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Judicial Role in Transition

1.1 Rise of the Settlement Judge in the United States

Settlement has always been the end result of some disputes, yet until recent decades it was not officially incentivized by legal systems. In the early twentieth century, the pretrial conference was introduced in the USA as a forum to prepare cases for trial. The idea was that before the presentation of evidence, a judge could make sure all requirements were met and clarify the main issues to make trial more efficient. With time, the pretrial became a forum for judicial settlement practices.

In 1983, the judicial settlement role was formally introduced into legislation after decades of practice.[1] Rule 16 (Pretrial Conferences; Scheduling; Management) of the Federal Rules of Civil Procedure was amended to specifically include the discussion of settlement possibilities during pretrial conferences. Moreover, 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."

In recent decades, the pretrial has become the main court setting for the discussion of cases in the USA, largely displacing trial.[2] By the time the vanishing trial phenomenon was observed and commented upon, the rate of trial in the USA was 1.8 percent of filed cases.[3] In his 2004 landmark article, Marc Galanter documented a general decline of adjudicated cases from the early twentieth century, and a more precipitous decline in the 1980s and 1990s. In 2019, the civil trial rate was below

[1] 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).

[2] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEG. STUD. 459 (2004); Edson R. Sunderland, *Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215(1937).

[3] Galanter, *supra* note 2.

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1 percent.[4] The criminal trial rate is less than 2 percent due to parallel trends in the criminal legal system that have put plea bargaining at the forefront of prosecutors' efforts. Settlement has become the modal legal outcome.[5]

1.1.1 Why Settlement?

The precipitous decline in trial that Galanter commented upon is often attributed to trends taking place in the 1970s. At that time, the US legal system was searching for ways to stem high caseloads due to a "litigation explosion."[6] Concurrently, the Critical Legal Studies movement, which viewed adjudication as inextricably tied with politics and underlying biases, was beginning to gain acceptance.[7] In addition, the Alternative Dispute Resolution (ADR) movement was offering an alternative view of justice, emphasizing the need for broader, consensual resolutions to conflict. Thus, efficiency concerns merged with critical and alternative views of the judicial process to deflect cases from adjudication.

That, at least, is the common explanation. Some have proposed that the "litigation explosion" of the 1970s was, in fact, not an explosion at all,[8] and that one had to look elsewhere to explain the falling rate of adjudication – namely, to the judges themselves, 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

[4] U.S. Courts Judicial Business Report, Table C-4 (2019). https://www.uscourts.gov/judicial-business-2019-tables [https://perma.cc/L8FJ-4L4C].

[5] Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009) (citing settlement as the "modal civil outcome").

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

[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] Sarat, *supra* note 6.

[9] