the authority to conciliate cases beforehand, yet it was rarely used; early judicial assessment of the case prior to these new articles was grounds for recusal, and thus the revised CPC specifically states that judges will not be recused for such practice.[51] The specificity of the judicial authorities provided in the reform reflect a serious effort by legislators to change the judicial culture. Yet the question remained—would judges actually implement these changes that were placed at their discretion?

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[49] *See Explanation of Art. 183 CPC*, BROCARDI.IT (Dec. 15, 2021), https://www.brocardi.it/codice-di-procedura-civile/libro-secondo/titolo-i/capo-ii/sezione-ii/art183.html?q=183+cpc&area=codici (For decades, legislation formally required the judge to try to conciliate the parties, yet this legislation was an abject failure and was not implemented.).

[50] For background and wording of Rule 16, see Roberto, *supra* note 17.

[51] *Article 185*, ITALIAN CODE OF CIVIL PROCEDURE (Apr. 29, 2022) https://www.brocardi.it/codice-di-procedura-civile/libro-secondo/titolo-i/capo-ii/sezione-ii/art185bis.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_succ_top ("The conciliation proposal cannot constitute grounds for recusal or abstention of the judge.").

B. *From Black-Letter Transplant to Practice*

Setting out to the Florence first-instance court (*tribunale*) to see how these changes were implemented if at all, our team performed 55 court observations, eight interviews with judges, and a statistical analysis of court dockets. The Florence Court is situated in a main metropolitan area and was one of a few courts in Italy[52] that introduced a program to implement the reforms in regard to mediation. The court collaborated with Florence University to facilitate the diagnosis of cases for court-referred mediation and this model is currently being replicated in other courts as well. The Florence court thus provides a window to study ways in which Italian judges may combine their traditional adjudicative role with the new settlement-promoting authorities that seemed to scholars to be foreign to the legal culture.[53]

The research at the Florence Court was both qualitative and quantitative. Courtroom observations and interviews of judges were conducted during October–December 2018. We received special permission to conduct trial observations, and thus observed 55 civil trials. (Trials are conducted in judges' chambers and are not open to the public.) We also conducted interviews with eight (out of 85) judges. The research did not include the "justices of the peace" (parallel to small claims courts). The quantitative analysis of cases was conducted by examining a random sample of case documents from 2013–2016.

We found that judges issued mediation "orders" primarily when the legal representatives gave their consent unless the parties had not fulfilled their obligation by law to first attempt mediation in certain types of cases. The relatively informal setting (hearings in civil matters are mostly private, with the judge sitting behind a desk in her office with the two lawyers sitting on the other side of the desk) and usually collegial relations between judges and lawyers (most often parties were not present) fit well with this stance. For instance, in a court observation conducted in the framework of this research, a case regarding corporate responsibility, the lawyers of four parties sought to conciliate with the help of a judicial conciliation proposal. The judge stated his preference for mediation and said that the fact that another proceeding between the parties was taking place in another court strengthened his position. However, he deferred his decision to consider the lawyers' requests, explaining to the observer after they had exited that the lawyers' willingness to mediate was important and decisive for the mediation's success.

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[52] Such as courts in Milan, Rome, and Bari. *See* Paola Lucarelli et al., *Fitting the Forum to the Fuss While Seeking the Truth*, 36 OHIO ST. J. DISP. RESOL. 213, 246 (2020).

[53] *See supra* Section III.A.

In another observed case, which involved a former romantic relationship that had also been a working relationship, the judge deferred to the lawyers' opinion, while expressing her opinion regarding mediation. The claimant was suing for payment for her work while the defendant argued that they had not signed a proper contract and thus was willing to grant only half of the sum. All three present (the judge and lawyers) were women.

> **Judge**: Why have you not conciliated this case yet? I have given you all the time.... It is impossible that you cannot find an agreement here, is it perhaps a matter of your obstinacy attorneys?
> [The lawyers seemed annoyed by the judge's words—this indeed deviated from the usually observed collegial stance. They moved forward on their chairs and started speaking at the same time.]
> **Claimant's lawyer**: It is not easy to communicate with the other side your honor... however, we still believe that our legal position is strong, thus we would appreciate more cooperation from the defendant.
> **Defendant's lawyer**: It is not the time to argue about our legal positions, colleague, the judge has asked us to find an agreement, but your client does not want to renounce to any of her claims. . . .
> [They started arguing between themselves about legal questions. After listening for a few minutes, the judge interrupted the conversation.]
> **Judge**: Stop, attorneys, please. I do not want to listen to these questions right now, as I have reserved them for the next stage of the trial. Instead, I would like to know if you sincerely believe that the sides might reach an agreement. Is there anything I can do to help you? Because I thought that, perhaps, a mediation order would be appropriate in this case.... It would allow the sides to communicate again. What do you say in this regard?
> **Defendant's lawyer**: Your honor, I would suggest continuing with the negotiation... there is a strong conflict between the sides and I am afraid that productive communication between them will take much time.
> **Claimant's lawyer**: On behalf of my client, I say that I would prefer to end these months of negotiation with a satisfying agreement, rather than start a new procedure now. Thus, my request is to fix another hearing in two months. I am sure that our clients will be more willing to cooperate.
> **Defendant's lawyer**: I support the claimant attorney's request, your honor.
> [The judge seems weary. While she looks for a time to fix another

hearing, she sighs noisily.]
Judge: I will give you a very last deferment and, please, do not disappoint me.

The judicial diagnosis of cases for mediation, as in the example presented above, stemmed in large part from a collaboration between the Florence first instance court and the Florence University, whereby trained interns analyzed cases for suitability for mediation and provided recommendations to judges along certain parameters.[54] Judges peruse the files along with the interns' recommendation and choose how to manage the case. By law, judges must specify their reasoning for referring a case to mediation in a mediation order. One judge told us: "Every judge must edit the mediation order written by the researcher.... We edit it according to what emerges from the hearing."[55] By showing the benefits of mediation in certain cases, this system can create a positive view of mediation when offered to litigants.

This practice differs greatly from the practice of judges in some countries where the incentives to settle are great.[56] Judges may pressure the parties to attempt mediation by emphasizing the *negative aspects* of legal proceedings (expressing legal aversion), rather than the positive aspects of mediation, thus proverbially cutting off the [judicial] branch on which they sit. During the court observations in the Florence Court, however, judges tended to point out to the parties (usually the lawyers) why the cases seemed appropriate for mediation when offering it to them rather than emphasizing the negative aspects of the court system. As one interviewed judge told us: "I always make clear to the parties who are present at the hearing that I am about to order the mediation and that I deem it a useful instrument and the reasons for the mediation."[57] One judge expressed a concern that otherwise the mediation order could be seen as a pretext to clear the table, and indeed, there are probably instances when this occurs.[58] Our observations found that judges in Florence gave specific, grounded reasons for preferring mediation in a certain case and did not coerce the parties to use mediation unless the parties did not conduct mediation in the areas in which it is mandatory.

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[54] Lucarelli et al., *supra* note 52.

[55] Interview with Judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (Oct. 16, 2018) (on file with authors).

[56] *See infra* Section IV.

[57] Interview with Judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (June 14, 2018) (on file with authors).

[58] Commission Giustizia II, Resconto Stenografico (Mar. 20, 2021) (discussing Italy governmental commission protocol, in which one of the participants stated that this was the experience of some of the parties reaching court).

In the analysis of court documents, we found that, despite initial skepticism regarding judges' cooperation in the implementation of reforms,[59] judges were making use of the tools and encouraging sides to settle in 39.3% of the cases reaching them.[60] Cases in which judges used settlement tools were more likely to settle. However, our court observations and interviews with judges uncovered that *even while using these tools, judicial conduct did not deviate much from its traditional nature*. For instance, in line with the inquisitorial origins of the Italian legal system, which place great emphasis on judicial truth-seeking, judges would not issue a conciliation proposal without first determining the liability of each party. Usually this occurred after receiving an expert opinion; in other cases, liability was assumed by law (strict liability as determined in certain cases).

The conciliation hearing, to which the judge orders the parties to be present for a conciliation attempt, was hardly used. Actually conciliating a case would require a departure from the diagnosing or adjudicating role—i.e., the sharp separation between the judicial role and mediation. The one case that we observed and others that were reported in an interview, demonstrated that judges may have trouble using this tool, even reverting to legal aversion. In the observed case, one judge exerted much pressure on a party, emphasizing costs and time of litigation, until the party agreed to settle.

The judge might also refer the side to a court expert with conciliation authority when technical issues were unclear. This option was usually used as a warning to nudge the lawyers to reach an agreement or attempt mediation and was actually implemented in 3.5% of the cases.[61]

In sum, while a settlement culture has made inroads in a primarily adjudicative culture, the separation between the adjudicative role and mediation was for the most part maintained in the Florence first-instance court. Judicial conciliation proposals took place for the most part after liability was discerned and were very close to the practice of adjudication or prediction (until recently prediction was considered as grounds for recusal).[62] When a mediation attempt seemed appropriate, judges would not try to mediate themselves but rather recommended referral to a mediation agency, and if they received consent, issued a mediation order. The convening of a conciliation meeting—in which the judge would have a conciliating role—was a rare occurrence. Thus, for the most part, the judicial role could be characterized as diagnosing the most appropriate path of the case and providing a

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[59] For a review of the social and professional reaction to the reforms, see Matteucci, *supra* note 48.

[60] Lucarelli et al., *supra* note 52, at 246.

[61] *Id.*

[62] Grossi, *supra* note 41.

recommendation upon this diagnosis[63] while seeking the truth (i.e., legal liability).

Is this the balance that has been struck or just the beginning of a process? Recent legislation has allowed mediation training for judges and emphasized the importance of dialogue in mediation, perhaps taking Italy a step further in promoting a mediation culture. In addition, the case types for which mediation is mandatory have been expanded to include real estate and taxation benefits for parties who mediate their cases have been increased.[64] It seems that Italy may be going through piecemeal change to incorporate mediation more strongly into the judicial role and the legal system in general.

IV. ISRAEL: HIGH NOON OF JUDICIAL SETTLEMENT PRACTICES

A. *Efficiency-Based Reforms*

While in Florence we found a separation between the role of the judge and the role of the mediator—with judges applying expertise in diagnosing cases to siphon cases to mediation, a conciliation proposal, a conciliation hearing or a court expert—in the Tel Aviv County ("Ha'Shalom") Court we found that the pretrial judge often takes an active role to settle cases. The transplanted concepts in Israel were not a reaction to extreme backlog as in Italy or a financial crisis as in England and Wales.[65] Rather, they were part of a general pursuit of efficiency, in tandem with that of the U.S. legal system, the prestige of which made it the prime exporter of legal constructs worldwide in the 20th century.[66]

The prime forum for judicial settlement in Israel, as in the U.S., is the pretrial (a stage that does not exist in Italy). Pretrial, as a unique stage between the filing of a claim and trial, has existed in Israel formally since 1963 and has evolved and been modeled along the lines of the U.S. pretrial.[67] The logic behind this stage is that the judge can prepare the case effectively for trial so

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[63] *See* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 50 (1994).

[64] *See* Gianfranco Gilardi, *Introduction. The Civil Justice Reform: From the Legislative Decree 1662/S/XVIII to the Delegated Law of 26 November 2021*, 206, GAZETTTA UFFICIALE DELLA REPUBLICA ITALIANA (Nov. 29, 2021), *https://www.questionegiustizia.it/rivista/articolo/introduzione-dal-ddl-1662-s-xviii-alla-legge-26-novembre-2021-n-206.*

[65] *See infra* Section V.

[66] Langer, *supra* note 3; Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOB. LEGAL STUD. 383 (2003).

[67] *E.g.*, ReqLA 288/89 Cohen v. Oshiyot Insurance Co. Ltd. (43) 434 (1989) (Isr.) (describing Supreme Court Justice Barak referencing several U.S. academic sources to describe the nature of pretrial).

that it runs smoothly and efficiently by ensuring that all documents have been submitted, clarifying the contended issues that will be explored during trial, and checking whether the claim should be disqualified by law. As in the U.S., the large majority of cases reaching pretrial settle at this stage.[68]

The formal basis for judicial settlement activity in the civil sphere in Israel appears in regulation introduced in 1996,[69] specifying that one of the possible goals of pretrial is to probe the possibility of settlement between the parties. The model adopted was influenced by the American legal system, which gave the judge settlement-making authority during pretrial, an authority that was used with growing legitimacy and prevalence since the 1970s and was formally encouraged in 1983 with the modification of Federal Rule 16.[70] Similarly, during the 1990s, following a pointed debate that included legal scholars, lawyers, and judges, the amendments to Israel's Rules of Civil Procedure (articles 140–145) established the broad discretion of judges during pretrial. The Courts Act was amended to authorize the judge to promote settlement; the judge could refer parties to arbitration or mediation (articles

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[68] ERC–JCR findings (on file with authors). *See also* Sela & Gabay-Egozi, *supra* note 36.

[69] *Civil Procedure Regulations, 579-2018*, ISRAELI RULES OF CIVIL PROCEDURE (June 7, 2022) https://www.nevo.co.il/law_html/law00/157751.htm (amendment of article 140).

[70] *See* Galanter, *supra* note 18, at 2 ("The adoption of the Federal Rules of Civil Procedure in 1938 made the pre-trial conference a feature of litigation in the federal courts of the United States. Some proponents viewed the new reformed procedure as a vehicle for judicial arrangement of settlements. The prevailing view among leading spokesmen for the federal judiciary was insistence that the function of the pre-trial conference was to prepare cases for trial; settlement was seen as a desirable 'by-product' of the pre-trial conference. By the 1960s the preparation for trial rhetoric had faded away and there was heightened emphasis on judicial promotion of settlements. By the 1970s whatever reticence remained among federal judges was barely perceptible. There was a forthright and ardent embrace of active participation in settlement negotiations. This was based on a warm endorsement of settlement as preferable to adjudication not only on the ground of administrative convenience but because it produced superior results."). The original Rule 16 contained no mention of settlement. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980–81 (1989) (summarizing the 1938 committee's deliberations over Rule 16). *See* Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO St. L.J. 163, 166–67(1956) (warning of potential adverse effects on pretrial of judicial involvement that forced settlements); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 163–65 (1998) (on the debate over Rule 16 and the assertion that settlement was specifically excluded from Rule 16). In 1983, with a view towards lightening the caseload, settlement was explicitly added as a possible pretrial conference topic. *See* Robert G. Bone, *To Encourage Settlement: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561 (2008).

79b, 79c), and—in a unique move on the part of the Israeli legislator—decide the case during pretrial with the consent of the parties (without the evidentiary phase; article 79a).[71] Additionally, the obligation to create a full court transcript was waived for the pretrial stage; judges are permitted to conduct off-the-record discussions with the consent of the parties and thus to include in the transcript only the main issues discussed during the hearing.[72]

Judges' efficiency in disposing of cases is tracked in an electronic system implemented by the Court Administration (called *Net Hamishpat*), thus providing an incentive for judges to dispose of cases at the earliest stage possible. Reform to the Rules of Civil Procedure, enacted on January 2021, has kept the active nature of the judge during pretrial but has sought to shorten this stage, which in the past could spread over numerous hearings (up to seven in our sample) thus upending the aim of this stage to make proceedings more efficient.[73]

It is interesting to note that while Israel has adopted many aspects of the American pretrial, pretrial judicial case management tools are sometimes described as inquisitorial in both America[74] and Israel, as they entail an active judicial stance. As described by the Israeli Supreme Court, "The pretrial judge must take the reins...the pretrial phase is inquisitorial, in contrast to the other two stages [filing and trial], which are adversarial."[75]

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[71] Israeli Courts Law, § 79A (1984) enables litigants to authorize the judge to rule on a matter partly or fully "by way of compromise." While the law provides no definition for this form of ruling, the "law in action" appears to be that this authority is used to provide a final outcome without a reasoned decision, to render a judicial decision that does not necessarily result from direct application of the law, or to create a judicially perceived fair settlement between the parties. In one observation, the judge referred to a ruling according to § 79A in contractual terms, as "a tri-party agreement between the defendant, the plaintiff and the court." Nearly all judges emphasize that a judgment by way of compromise is final, does not pronounce the reasoning behind the decision, and can rarely be appealed. For a discussion of this section and a parallel use of judicial arbitration in the U.S., see Yuval Sinai & Michal Alberstein, *Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 739 (2014).

[72] Israeli Court Order, Rule 68a.

[73] *Civil Procedure Regulations, 579-2018*, *supra* note 69 (Israeli Rules of Civil Procedure came into effect in 2021).

[74] *See also* Resnik, *supra* note 24 (criticizing the inquisitorial nature of the pretrial. It is important to make a distinction, however, of the goal of active judicial management, which is often settlement, in contrast to the traditional goal of inquisitorial judicial intervention— uncovering the truth.).

[75] Justice Amit in CA 4810/15 Interior Ministry vs. ICM Investments (2015) (Isr.) (permission needed to see the full decision).

In 2001, fast-track proceedings—modeled on fast-track proceedings in England and Wales following the Woolf Report[76]—were introduced for claims up to a certain sum (at first the sum was set for 50,000 NIS yet was updated from time to time and today stands at 75,000 NIS). Rigid time limits are set for filing of documents, proceedings, and the reaching of a verdict. Parties must adhere to wide discovery requirements at the filing stage, one pretrial conference is permitted, and the trial is set to end within one day using written affidavits of witnesses rather than direct examination. Judges have the discretion to change the status of cases from accelerated to regular proceedings and vice versa according to the complexity of the case.

In 2002, institutional case management was also fortified with the establishment of a Case Management Department (MANAT in Hebrew) in the Israeli Court System. This department is operated by the secretary of the court, and performs a variety of activities, among them: classification of cases, directing cases to judges according to their specialties, and directing cases to ADR processes. Today, this role has been accorded to a court secretary according to the revised Civil Procedure Regulations.

These two strategies—case management (whether judicial or institutional) and abbreviated proceedings—were introduced to, on the one hand, promote settlement, and on the other, provide accelerated adjudication.

Recently, with the reform to the Civil Procedure Regulations, a free introductory mediation meeting has been made mandatory for a greater part of the claims and the objective of civil procedure has been modified to include proportionality. This latter change hearkens to English civil procedure reform, as described in Section IV, and may signify a move from substantive justice to proportionate justice.

B. *Into the Field: The Indelible Mark of Transplants on Judicial Practice*

The settlement-promoting authorities given to judges have resulted in active judicial management of cases, and the centrality of the pretrial in disposing of cases. Our observations of pretrial hearings in the Tel-Aviv first-instance court (i.e., excluding small claims) uncovered a wide range of judicial practices to encourage settlement.

The judicial practices seemed to have much influence on the parties, especially since the judge presiding over the pretrial is the same judge who sits on the case if it continues to trial. Parties thus know that waiting out the pretrial

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[76] Ehud Brosh, *Cutting Corners or Enhancing Efficiency? Simplified Procedures and the Israeli Quest to Speed up Justice*, 8 ERASMUS L. REV. 185, 186–87 (2015). For information on the Woolf Report, see *infra* Section V.

and going to trial with a different judge is not a possibility. Moreover, parties that do not follow a judge's preference for settlement may worry that the judge may view them in a less than positive light during trial.

The observed case below, which demonstrates some judicial settlement tactics, involved a claim against a shipping company, which had not reported damage to a ship on time, and as a result the delivered produce was not marketable. The claimants had not filed their case immediately.

> **Judge**: Enough, close this case. I suggest that you show generosity and reach a compromise. From the nature of things, if this reaches trial it can go either way, and I suggest you reach an understanding between yourselves. [Turning to a claimant:] Consider this eagerly. Understand, it's in your interest to speak with them. There are many problems here and the time that has passed damages your case—it will be difficult for you.
> **Claimants' lawyer**: I'd like to discuss the case off the protocol because the distance between the sides is not great. We've come here so that your honor will help us come closer. My clients are determined not to go under half of the damages that were caused them and will not go under 130,000 under any circumstances. The other side proposed 95,000.
> **Judge**: And where does this figure come from, 95,000?
> **Defendant's lawyer**: We calculated only one type of damage.
> **Judge**: I have my own directions of thought as well. Since the other side does not even have a letter from the Health Ministry, I'm also trying to reach a sum, I was thinking of half-half which is 115,000 but [speaking to the defendant's lawyer] I'd like to help you come closer—would 110,000 work? Or 100,000? How much would your client agree to add? [the client was not in the room.]
> **Defendant's lawyer**: I was thinking together with the claimants' lawyer of going halfway.
> **Judge**: So 110,000 it is then. Let's put that in writing—perhaps that will cause your clients to leave their burrowed stances [dictates the decision in the name of the lawyers as well]. Friends—as you know very well, close this case, don't try to manage it in court.

As in the above instance and many others, judicial settlement practices as observed in our research may include directly stating an expectation for settlement, portraying the dangers of trial, pointing out the strengths or weaknesses of a case, speaking directly to the party involved, taking the hearing on—and off—the record to allow free discussion, and splitting the

difference. Judges may also ask the lawyers to assess the probability of reaching the desired sum and thus include the risk in the sum to narrow the differences between the parties. In addition, they may predict the outcome of a case. It is rare for the judge to carry out mediation in the original sense—i.e., addressing the underlying needs of the parties and creating a dialogue. Since parties to the next cases are present in the courtroom, judges' practices have a carryover effect to other disputes.[77]

In addition, judges make use of their authority to refer sides to ADR (79b and 79c of the Courts Act) and to decide cases by compromise during the pretrial phase with the consent of the parties (79a of the Courts Act).[78] The latter unique quasi-arbitrational tool—which is closest to adjudication among the tools used by judges in pretrial—is sometimes offered to the parties after the judge has probed the possibility of settlement between them using other settlement promoting tools.

ADR tools *in the courtroom* according to our observations consist mainly of narrow practices that are far removed from the ideal of mediation (which would ideally involve expressing empathy and addressing the underlying needs of the parties). They often involve a statement on the non-binary nature of conflict. For example, one judge commented to a resilient party: "We cannot accept the perception of either party that it is the only one who is hurt and has a just cause."

The judicial stance in pretrial seems to be a central factor in stemming the tide of case. The study's statistical analysis, which was conducted in the years before the 2021 enactment of the revision to the Civil Procedure Rules (stated above), uncovered that 47.9% of cases lodged in the Tel-Aviv first-instance court reached pretrial, while only 8.3% proceeded to trial, and 4% received a verdict at trial.[79]

C. *The Road Not Taken*

While the transplant of U.S. constructs has had a major effect on Israeli court proceedings and the nature of the judicial role, it has resulted in a somewhat different translation. As mentioned in Section II, U.S. judges (or magistrates) may meet with the parties separately in their chambers, and thus negotiate the case much like a mediator, taking offers from one party to another until reaching an agreed offer. This is not possible in Israel, where proceedings are public, and both parties are present at all times, along with parties to other cases waiting their turn in court. This requirement is tempered

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[77] Sela & Gabay-Egozi, *supra* note 36.

[78] Israeli Courts Law, *supra* note 71.

[79] The data and analysis are on file with the authors.

by placing parties on and off the protocol (with their agreement) to allow a freer interaction while trying to settle the case. The parties are present throughout the discussion of the case but the protocol may not include parts of the discussion on appeal. In sum, while Israel has transplanted American concepts and practices, it has done so while putting limits on judicial negotiation and keeping it in the public eye—though compromising on its inclusion in protocols.

V. ENGLAND: TWILIGHT HOUR OF TRIAL?

A. *Getting Out of Trial, Managing the Margins*

During the past three decades, the civil justice system of England and Wales has been overhauled to cut costs, transitioning to a legal system in which litigation is formally defined as a "last resort"[80] and settlement is highly incentivized. Pre-action protocols have been introduced to regulate party actions before the filing of the claim to promote settlement,[81] thus placing the focus of conflict on the pre-filing stage, and frontloading legal costs.[82] Refusing a settlement offer or offer to mediate at this stage (and at later stages) can result in heavy post-trial cost sanctions (even if the party succeeds in trial).[83] The number of filed claims has considerably declined since the

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[80] *The Practice Direction for Pre-Action Conduct and Protocols*, UK MINISTRY OF JUSTICE, Section 1.8. ("Litigation should be a last resort . . . the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings."). In England, alternatives to civil trial include arbitration, early neutral evaluation by a judge and numerous ombudsmen schemes.

[81] *Civil Procedure Rules 1998*, UK STATUTORY INSTRUMENTS, https://www.legislation.gov.uk/uksi/1998/3132/contents/made (last visited July 3, 2022). Since 1998, pre-action protocols for a wide variety of legal issues have been introduced (e.g., for debt claims, travel package claims, disease and injury claims, construction, and engineering disputes).

[82] TAMARA GORIELY, RICHARD MOORHEAD & PAMELA ABRAMS, MORE CIVIL JUSTICE? THE IMPACT OF THE WOOLF REFORMS ON PRE-ACTION BEHAVIOUR RESEARCH STUDY 43, UK JUSTICE MINISTRY REPORT (2002); JOHN PEYSNER & MARY SENEVIRATNE, THE MANAGEMENT OF CIVIL CASES: THE COURTS AND POST-WOOLF LANDSCAPE, UK DEP. FOR CONSTITUTIONAL AFFAIRS REPORT (2005).

[83] Neil Andrews, *Fundamental Principles of Civil Procedure: Order Out of Chaos, in* CIVIL LITIGATION IN A GLOBALIZING WORLD 19–38. (X.E. Kramer and C.H. Rhee eds., 2012).

introduction of these measures.[84] Of claims that are filed, 84% are undefended.[85]

Judges are expected to expedite the few cases that do reach them through active case management in conferences in the pretrial stage (cost and case management conferences), whose aim is to control the costs of litigation and define the time schedule for the case. As Simon Roberts eloquently stated, "[t]he Case Management Conference, a meeting presided over by a district judge at which defended claims are guided forwards to settlement—or exceptionally trial—has come to replace trial and judgment as the central public activity of the court,"[86] and "[t]he articulated priorities of government, and of the courts themselves, have shifted dramatically. Sponsorship of settlement is now explicitly identified as the courts' primary responsibility, with supervision of trial and the delivery of judgment becoming residual . . . ."[87] Even this activity, however, is to be conducted in writing or by phone when practicable.[88]

The duty of the court to actively manage cases to ensure effective cost allocation appears in Section 1.4 of the Civil Procedure Rules ("CPR"). The definition of active management includes: ". . . (f) helping the parties settle the whole or part of the case." Yet, as demonstrated in our fieldwork (described in the next section), despite this clause, these conferences are primarily focused on bringing down costs and setting the schedule of the case, often indirectly assisting settlement efforts; judges do not settle the case themselves (unlike U.S. or Israeli pretrial judges, and more rarely Italian judges in conciliation hearings).

Despite the substantial differences, the introduction of this stage in April 1999 may have been influenced by its extensive use by then in the U.S.—though it is interesting to note that in the case of England, as progenitor of the

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[84] PEYSNER, *supra* note 82, at 8, citing data from the Constitutional Affairs Statistical Branch (in 1998, the year before the reforms, 2,245,324 cases were filed annually; five years after the reforms 1,571,976 cases were filed); *see also* Robert Dingwall & Emilie Cloatre, *Vanishing Trials: An English Perspective*, 2006 J. DISP. RESOL. 51 (2006). In recent years, the steady decline has leveled off (or bottomed out), see Linda Mulcahy & Wendy Teeder, *Are Litigants, Trials and Precedents Vanishing After All?* 85 MOD. L. REV. 326 (2021).

[85] *Statistics at Ministry of Justice*, *supra* note 34.

[86] SIMON ROBERTS, A COURT IN THE CITY: CIVIL AND COMMERCIAL LITIGATION IN LONDON AT THE BEGINNING OF THE 21ST CENTURY 5 (2013).

[87] Simon Roberts, *'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation*, 29 OXFORD J. LEGAL STUD. 457, 458 (2009).

[88] *Part 3—Court's Case Management Powers*, JUSTICE, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.16 (Apr. 6, 2021) (Practice Direction 3.16(2)).

common law, transplants from the U.S., such as the pretrial, can be influenced by English roots.[89] Thus the term "diffusion" may provide a broader view that takes into consideration a longer timeline.[90] However, the last century, sometimes called the "American century," has yielded distinctly American constructs,[91] such as the ADR movement and its promotion by the legal system,[92] which can be analyzed as transplants in themselves.

The shift to litigation as a last resort was indeed to be made possible through an era of negotiation and ADR.[93] Mediation began to make its mark in England in the 1990s, following the establishment of the commercial mediation provider Centre for Effective Dispute Resolution (CEDR) in London and in line with the 1990 Courts and Legal Services Act, which introduced procedural changes to encourage early settlement in civil disputes.[94]

The term mediation may elicit expectations of a meaningful deliberation on the conflict at hand and a facilitated dialogue to reach an agreement. Unfortunately the mediation made available through the main mediation agencies in London seems to have gone through the familiar cascade of cooptation experienced in the U.S. with the promotion of mediation

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[89] Pretrial in the U.S. may have been influenced by the English practice of summons for directions. The pretrial as a stage to better prepare cases for trial has existed in the U.S. since the 1930s. R. E. Holland, *Pre-Trial Conferences in Canada*, 7 ADVOC. Q. 416 (1987). In England the common practice before civil trial was a summons for directions, a perfunctory stage in which the court summoned directions for trial, see Sunderland, *supra* note 16.

[90] William Twining, *Diffusion of Law: A Global Perspective*, 36 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2004).

[91] Mattei, *supra* note 66, at 390 (2003) ("By the early part of the last century, a century significantly labeled the American century, U.S. law had already received from Europe, and digested in a genuinely original way, the fundamental components of its legal structure.").

[92] Nolan-Haley, *supra* note 43; Alexander, *supra* note 45.

[93] *See* Goriely, *supra* note 82 and Practice Direction, *supra* note 80.

[94] Hazel Genn, *Civil Mediation: A Measured Approach?* 32 J. SOC, WELFARE & FAM. L. 195, 197 (2010); Mattei, *supra* note 66 (including ADR as a U.S export meant to empower global corporate governance).

by the legal system.[95] Institutionalized mediation in England is targeted toward an efficient, speedy resolution of the case—much like adjudication or any other activity of the court.[96] It is often evaluative positional bargaining[97].—i.e., mediators point out the weaknesses of each party's legal case–limited in time, and is often conducted without dialogue between the parties. Roberts describes mediators shuttling between rooms (parties were not seated together) to negotiate a compromise.[98] In addition, parties may enter mediation merely as a necessary step to avoid cost shifting.[99]

Mediation seems to have little semblance to the ideal or traditional conceptualization of mediation yet even in its truncated form it does still have benefits. According to a study on voluntary mediation in London courts:

> Overall, reaction to mediation was positive, with users and representatives displaying confidence in mediators and their neutrality. Parties valued the informality of the process, the skill of

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[95] Patrick G. Coy & Timothy Hedeen. *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 THE SOCIOLOGICAL Q. 405 (2005); Carrie Menkel Meadow, *When Should I Be in the Middle? I've Looked at Life from Both Sides Now* in Howard Gadlin and Nancy A. Welsh, eds. EVOLUTION OF A FIELD: PERSONAL HISTORIES IN CONFLICT RESOLUTION, 421, 437 (2020) ("Another concern is the growing practice, in private mediation, for more evaluative, no-joint-session, shuttle-diplomacy forms of mediation. Major litigation, commercial, employment, and divorce mediation have now become professionalized, organized, and institutionalized as well as commercialized, so that in my home town of Los Angeles, the norm is now closer to dispute management by a mediator who shuttles back and forth between the parties, 'selling' solutions or settlements, without any or much quality face-to-face time.").

[96] Sue Prince, *"Fine Words Butter No Parsnips": Can the Principle of Open Justice Survive the Introduction of an Online Court?* 38 CIV. JUST. Q. 111 (2019).

[97] Nadja Alexander, *The Mediation Meta-Model: The Realities of Mediation Practice*, 12 ADR BULLETIN 126, 126–131 (2011) (presenting a spectrum of mediation practices, with positional bargaining on the one end, interest-based negotiation in the center and dialogue-based discourse on the other side: "Interest-based negotiation and positional bargaining are both negotiation discourses and therefore outcome-oriented in nature; by contrast, the focus of dialogue is relational development and perspective sharing, rather than settlement or resolution.").

[98] Roberts, *supra* note 87; Prince, *supra* note 96.

[99] HAZEL GENN ET AL., TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE 1–215 (London: Ministry of Just. Rsch. Series ed., 2007) (stating that demand for the voluntary ADR scheme at Central London increased significantly following the case of *Dunnett v. Railtrack* in 2002, which confirmed the power of the courts to deny a successful party legal costs following an unreasonable refusal to mediate and that the rush to mediate was mitigated after the *Halsey v. Milton Keynes General NHS Trust* judgment in 2004, which offered a nuanced interpretation of "unreasonable." Since then, there have been further conflicting judicial decisions on the matter.).

> the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common features disliked were that the mediation was rushed, failure to settle, facilities, or poor skills on the part of the mediator.[100]

While an effort to evaluate which cases are appropriate for adjudication is lacking (other than urgent cases or cases in which it can be shown that following pre-action protocol would unduly compromise the case), a 2017 government report evaluating mediation processes has stated that the benefits of mediation hinge upon a realistic prospect of access to trial.[101]

> We are conscious that the primary concern of the system of civil justice must be genuine access to the Court. Not only does ADR not supplant the court process but ADR provision only works as an adjunct to an efficient system of adjudicative justice. To put it crudely, Defendants do not make fair or realistic offers of settlement if there is no real prospect of the Claimant being able to get the matter before a court for judgment. ADR is not a substitute system but a complementary one. Mediation and conciliation work best 'in the shadow of the law.

As mentioned above, the shift to negotiation and ADR in England has been explained by scholars as rising from cuts to civil justice. Describing the background in further detail will allow for a deeper understanding of the findings presented in the next section. Legal aid was first introduced in 1949. Originally, legal aid was almost universal, with 80% of British people eligible. The combination of cuts to legal aid since the 1980s and high litigation costs in England and Wales has left much of the population without redress.[102]

Following the cuts to legal aid, Lord Justice Woolf was commissioned to review the civil justice system, resulting in a report that centered on the problem of high costs as a barrier to the legal system, as litigation costs could be many times higher than the value of the case. "We have become the laughingstock of the world" he wrote, and laid out his solution, which resulted

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[100] *Id.*

[101] *ADR and Civil Justice Interim Report*, CIVIL JUSTICE COUNCIL (Oct. 2017), https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf.

[102] ASHER FLYNN & JACQUELINE HODGSON, ACCESS TO JUSTICE AND LEGAL AID CUTS: A MISMATCH OF CONCEPTS IN THE CONTEMPORARY AUSTRALIAN AND BRITISH LEGAL LANDSCAPES 1–22 (Access to Just. & Legal Aid eds., 2020); John Sorabji, *Austerity's Effect on English Civil Justice,* 1 ERASMUS L. REV. 1 (2015).

in an overhaul of civil justice in England and Wales, placing its emphasis on the pre-filing stage (through pre-action protocols) and on judicial case management before trial. Following criticism that costs had been frontloaded rather than reduced (thought outcomes such as modifying the adversarial culture were noted),[103] the Woolf Reforms were followed by another review of the legal system by Lord Justice Jackson.[104] Justice Jackson devised a cost regime that incentivized settlement on the one hand (increasing the risk of parties that did not accept a settlement offer or invitation to mediation) while strengthening certain claimants (in personal injury claims in particular) by minimizing their cost risk ("No win, no fee"). Additional emphasis was placed on judges' critical role in bringing down litigation costs—the words "at proportionate cost" were added to the CPR's overriding objective, which now read: "to deal with cases justly and at proportionate cost."[105] This seems to have made an indelible mark on the judicial role, as will be seen below in our court observations. From reportedly minimal intervention of judges in case management conferences after the Woolf reforms,[106] it seems, according to our observations, that judges have stepped up efforts to control litigation costs and are intervening actively in planning the course of the case to ensure its time-effectiveness. In doing so, they often state their obligation to ensure proportionate cost according to the CPR. Notably, judges receive training to conduct these conferences effectively, further showing the promise of judicial training, as in Italy.

Yet, as has been commented upon by representatives of the legal system, and as the numbers demonstrate in our court observations, legal costs are still high. As Lord Justice Briggs, commissioned to conduct a subsequent review of the justice system, stated: "[T]he single most pervasive and indeed

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[103] GORIELY, MOORHEAD & ABRAMS, *supra* note 82 (conducting a qualitative study including lawyers, insurers and claims managers, they discovered that while the Woolf reforms had positive consequences such as providing clearer litigation structures and improvement in the level of cooperation and settlement, the reforms had not resolved the problem of costs. Costs had in fact increased, most likely due to front-loading.). These findings were replicated by PEYSNER, *supra* note 84, at 2 (stating that although the overall sentiment was that the culture of litigation had changed for the better, this was not translated into reduced expenses or of delay. In addition, although the settlement rate had increased as a consequence of the Woolf reforms, the majority of cases settled in the pre-filing stage not as a consequence of ADR being incorporated into the court process.).

[104] *See generally* LORD JACKSON, REVIEW OF CIVIL LITIGATION COSTS (2009). The Jackson Review was conducted because the senior judiciary was concerned at the disproportionate litigation costs, despite the implementation (and the perceived success) of the Woolf reforms. The report concluded that the costs system should be based on legal expenses that reflect the nature/complexity of the case.

[105] *Civil Procedure Rules 1998*, *supra* note 81 (Part 1.1).

[106] PEYSNER, *supra* note 82.

shocking weakness of our civil courts is that they fail to provide reasonable access to justice for the ordinary individuals."[107] The fact that litigation is inaccessible to a large part of the population has been the basis for propositions of mandatory mediation—since that is the only realistically open avenue.[108] Briggs suggested taking resolution of disputes online to allow ordinary people to resolve their conflicts, a suggestion that is being heavily invested in by the legal system (currently the government estimates that the Online Court will be ready in 2023).[109] The idea is that the disputants will be guided on their dispute, and if needed will be referred to online facilitators, and if that is insufficient will be able to file their claims and bring their case online before a judge.[110]

In sum, the diminished number of claims in England and Wales might attest to the success of reforms in encouraging early settlement, the continuing effect of high legal costs coupled with the lack of legal aid (or to some extent both). The continued preoccupation with bringing down costs to enable access to justice suggests the latter to some extent,[111] as does the phenomenon of unrepresented parties that began after the cut in legal aid and continues to encumber the system to this day.[112]

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[107] Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, JUDICIARY OF ENG. & WALES 1, 28 (July 2016), https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf.

[108] *See* Masood Ahmed & Dorcas Quek Anderson, *Expanding the Scope of Dispute Resolution and Access to Justice*, 1 CIV. JUST. Q. 1, 8 (2019) (quoting a statement by Justice Neuberger to that effect).

[109] *Online Dispute Resolution for Low Value Claims: Online Dispute Resolution Advisory Group*, CIVIL JUST. COUNCIL 1, 18 (Feb. 2015), https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf (promoting an online solution to enhance dispute resolution in the UK. Among its proposals, the Group recommends "online facilitation to support dispute containment; and online evaluation to support dispute avoidance."). Its proposals were adopted by Lord Justice Briggs in his review of the justice system that aimed to overhaul the structure of the civil justice system. *See* Lord Justice Briggs, *supra* note 107.

[110] Joshua Rozenberg, *The Online Court: Will IT Work?*, LEGAL EDUC. FOUND., https://long-reads.thelegaleducationfoundation.org/ (last accessed Feb. 1, 2022).

[111] Rosemary Hunter, Anne Barlow, Janet Smithson & Jan Ewing, *Access to What? LASPO and Mediation*, *in* ACCESS TO JUSTICE AND LEGAL AID (Asher Flynn & Jacqueline Hodgson eds., 2017) (arguing that the removal of legal aid funding for the majority of private family law disputes in England and Wales, and the expectation that all such matters will now be resolved through mediation, reflects a moral as well as an economic ideology. Drawing on their extensive qualitative empirical research, they conclude that mediation—the only option available to those with limited means—is not appropriate for all cases; and in the cases where it is unsuccessful, there is no alternative procedure available to the parties.).

[112] Richard Moorhead, *The Passive Arbiter: Litigants in Person and the Challenge to Neutrality*, 16 SOC. & LEGAL STUD. 405 (2007).

B. *Into a Shrunken Field*

Going into the field in London was a different experience than in the other two legal systems. Case management conferences, when they occur, often occur by phone. Trial is a rare event. The head of litigation at a law firm with well over 100 lawyers and legal professionals, told us that the law firm takes about one case to trial a year.

While litigation is a rare event, the threat of litigation and mediation is part of negotiations, with an invitation to mediation incorporated into the letter exchange (with a reminder that refusal could result in cost penalties). Mediation can be expensive when lawyers are involved. In our observations of case and cost management hearings at the London County Court (a first-instance court), the cost for mediation with lawyers was regularly cited as around 10,000 pounds. Regarding the form of mediation, a senior mediator whom we spoke with at one of the two major mediation firms in London echoed Roberts' accounts cited above, saying: "The parties are in the same room for a brief opening, then the mediator does shuttling between the parties."

While the legal system takes the view of litigation as a "last resort", one judge speaking on a panel that we conducted took a more nuanced approach:

> It is important that a judge promote settlement when it is the right thing to do for both sides... There are instances in which it is better for the sides and necessarily more useful... At the same time, judicial experience allows to know when you should not end the case with a settlement agreement. Directing behaviors, perhaps creating norms, are another consideration—such as empowering a disempowered litigant that dared to take legal action. In such cases perhaps it is the duty of the legal system to empower him and to encourage others like them to use the legal system in the future. . . . You must ask: Are there disempowered sides and is there a concern that turning to the path of compromise will only duplicate the weakness with which they arrive to the legal process . . . .

In the case and cost management conferences, however, it was apparent that the judges preferred settlement, perhaps due to the nature of their roles to ensure proportionate costs and to encourage parties to agree on costs, and the fact that it is not a trial setting in which the merits are explored. In London, litigants waited their turn outside the courtroom in a designated room, allowing lawyers to discuss the case and settle on case management or the case

itself.[113] We witnessed two such cases in which the lawyers entered the courtroom with an agreement that they had reached outside, to the satisfaction of the judge. In one instance, when lawyers told the judge they had reached a settlement of the case, he responded:

> I offer congratulations. No one can be more pleased than me. It's always better that the parties reach a settlement themselves. Do you want a Tomlin order [a confidential written settlement]? I don't want to rush you into that... if the parties reach a settlement I never rush. Take all the time that you need and when you have a minute make it signed... Proportionality is on your side. I congratulate the parties!

The judges, who had received training in cost management, took a hands-on approach to costs, and seemed much more activist than judges as described before the Jackson reform.[114] They took an active stance to minimize the use of experts and thus reduce litigation costs. In a claim regarding damages due to pipe leakage, the barristers disagreed about the need for an expert to determine the cause for leakage. The judge thought that perhaps it was premature to decide on the need for an expert on corrosion: "If it turns out that the building servicing person can decide on the matter of the corrosion, why did both sides need an expert?" He then left the room to allow the barristers to discuss this matter. When he returned, he asked: "Did you manage to agree or should I come back in a bit? The barrister answered: "My learned friend was just about to crunch the numbers." They agreed on the costs of the expert phase—17,292.50 pounds. The judge then addressed the parties' disagreement on disclosure costs. The lawyer for the defendant said: "The claimant is saying that it is a document light case but that is not correct." The judge responded: "Let me hear the other side." After hearing the claimant's lawyer, the judge said, "Forty-five hours is too much." The last point of contention between the parties was the cost of mediation. The judge said: "Counsels will not spend seven hours but more like five hours, and I suggest getting down from 38 hours to 30 hours. I approve 15,000 pounds."

In a case with a different judge, the plaintiff was a woman who slipped on debris in the stairwell of her apartment building, injuring her ankle. Interestingly, the judge, in ensuring proportionality, made a realistic evaluation of the claim itself. The interaction contained many of the recurring

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[113] In contrast to the case in Israel, where parties wait their turn in the courtroom. The cases that they see can have a carryover effect, in which they realize that settlement is the main course of the day in the eyes of the judge.

[114] PEYSNER, *supra* note 82.

motifs—citing proportionality and the CPR, limiting expert use, reducing legal costs, encouraging the parties to agree but deciding for them when needed—yet most cases that we observed did not involve a realistic evaluation of the sum of the claim and were more technical in nature.

> **Judge**: We saved 45 minutes for this. Is there any agreement regarding costs?
> **Lawyer**: Two aspects are agreed (discusses sums). . . . The parties have made attempts, but the rest remains not agreed.
> **Judge** (after stating that he has read the affidavits): Why do we need liability experts? According to CPR 35 I have to make a decision whether an expert is going to help the court. It's a factual matter. I don't see how a liability expert can help. So, we are not having liability experts.

Then the judge turned to the question of proportionality. He stated his duty to ensure proportionality according to law and asks the lawyers to address that issue. The costs lawyer (a new profession arising from the reforms) sat with a very big calculator in front of him.

> **Judge**: This is a QC [Queens Counsel—a senior lawyer] case.
> **Lawyer**: The budget has been prepared based on the assumption that this is a QC case.
> **Judge**: If you have junior counsel, how much does it come to?
> **Lawyer** (calculating a new sum): 62,861 costs coming forward.
> **Judge**: Address the proportionality please.
> **Lawyer**: There are issues of liability, losses. If we assume that this goes to a trial, this sum is proportionate.
> **Judge**: You already spent 25,000 for pre-action. This is a fairly straightforward case, isn't it?
> **Lawyer**: There are a lot of medical records.

Then the judge referred to the sums that the plaintiff was actually asking for in her lawsuit (not the costs):

> **Judge:** We have all heard of the Alexander technique, I don't think you are going to persuade a judge that 35,000 for future Alexander treatments is necessary.
> **Defendant's lawyer**: The sums asked for in the lawsuit are realistically too high, therefore, asking for 91,000 in expenses is not proportionate to the damages that may be decided upon at the end—

60,000 is a sensible figure.

After some more conversation regarding the sums, the judge dictates a decision to the parties.[115] He states that a junior lawyer rather than a senior lawyer should represent the case, with the senior lawyer a phone's call away. In addition, the value of the claim itself should in fact be lower, affecting proportionality of litigation costs:

> **Judge:** My sense is that she is an active lady and has done what she can to alleviate the damage. But the bulk of the claim relates to other damages . . . and some remarkable 35,000 for future Alexander massages . . . I sympathize with the defendants' claim that the sum asked for is too high and that if [the claimant] wins her lawsuit, she will not get its entirety. My function today is to deal with costs. CPR 43 (2) states that only proportionate costs will be allowed. CPR 44(3)(5) defines what proportionate costs are. It is an unfortunate accident, but it is not complicated. It is straightforward, bread and butter for personal injury lawyers. So far 24,000 has been spent. Claimants have spent time and money that is excessive and disproportionate. The issues can be litigated within 40-60 thousand pounds.

Our court observations show that as judges determine the costs of each phase (expert reports, legal fees), they are not hesitant to tell the sides that a certain cost is too high or not proportional to the issue at hand. The judge may ask the parties to reach an agreement on a lower sum, offering to leave the chamber while they do so. The parties may reach an agreement, and if not the judge may decide on the cost. Judges might ask if the parties had attempted mediation, but did not tie this option to the concrete cases (unlike judges in Italy who must explain to parties why a case is suitable for mediation when issuing a mediation order).[116]

In sum, unlike the diagnosing role of judges in Florence, or the settlement-making role of pretrial judges in Tel-Aviv, the judges in the London County Court limited themselves to clarifying the scheduling and sequence of the trial (should it occur) and determining the costs. They did not attempt to

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[115] There is no court reporter, the judge just speaks out the decision and the lawyers write it down; hearings are recorded but judges often ask lawyers to send them summaries, so perhaps transcripts are not sent to them unless they ask for them.

[116] Judges in England and Wales have been documented as saying something to the effect of "this case cries out for mediation" in extreme cases. Roberts, *supra* note 87, at 467.

go into the substance of the issues in dispute, though they are authorized to do so by law, or to find ways to reach a settlement of the case between the parties. As one judge said, "I am not a court of mediation—a court of mediation is a contradiction in terms." Lawyers with whom we spoke also said that settling the case was not part of a judge's role, though one lawyer noted, "I have heard it exists but I've never seen it."

VI. CRIMINAL CASES

Though the general emphasis of the study was on judicial settlement practices in civil justice, it seems important to note trends in criminal justice as well, especially since they seem to correspond with the civil justice trends in each legal system. In Italy, transplants related to settlement (plea bargaining) or other abbreviated proceedings have been introduced while preserving a main role for adjudication and maintaining the separation between adjudication and settlement practices. In Israel, transplants have resulted in a central role in pretrial—the criminal pretrial judge intervenes to encourage the parties to reach a plea bargain using a variety of narrow settlement strategies. In England and Wales, the legal system incentivizes guilty pleas at the first possible opportunity (the earlier the plea the greater the sentence reduction), leaving the judge with a relatively minor role in facilitating pleas and adjudicating cases. Judges usually do not incorporate ADR into their practice, and the institutional preference for settlement is grounded mainly in efficiency (despite the transplant of some restorative practices to deal with a minority of cases).

A. *Italy: Tension Between Adversarial and Inquisitorial Procedure*

Italy's criminal justice system tried to ingest, and digest, large swathes of U.S.-inspired adversarial constructs near the end of the 20th century.[117] Its traditional inquisitorial justice had placed great emphasis on the investigative phase before trial—conducted either by prosecutors (themselves judges in the inquisitorial system, receiving the same training)[118] or instruction judges,

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[117] William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy,* 25 MICH. J. INT'L L. 429, 430 (2004); Illuminati, *supra* note 40; Montana, *supra* note 38.

[118] *See European e-Justice Sysyem*, EUROPEAN UNION, https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-it-maximizeMS-en.do?member=1 (Jan. 18, 2022) ("In Italy, the role of public prosecutor is played by career magistrates, who exercise their functions under the supervision of the chief of their bureau. This operates as a kind of hierarchy that applies only to the public prosecutors' offices."). *See also* EUROPEAN JUDICIAL TRANING NETWORK (EJTN), http://www.ejtn.eu/About/EJTN-Affiliates/Members/Italy/.

entrusted with carrying out an objective investigation, seeking out evidence on the innocence or guilt of the defendant. Only if the prosecutor or instruction judge decided there was enough evidence to continue to trial could the trial be referred to the trial judge, who would receive the investigative file.[119] With all the evidence (which benefitted from the aura of neutrality) before them, trial judges might be able to reach a decision even before the trial began, and might be biased by the information during trial.

As a result of the emphasis on the investigative file, the presentation of the case by the parties was criticized as being relatively marginal.[120] Though the judge was authorized to actively seek out the truth by examining witnesses and calling forth evidence, the efforts of the defense to alter the conclusions rising from the investigative file were perceived by many as largely compromised.[121]

In 1988, with a view to the United States adversarial system,[122] which was perceived as protecting the rights of defendants,[123] and due to criticism of the long duration of the investigative phase—which could take years, and was criticized from a human rights perspective by the European Union, the United Nations and Amnesty International[124]—the Code of Criminal Procedure was revised in Italy. This reform aimed to change the criminal justice system to an adversarial one along the lines of the American legal system.[125] Among other measures, it prohibited the trial judge from having access to the investigative file: Evidence was to be presented during the trial in adversarial fashion. The judge was to receive but a few pertinent details (such as the criminal history

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[119] Illuminati, *supra* note 40.

[120] Illuminati, *supra* note 40.

[121] Illuminati, *supra* note 40.

[122] The U.S. was perceived as having hegemonic stature in the second half of the 20th century. *See* Mattei, *supra* note 66, at 394.

[123] Langer, *supra* note 3, at 24 ("Many commentators have said that while in the adversarial system the defendant is a subject of rights, in the inquisitorial system he is an object of investigation. This was probably true for a long time, but after World War II—and even earlier in some jurisdictions—most inquisitorial countries began considering the defendant as a subject of rights, both at the rule level—constitutions, human rights treaties, criminal procedure codes—and at the law in action level. Thus, in most civil law jurisdictions today, the defendant is presumed innocent, has a right against compelled self-incrimination, a right to assistance of counsel, etc."); *see* Thea A. Cohen, *Self-incrimination and Separation of Powers*, 100 GEO. L.J. 895 (2012) (analyzing the Self-Incrimination Clause).

[124] Similar to the case in civil justice, the European Court of Human Rights condemned Italy's criminal trial lengths and pressed it to increase efficiency and cut the lengthy trial process, in addition to criticism from the United Nations and Amnesty International. *See* Pizzi & Montagna, *supra* note 117, at 437.

[125] Illuminati, *supra* note 40.

of the defendant).[126]

According to various scholars, this legislative change did not have the desired effect due to its blunt departure from the prevailing legal culture.[127] In 1992, many of the provisions of the reforms were struck down by the Court of Cassations as unconstitutional (and did so again after another attempt by Parliament in 1997).[128] Only after amending the Constitution and legislating Law n. 63/2001, which restored most of the provisions struck down by the Constitutional Court in 1992 was Parliament finally able to entrench the adversarial system in the Italian criminal justice system.[129] Yet, as in most adversarial systems, there was a need for "crutches".

The main drawback of the adversarial system was the length of the full trial.[130] If the judge does not have the investigative file, all of the evidence must be presented, with examination and cross-examination, during trial. It

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[126] Illuminati, *supra* note 40.

[127] Illuminati, *supra* note 40, at 573 ("The fault of the 1988 codification was that it had not been adequately prepared in cultural terms. The bar and judiciary were not fully involved in the reform. This is especially true for the judiciary, where the deepest changes were imposed. Italian judges were accustomed to having an almost unlimited power to introduce evidence, to having full knowledge of the investigative dossier and the freedom to use any document from that dossier for the decision. Judges conceived of their role as one of seeking the truth, where they were supposed to search in all possible ways and with all the permitted means in order to accomplish their duty. Judges were accustomed to being the active protagonists of the trial; the focus now shifted to the parties' initiatives and arguments. The first criticisms to the new Code were, not surprisingly, made by prosecutors and judges concerned over a perceived loss of efficiency. But it is apparent that the real disappointment was grounded in a belief that the newly introduced accusatorial context was useless. That is to say, the same—if not better—results could have been reached more expeditiously under the old procedures.").

[128] Illuminati, *supra* note 40, at 576 (suggesting that the Italian Constitutional Court was making decisions that went against the Parliament's changes based on the ideological belief that truth at trial was being compromised).

[129] Pizzi & Montagna, *supra* note 117.

[130] Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 971–72 (1983) (writing over 30 years ago when trials were simpler than they are now, Alschuler states: "[T]he American jury trial now has become so complex that our society usually refuses to provide it. Reluctant to reconsider our expensive trial procedures, we press most defendants to forgo even the more expeditious form of [bench] trial that defendants once were freely afforded as a matter of right."); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76 (2015) ("As we transformed from an adversary process where guilt was determined by trial to an administrative process where guilt and penalties are determined by negotiation, many prosecutors began demanding waiver of all constitutional criminal procedure rights, not just the trial and investigative-related ones.").

soon became apparent that the time saved through a shorter investigative phase was short-lived. Adversarial systems around the world have dealt with the drawback of lengthy trials through plea bargains, which dramatically shorten proceedings, often leaving the judge limited opportunity for intervention.[131] This adversarial crutch—used extensively in common law countries (disposing the large majority of criminal cases)—may run counter to inquisitorial culture, which is based on the centrality of the judge and the seeking of an objective truth.[132] In addition, it runs counter to another important principle of inquisitorial culture—the limited value of the admission of guilt in establishing liability.[133] A guilty plea is not sufficient to establish guilt in inquisitorial systems but rather is a piece of evidence that is taken into account while uncovering the truth. Thus, while the plea-bargaining concept was taken up unenthusiastically in Italy (and other inquisitorial countries), it was changed. The bargain between prosecution and defense pertains only to the punishment without a plea (defendants agree only to the punishment and cannot incriminate themselves through pleas).

Another crutch—this time with inquisitorial facets—involves the defendant's request for a summary trial in exchange for a reduced sentence if the defendant is proven guilty. If the prosecution agrees and the judge views the case as appropriate for this type of disposition, the judge adjudicates the case based on the investigative file alone—reverting to the previous inquisitorial-fashion trial, in which the judge has access to the investigative

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[131] *See* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye and Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 459–60 (2013) (explaining that plea bargaining is "a system that is tolerated because, without it, our criminal justice system would be so overwhelmed that it would collapse"); Kyle McCleery, *Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals: Lessons from Civil Law Systems*, 14 J. INT'L CRIM. JUST. 1099, 1110 (2016) ("American prosecutors have the power to determine whether or not to lay charges, what charges to lay, whether to withdraw charges and the sentence to be sought in the event of a conviction. This discretion is largely unchecked by the judiciary, which will typically intervene only in cases of gross misconduct.").

[132] *Cf.* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1518 (2016) ("Where the parties control the adjudicatory input, waivers that truncate or eliminate the trial process are not only justified, they become an entitlement, regardless of the validity of the state's or the defendant's case."); Lucarelli et al., *supra* note 52.

[133] McCleery, *supra* note 131, at 1112 ("Whereas common law/adversarial systems view admission of guilt as a mechanism for relieving the court of the burden of deciding which party prevailed at trial, inquisitorial systems tend to see admissions only as evidence that can assist the court in establishing the truth. However, in no way does this relieve the court of its duty to establish a complete account of what occurred.").

file. The defendant forgoes the evidentiary phase.[134]

Omission of the evidentiary phase is only one way to abbreviate trials. The investigative phase preceding trial—shortened, as mentioned in the reforms—can be done away with altogether in certain cases, as can the pretrial: when the prosecutor decides there is enough clear evidence against the accused (*immediate trial,* which can also be requested by the accused) or when there is a strong *prima facie* case, such as a person arrested during the act of the crime or an accused who has confessed (*direct trial*, which skips over the pretrial decision to go to trial and often the investigative phase).

For minor offenses punishable by fines or up to three months in prison, the prosecutor can request a penal decree consisting of a reduced fine (reduced up to 50% of the minimum required law) to the defendant without trial. The defendant can oppose the penal decree. Going further are measures for decriminalization and non-punishment., such as the messa alla prova, allowing for suspension of trial with probation.[135]

While the reforms from 2003 to this day have not resulted in a reduced backlog of criminal cases according to the Italian Ministry of Justice statistics,[136] this is expected to change with reform to the statute of limitations, which had continued to run during the criminal case, thus creating disincentives to settle.). Preference for abbreviated trial may increase with the cancellation of Italy statute of limitations, which has prevented defendants from using abbreviated proceedings, in the hope that delay tactics could work to their benefit to cancel the trial altogether.[137]

At present, the full trial is still on the plate. The judicial conflict resolution role of the Italian judges in the criminal arena—which is relevant to the 16% of cases terminated through agreement between the prosecution and defendant—is mainly passive. The use of plea bargaining and abbreviated forms of trial is estimated at around a third of cases.[138]

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[134] Pizzi & Montagna, *supra* note 117.

[135] Oriana Binik, *Testing for Adults in the Milan Area, Analysis of the Application of an Innovative Measure in the Italian Sanctioning Landscape*, ITALIAN REV. OF CRIMINOLOGY 16 (2018).

[136] *See Ministry of Justice—Statistics*, ITALIAN GOVERNMENT MINISTRY OF JUSTICE, https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1288006&previsiousPage=mg_1_14 (last accessed Jan. 20, 2022) (statistics for 2003–21).

[137] Beatrice Coscas-Williams & Michal Alberstein, *A Patchwork of Doors: Accelerated Proceedings in Continental Criminal Justice Systems*, 22 NEW CRIM. L. REV. 585 (2019).

[138] Maximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY 377, 397 (2020) [hereinafter Langer, *Plea Bargaining*].

B. *Israel: Judicial Plea for Pleas*

While used sporadically for centuries in different parts of the world,[139] plea bargains were not accepted as a mainstream method for disposing of cases until the 1970s in the United States. Since then, plea bargaining has spread globally as a common practice,[140] becoming the primary mode of case disposition in the criminal justice systems of England and Wales and Israel, and to a much lesser extent in Italy.[141]

In Israel, judicial settlement powers in the criminal sphere have developed in practice in courts, with the main goal of facilitating plea bargains. Like many common law countries following the example of American criminal procedure,[142] Israel makes extensive use of plea bargains—in over 70% of criminal cases—to lessen the load on courts.[143] Plea bargains became accepted practice through recognition by the Supreme Court in the 1970s[144] and have yet to be formalized in law, despite an attempt in 2010 by legislators to do so. Proactive judicial practices to promote plea bargains have developed in courts since the 1990s,[145] and—aside from judicial criminal mediation to facilitate plea bargains—later received recognition in law, as described below.

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[139] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. REV. 1 (1979).

[140] Langer, *supra* note 3.

[141] Langer, *supra* note 3. Langer, *Plea Bargaining*, *supra* note 138, at 377, 397 (16% of criminal cases are disposed through plea bargains in Italy).

[142] In the United States, the most recent data on the topic indicates that the plea bargain has become the most dominant form of conviction, with more than 95% of convicted defendants pleading guilty; *Federal Justice Statistics, 2014—Statistical Tables*, U.S. DEPT. OF JUST. (Mar. 2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf; Langer, *supra* note 3, at 378–79 ("Four decades ago, scholars characterized plea bargaining as a uniquely American phenomenon (Langbein & Weinreb 1978, Langbein 1979a). Although at the time there were commentators who questioned how uniquely American plea bargaining truly was (Baldwin & McConville 1979, Goldstein & Marcus 1977), there is no question that in many jurisdictions a trial was a requirement to issue criminal convictions for all offenses or at least for all non-petty offenses.").

[143] *Annual Report of the State Attorney's Office*, ISRAEL DEP'T OF JUST. 30 (2017) https://www.gov.il/BlobFolder/reports/annual-report-2017/he/files_data-report-2017.pdf (76%).

[144] *See* CrimA 532/71 Bahmoutzki vs. State of Israel (1972) 26(1) PD 543 (establishing plea bargaining requirements).

[145] CrimA 1958/98 State of Israel vs. John Doe (2002) 57(1) PD 577.

One central tool for encouraging plea bargains between the prosecution and defendant is the criminal pretrial,[146] which had long been in effect in the United States and bears many similarities to the American model. It developed in Israel in judicial practice in the 1990s, around the same time that judges presiding over civil cases received wide-ranging pretrial settlement powers by law.[147] The criminal pretrial and the judicial settlement powers accompanying it were introduced on the initiative of first and second-instance courts, and approved by the Supreme Court. In 2006, this practice was formalized in law in article 143a of the Criminal Procedure Law. According to the law, a criminal pretrial may be conducted to clarify the defendant's position on the charges, to narrow disagreement on legal or factual issues, to obviate the need for the evidentiary phase, and to end the case during pretrial.[148] Unlike the civil pretrial, the judge presiding over this phase *does not* continue to sit on the case if it continues to trial; pretrial transcripts are not transferred to the trial judge. The numbers speak to the effectiveness of the criminal pretrial, with 87% of plea bargains made before reaching the trial phase.[149]

To further encourage plea bargaining, another judicial practice has developed in recent years: judicial mediation between the prosecution and the

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[146] Fed. R. Crim. P. 17.1. The criminal pretrial was set in Article 17.1 of the U.S. Federal Rules of Criminal Procedure in the 1960s. The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, with some exceptions: Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self–representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se. On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.

[147] *See supra* Section IV.

[148] ISRAEL CRIMINAL PROCEDURE LAW (1982) https://www.nevo.co.il/law_html/law01/055_096.htm (last visited Aug. 22, 2022) (Section 143a). As in the U.S., the law conditions the pretrial on the legal representation of the defendant. The condition is not adhered to in practice when defendants choose not to be represented (though public lawyers can be accessed without a fee).

[149] ISRAEL ATTORNEY GENERAL ANNUAL REPORT 1, 45 (2018) https://www.gov.il/blobfolder/generalpage/files-general/he/files_report-2018.pdf.

defendant. In this setting, the pretrial judge or, if a trial has begun, a specially-appointed judge (who does not preside on the case), tries to facilitate settlement between the prosecution and the defendant with the aim of reducing judicial bench time (thus this practice is considered especially suitable for cases that are expected to be protracted).[150] The judge presiding on the case is not involved in the mediation and is not permitted to see transcripts of the meeting(s).

Observations of criminal pretrials in the Tel-Aviv first-instance court uncovered active judicial interventions to encourage plea bargains, and a tendency to prolong the preliminary phase and enable more hearings until an agreement between the parties could be reached.[151]

When judges intervene, they employ a variety of judicial practices to facilitate plea bargains, which are often accompanied by pressure on the prosecution to settle (as is the case in civil pretrials). Judges in criminal pretrial use the following tactics that were also found in civil pretrials: 1) facilitation of litigation, 2) prediction of the legal outcome, 3) portrayal of the trial in a negative light, 4) using lawyer-client relations to promote agreement, and 5) using ADR techniques.[152]

A technique that was used in criminal pretrials and cannot be used in civil pretrials was the overriding of the prosecutor's opinion by referring to a senior prosecutor (ordering the prosecutor to go outside and consult by phone with a senior prosecutor, or ordering a senior prosecutor be present in the next pretrial hearing regarding the case). Another interesting finding in criminal pretrials is the reference by judges to former plea bargains in similar cases. Thus the judges' predictive practices were not based only on judicial decisions in relevant cases but also included former plea bargains. The fact that judges have the final word on whether the case could move to trial was also mentioned by one judge when a defendant's lawyer commented that there was no choice but to go to trial. While judges are given freedom to settle cases in almost any manner that they please, they often choose narrow settlement practices, such as casting trial in a negative light (costs, time).

Observations of judicial criminal mediation showed a huge disparity of judicial approaches: from a truly mediation-oriented approach that seeks to address the emotions and needs of the parties, construct a letter of apology and to take a larger view of the issue at hand to a heavy-handed, acerbic approach

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[150] Ami Kobo, *Criminal Mediation*, 24 HAMISHPAT (2018) (Hebrew).

[151] Sari Luz Kanner, Dana Rosen, Yosef Zohar & Michal Alberstein, *Managerial Judicial Conflict Resolution (JCR) of Plea Bargaining: Shadows of Law and Conflict Resolution*, 22 NEW CRIM. L. REV. 494 (2019).

[152] For a comparison with judicial practices to bring about plea bargains in the U.S., see King & Wright, *supra* note 23, at 331–34; Alschuler, *supra* note 139.

and refusal from the start to speak with the defendant, only with the lawyer. *The large majority of mediations were between these poles, with the judge taking an evaluative approach, pointing out the weaknesses in the case (of either the prosecution, the defendant or both), and attempting to bring the parties closer to an agreement.* The meeting would take place with both of the parties present, and when needed, the judge would ask one of the parties to exit the room and speak to the other party separately. The benefits of a relatively free-flowing conversation in which the adversarial mode is reduced and a real discussion can take place have been commented upon.[153] While such mediations have the potential to involve the victim, they rarely do.

A broadening of the role of the judge takes place in community courts, in which the needs and rehabilitation potential of defendants who have committed minor offenses are more greatly emphasized. The Israeli community court model was inspired by the Red Hook Community Justice Center, a community court that was created in Brooklyn, New York. Some adaptations were made to the original model to meet the social, religious, and structural needs of the Israeli population.[154] Judges in community courts manage a team of experts whose aim is to rehabilitate defendants who have pleaded guilty to minor offenses. The victim, as in the original model, is usually not a part of the process. Since 2014, six community courts have been established in Israel, handling approximately 100 cases each per year, a slight percentage of the total criminal cases in Israel.[155]

The focus on the offender and the primarily managing role of the judge are far from the ideal of a broad judicial conflict resolution role. Nevertheless, the community courts are the apex of judicial conflict resolution activities in the criminal justice system, for they take a relatively deep look into the needs of the defendant and take the community into account in finding ways for rehabilitation. However, this judicial role is limited to very few cases—i.e., only minor offenses in which the defendant has admitted guilt.

C. *England and Wales: Incentivizing Pleas*

While legal aid is available for defendants in criminal cases, the same economic concerns that have motivated legal reform in civil cases are relevant to reform in criminal justice, along with a concern regarding growing rate of crime and its effect on the handling of cases. The strategy to economize

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[153] Kobo, *supra* note 150.

[154] Hadar Dancig Rosenberg, Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 954 (2003).

[155] *Community Court Annual Report*, ISRAEL JUSTICE MINISTRY (2020) (on file with authors); Tali Gal & Hadar Dancig-Rosenberg, *Characterizing Community Courts*, 35 BEHAV. SCI. L. 523, 527 (2017).

criminal justice has been similar to that of the civil realm: an emphasis on processes preceding trial with the aim of early disposition of cases, along with active judicial case management for cases that are not resolved. Thus a large variety of out-of-court processes (waiving trial) have been developed for relatively minor offenses (including cautions, conditional cautions, fixed penalty notices and more).[156]

Pretrial procedure requires the prosecution and defendant to communicate on the case and elucidate the points of agreement and differences between the parties.[157] In general, the legal system encourages defendants to plead guilty *at the earliest possible moment*: the earlier the admission, the greater the sentence discount. Judges have been poised to assist in this endeavor, by predicting at a "Goodyear hearing" what the sentence would be considering the charges if it went to trial. The predicted sentence is shortened by one third if the defendant pleads guilty, and if the defendant continues to trial is binding upon the sitting judge as the maximum penalty.

The adversarial nature of trial is tempered by broad pretrial discovery requirements and a foretelling of the defense's case to prevent "ambush defense" tactics: "Rather than resting the burden of proof squarely on the prosecution, the accused is co-opted into participating in the construction of the case against her and promoting the wider system goal of efficiency-in some instances, with the penalty of adverse inference for non-compliance."[158]

Cases that proceed to trial are actively managed by the judge, and a long chapter in the Criminal Procedure Rules is dedicated to this effort. The

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[156] Nicky Padfield, *Judicial Rehabilitation? A View from England*, 3 EUR. J. OF PROBATION 36 (2011) (noting the vast use of fixed penalty notices for many high volume offenses and noting criticism of the police and prosecution for broad interpretation of the type of offenses that can be included and disposing offenses that include violence in this manner); RICHARD YOUNG, REGULATING POLICING: THE POLICE AND CRIMINAL JUSTICE ACT 1984 PAST, PRESENT, AND FUTURE 149 (Ed Cape & Richard Young eds., 2008).

[157] *Criminal Procedure Rules 2015*, UK Statutory Instruments, Pre-trial procedure, https://www.legislation.gov.uk/uksi/2015/1490/contents/made (last visited July 3, 2022) (Rule 3.3, the duty of the parties). This rule requires parties to communicate with each other to find whether the defendant is likely to plead guilty or not guilty; what is agreed and what is likely to be disputed; what information, or other material, is required by one party of another, and why; and what is to be done, by whom, and when.

[158] Anthony Edwards, *Do the Defence Matter?*, 14 INT'L J. EVIDENCE & PROOF 119 (2010) (arguing that foretelling the defense gives an unfair advantage to the prosecution and compromises cross-examination of prosecution witnesses, who know in advance what the issues are, and can thus prepare themselves for questions that will be asked); Jacqueline S. Hodgson, *The Future of Adversarial Criminal Justice in 21st Century Britain*, 35 NCJ INT'L L. & COM. REG. 319, 331 (2009) ("[C]riminal justice reforms have sought to dissuade the accused from exercising her right to trial, but have also attempted to shift the weight of the proceedings and of case disposition to the pre-trial investigation.").

judge can interfere in the cross-examination of a witness, interrogate the witness, exclude evidence or witnesses and demand appropriate time forecasts and limits from the attorneys for any part of the criminal trial. This interrogating, managing and evidence-screening role is reminiscent of that of an inquisitorial judge.[159] In addition, the weakening of the defense is reminiscent of the traditional inquisitorial criminal regime, which based judicial decisions mainly on the prosecution file, with the trial itself considered a symbolic and largely futile effort of the defense to change the judge's bias.

While the changes to the adversarial system have often been accompanied by the disclaimer that this does not mean that the system is becoming inquisitorial (just less adversarial) and scholars have noted that the move towards managerialism does not equal a move toward inquisitorialism, some voices in the English legal system have already noted that judges are becoming more inquisitorial.[160] The accumulated impact of the reforms on the judicial role seems to suggest that this is true.

With the simplification of criminal procedure also encouraged by the European Union,[161] active judicial case management in criminal cases has been promulgated in legislation in criminal justice as well. Plea bargains have been an accepted form of disposing claims for decades, as in many common law systems, following acceptance in the U.S. A full trial or the hearing of oral evidence are the exception, while guilty pleas and alternative forms of case disposal are the rule.[162] Data is lacking for the first-instance (magistrates) courts,[163] which try minor offences. In the Crown Courts, guilty pleas on all counts were entered in 63% of criminal cases in 2018, and a further 33% consisted of pleas that were partial (guilty pleas on some of the counts) or not guilty pleas.[164] As the latter category makes it difficult to estimate the percentage of guilty pleas, the 2016 figure of 88.2% of cases sentenced by the

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[159] J. A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT'L & COMP. L.Q. 281 (2003).

[160] *Id.*; Resnik, *supra* note 24 (describing U.S. judges' active stance during pretrial also makes this comparison).

[161] COUNCIL OF EUROPE, RECOMMENDATION NO. R (87) 18 OF THE COMM. OF MINISTERS TO MEMBER STATES CONCERNING THE SIMPLIFICATION OF CRIM. JUST. (1987).

[162] Hodgson, *supra* note 158.

[163] Surprisingly, despite the widely held estimate that the vast majority of criminal trials are disposed through plea bargains, no figures on plea bargains are presented in UK criminal justice reports. *See* Carol A. Brook, Bruno Fiannaca, David Harvey & Paul Marcus, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147 (2016).

[164] *UK Crim. Ct. Stat. Q. July–September 2018*, GOV.UK (Dec. 13, 2018), https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2018.

Crown Court involving a guilty plea gives a more accurate picture.[165] Guilty pleas are greatly encouraged by the legal system through sentence reductions that hinge on the timeliness of the plea.[166] Problem-solving courts, where judges might have a more substantial role account for only 3.5% of criminal cases in England and Wales in recent years.[167]

VII. INSIGHTS ON TRANSPLANTS: LEGAL CULTURE, IDEALS AND REALITY

The comparative picture as it emerges from the above sections reveals that reforms related to settlement and alternative justice, transplanted due to efficiency concerns, have dramatically transformed the judicial role. While in theory the judicial role could have been broadened through an infusion of consensual values, it has, in effect, been sequestered in England and Wales through disincentives to litigate and constricted in Israel due to the centrality of the abbreviated role of the pretrial judge. In Italy, the centrality of the judicial role has thus far been maintained alongside a diagnostic judicial role regarding mediation.

What was different in each legal system that led to a unique formulation that is generally replicated in civil and criminal justice? We propose two elements that can contribute to the understanding of the different transformations that occurred in each legal system: 1) adversarial roots or the

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[165] UK CRIM. JUST. STAT. Q. 2016 (FINAL) (2017) (72,474 guilty pleas out of 82,118 cases sentenced by the Crown Court); *Cf.* Alschuler, *supra* note 24, at 1 (In the U.S. as early as the 1970s "roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury. Behind this statistic lies the practice of plea bargaining, in which prosecutors and trial judges offer defendants concessions in exchange for their pleas.").

[166] *Criminal Justice Act 2003—Section 144*, U.K. PUB. GEN. ACTS (Dec. 1, 2020), https://www.legislation.gov.uk/ukpga/2003/44/section/144/2015-07-17 (Reduction in sentences for guilty pleas: (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account—(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given.). *See* Langer, *Plea Bargaining*, *supra* note 138, at 388 (citing studies that show that in the UK "almost all defendants that plead guilty receive a discount of one third or less, that these discounts largely comply with the sentencing discounts established by English law"). On Section 144 of the Criminal Justice Act, and the direction of the criminal justice system in general, see Hodgson, *supra* note 158.

[167] *See, e.g.*, *Crime Outcomes in England and Wales 2014/2015*, UK JUST. MINISTRY 23 (July 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445753/hosb0115.pdf.

lack of them, and 2) the impetus for the transplants in the context of the tension between the aspiration to high ideals of justice on the one hand and the search for efficiency on the other.

Adversarial legal systems, which place an emphasis on the agency of the parties, have long included a significant settlement component. Well before the institutional promotion of settlement and the vanishing trial phenomenon, settlement was a common mode for disposing of disputes in these legal systems. The traditional perception of the judge was of a passive umpire, while the parties that reached trial were responsible for actively making their case. In a setting that places emphasis on the parties, it is perhaps more natural to take dispute resolution to the parties, even to the point of nearly privatizing civil justice as in England and Wales. This can be conceived as traveling along an already existing continuum of party agency, nearly reaching its farthest point. A similar hypothesis has been raised in regard to the administratization of criminal justice in adversarial systems: Legal systems with adversarial roots may have a higher tendency to dispose of criminal cases through managerial means, such as plea bargains, than do legal systems with inquisitorial roots.[168]

In contrast, legal systems with inquisitorial roots (i.e., civil law systems), have traditionally placed an emphasis on the active role of the judge and the application of formal legislative rules to implement social norms.[169] In these systems, adjudication has been the primary mode of disposing of cases, and the option of settlement has been relatively disregarded.[170] While this is changing, the historical milieu shapes the subsequent transplants. Thus, in Italy, settlement reform is itself is introduced in a formalistic fashion (with judges required to explain their reasons for referring cases to mediation in writing), and the effect for the time being is moderate.

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[168] Langer, *supra* note 3, at 401 (" . . . there could be a relationship between accepting and using plea bargaining (and other trial-avoiding conviction mechanisms) and the predominance of a party-driven conception of the criminal process in a given jurisdiction, as these mechanisms afford the parties a large say in the adjudication of the case. Legal actors educated and socialized in common law adversarial systems would thus consider the use of guilty pleas, plea bargaining, and other trial-avoiding conviction mechanisms as a natural phenomenon (Langer 2004). By this hypothesis, one would expect that, everything else being equal, the more important the adversarial ideology or structures of interpretation and meaning in a given jurisdiction, the larger the rate of administratization of criminal convictions.").

[169] *Id.*

[170] Pablo Cortes, *A Comparative Review of Offers to Settle: Would an Emerging Settlement Culture Pave the Way for Their Adoption in Continental Europe?*, 32(1) CJQ 42 (2013). *See also* Lucarelli et al., *supra* note 52.

However, adversarial roots do not account for the differences described in this study within legal families. The model adopted in England and Wales is strikingly different from that which was adopted in the U.S., which saves a central settlement role for pretrial judges, akin to the role of pretrial judges in Israel. Since the U.S. is the origin of many of the discussed transplants, this deserves a close look, and brings us to the next contributing factor that can explain some of these differences: the impetus for the transplants within the context of ideals and reality.

The tension between ideals and the pragmatic need for reducing caseloads (efficiency) accompanied the adoption of ADR from the outset in the U.S. legal systems. The transplant of ADR and other settlement-related reform has produced different manifestations of this original tension in other legal systems.

As has been mentioned by scholars, ADR lost its founding values in the U.S. when it expanded from the corridors of academia into the legal system.[171] As an idealist movement, ADR suggested an alternative to achieving legal justice through adjudication, which is the search for external rationality in human interaction.[172] Efficiency was not as the main motivation for the proponents of ADR; high caseloads, rather, were an opportunity to promulgate consensual dispute engagement and, for many, to offer an alternative to what they viewed as dysfunctional and narrow justice, also expressed by realist and critical legal studies movements.[173]

Yet this vision did not converge with that of the U.S. legal system. The impetus for adopting ADR was the reduction of caseloads (efficiency) while the benefits of dialogue were a side effect.[174] The implementation of ADR into the legal system, whether through various court-connected ADR schemes or in-court ADR led by judges, took on the nature of the underlying impetus: efficiency. ADR in practice in the U.S. has become increasingly devoid of consensual values and caucusing often takes the place of dialogue.[175] In many cases, ADR is not different from bargaining between lawyers, and

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[171] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the Law of ADR*, 19 FLA. ST. U. L. REV. 1 (1991).

[172] This is one possible definition based on Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92(2) HARV. L. REV. 353 (1978).

[173] Michal Alberstein, *Fast Justice vs. Sublime Justice: An Anatomy of the Relations Between Practice and Theory in Conflict Resolution*, 9 ALEI MISHPAT 85 (2011) (Hebrew); Menkel-Meadow, *supra* note 171.

[174] Menkel-Meadow, *supra* note 171.

[175] Menkel-Meadow, *supra* note 171; Roberts, *supra* note 87; *see supra* Section V (interview with senior mediator).

this may account for the fact that ADR seems often under-used.[176]

This same type of analysis can be made of transplants across legal systems. Is the impetus for adopting the original concept (in the U.S.) and the transplanted concept (in the importing legal system) the same? The impetus for efficiency in England and Wales was *even more powerful* than in the U.S. due to deep cuts in civil justice and thus the cancellation of legal aid except for the very poor. The exorbitant cost of litigation, without legal aid, left "the ordinary litigant" (neither very rich nor very poor) without recourse to courts, and the continuing cuts to civil justice led to an aversion to any caseload at all. The drive for efficiency was not a result of high caseloads but rather due to an aversion to any form of caseload since most citizens couldn't afford it, and the justice system was looking to cut costs in any way possible. Thus the legal system embraced settlement and ADR—incentivizing them through cost sanctions and pre-action protocols to resolve differences between them rather than file a claim in court. The strong emphasis on efficiency has resulted in both a fall from the adjudicative ideal of "justice on the merits at all cost" (the implementation of social norms through judicial decisions) and a fall from mediation's ideal—due to the prevalent use of caucusing. The declarative call of the Woolf reform for "access to justice" addressed the "vanishing litigant" through encouraging her to use out of court settlement and ADR.

In promoting a settlement culture, the impetus for efficiency in Israel was also significant yet it was part of a general pursuit of ways to reduce caseloads, not as part of a crisis situation. It thus has allowed for some space for both the adjudicative ideal: Israel has not blocked the door to court altogether. It is possible to file a claim without pre-action requirements and running a costs risk, though an informational mediation meeting is obligatory for claims above 40,000 NIS. Most cases reaching pretrial settle at that stage, often through intervention of the pretrial judge. The somewhat lower emphasis on efficiency also allows for some expression of the ideal of mediation as court-connected mediation usually includes dialogue. Recently, Israel inserted proportionality into its objective for civil justice,[177] hearkening to this central concept in England and Wales (see Section IV). The continuing pursuit of

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[176] Robert A. Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLCT RESOL. 741, 741–42 (2014) ("[M]ediation is presently underutilized almost everywhere . . . the problem lies not with an uninterested community of potential users, but with the failure of mediation providers to deliver a "product" that lives up to its promises and offers something truly new and valuable to its users.").

[177] *Civil Procedure Regulations, 579-2018*, *supra* note 69 (Ch. 1, Art. 2. enacted in 2021); *see also Explanatory Notes to Civil Procedure Rules*, ISRAEL JUSTICE MINISTRY 1, 6 (2021) https://www.gov.il/he/departments/news/16122020 (explaining that the idea for an overriding objective and proportionality were adopted from England and Wales).

efficiency will thus probably result in increasing gradual measures.

In Italy, the impetus for efficiency and ADR-related transplants stemmed from a notorious caseload that has caused both external (EU) and internal criticism due to the length of proceedings. The country has thus conducted a sequence of reforms to stem the caseload. While the caseload problem has existed for a long time, and there is no acute need (such as an impending EU sanction or deep budget cut) to clear all cases all at once, it is expected that continuing efforts will be made, yet will also result in gradual rather than drastic measures such as those taken in the reform to civil justice in England and Wales. Recently, Italy has allowed for judicial training in mediation raising the possibility that judges will become more involved in the settlement of cases, perhaps gravitating toward an active judicial settlement role. There are also indications of efforts to emphasize the importance of dialogue in mediation.

A crisis situation calling for extreme measures to increase efficiency might change this gradual move. For instance, when the Covid-19 pandemic ends and courts may be flooded with claims that were not brought forth or were filed yet not dealt with during the pandemic years due to social distancing measures, ways to stem the tide may accelerate the move toward privatized dispute resolution. For the time being, each reform brings with it a small step toward the current state in England and Wales.

Of course, adversarial culture and impetus are not the only factors delineating the course of legal transplants. Yet this should not hinder us from identifying these influences, which may be no less central than the mode of implementation of transplants by first-instance judges—who were observed in this study to, for the most part, faithfully implement legislation on settlement practices. The strength of adversarial roots and the need for reduction of caseload can be summed up in the following table, which indeed does not encapsulate the full breadth of formants that influence the judicial role, but perhaps can provide an insight into two elements that may have come into play.

Table 1: Two elements affecting the implementation of transplants and the judicial role in the three legal systems. The presence of adversarial roots and the strength of the impetus for efficiency may contribute to a trend of disintegration of the judicial role.

	Roots	Efficiency Impetus	Judicial Role
England and Wales	Adversarial	Extreme	Sequestered
Israel	Mixed	Strong	Constricted (mainly pretrial judge)
Italy	Inquisitorial	Strong	Traditional judicial role, with some alternative roles

VIII. CONCLUSION: OUT, OUT, MILLENNIA-OLD CANDLE?

Italy, which is just beginning its journey into settlement, presents the dawn of settlement culture, with judges in the Florence Court often presenting mediation in a soft light, as a beneficial alternative for certain types of cases. Israel presents a high noon of judicial settlement activity, with settlement beating down on sometimes reluctant disputants as it is presented by judges many a time as the only good option they have. In England and Wales, we identify the twilight of the judicial role, and the vast majority of cases, both civil and criminal, do not reach a judge, but rather are settled earlier due to disincentives for trial that are high to the point that freedom of choice is questionable.

Will the dawn in Italy naturally progress to high noon, as in Israel? Is the twilight of the judicial role expected after that, when costs, efficiency and technology shift the focus of legal activities outside the courts?

These questions go to the heart of the judicial role in all countries: Does it have an important function—is it worth keeping? Should common law countries make an effort to roll back the process of disintegration of the judicial role? What are the implications for other continental countries that have integrated ADR into their legal systems but at present maintain a relatively high rate of trial? And what can this study teach us about the dynamics of transplants, other than the fact that in two legal systems described above judicial transplants have contributed to the constriction and marginalization of the judicial role?

Each legal system explored in this study presented its own unique combination of formants and distinct legal history. Italy has been juggling internal and external criticism due to a heavy caseload while looking toward

the United States as a place of prestige and towards the European Union, as well as the World Bank, for improved international economic standing. England, addressing the needs of austerity, has cut legal aid and given judges active management roles reminiscent of both American and inquisitorial legal culture. Israel has adopted a host of external influences to inform a new-old legal identity and increase efficiency.

Yet the measures the legal systems have adopted have much in common. The common thread—placing increased emphasis on the stage before trial, referral of cases to mediation by the judge, active judicial management of cases with an eye towards settlement—might be influenced both by efficiency concerns and by the prevalent legal influence of the U.S, where many of these measures gained broad acceptance and became common practices.[178]

Yet the transplants of these constructs is malleable. As shown in the previous Section, comparing the original impetus of a legal construct (including its underlying formants) to the impetus of its transplantation in another legal culture might help predict the transplant's trajectory. In addition, adversarial roots may portend a more natural tendency to privatize civil justice and promote plea bargaining in criminal justice. While in common law countries the settlement continuum prevails, Italy has for the time being preserved judicial truth seeking.

As is demonstrated in this study and is a common feature of legal change, systems of adversarial (common law) origin and systems of inquisitorial (continental law) origin borrow practices and regulation from one other. The continued differences between them might gradually disappear. A powerful impetus for efficiency (as in a period of austerity) process might result in a less gradual process to promote settlement, as in England and Wales.

Civil law and common law countries have borrowed constructs from each other in large part to increase efficiency and expedite or obviate trials. Italy has borrowed settlement practices that could be perceived as inimical to the inquisitorial tradition (e.g., the centrality of the judge vs. the parties, the emphasis on a judicial search for truth). Yet it has retained some of its original values: Judges still maintain their adjudicative role for a significant portion of cases and generally, according to our observations and interviews, make conciliation proposals only after considering the merits of the case.

Israel and England and Wales borrowed practices from civil countries, supplementing plea bargains, settlement practices and other adversarial-like

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[178] The influence, as shown in this paper, is not one-way, and a few of the exported American constructs were historically influenced by concepts of European legal thought at the end of the 19th century and early decades of the 20th century. However, these concepts took on a new momentum in American legal culture and were transformed in unique ways.

shortcuts with inquisitorial-like judicial practices that consist of both management and active interrogation in criminal and civil proceedings. The embodiment of both tactics in the three legal systems—the inquisitorial penchant for a proactive judiciary and the adversarial penchant for settlement—is powerful as it adopts the main tool for reining in litigation from each legal tradition.

This dual tactic is present to a different extent in each of the legal systems that we studied and can result in a judicial demand for settlement that is hard to deny. The question is whether this is the vision we have for judges in an age of consensual dispositions: judges who are given greater powers for the purpose of pressuring parties to settle. Such a role may not seem significant enough to survive the pressure of digitalization and replacement of the judicial role altogether, a departure from a venerable institution developed over 4,000 years ago.

The three described stages do not have to be sequential. England may reopen its gates to litigation; Israel may decide to inject meaningful judicial settlement practices that address the needs of the parties; Italy may decide to stay where it is, with a clearly defined division between adjudication and settlement practices. Yet, by analyzing the impetus for the settlement-promoting transplants, it seems that there is a realistic possibility that Italy and Israel may gradually go the way of England, viewing civil justice as a mostly private issue. Italy is currently seeking to augment its policy of promotion of alternatives, and has recently allowed judges to undergo mediation training (perhaps envisioning a more hands-on approach in bringing about settlement, bringing to mind the pretrial judge). Israel is trying to shorten the pretrial phase, opening the way to trial on the one hand, while requiring more civil cases to go through a mandatory meeting to explore the prospect of mediation, opening the way to mandatory ADR requirements on the other.

There are many ways forward to ensure a meaningful judicial role and protections for individual litigants. All are proactive and require a real effort. The promising part is that, as we have seen in Italy and England, judicial training can yield real results in practice. In Israel, too, judges faithfully implement the policy of the legal system. Whether the direction is to give judges more cases to adjudicate (through prioritization of case type or otherwise), or to infuse meaning into judicial settlement practices, many avenues are open to increase the value of the judicial role.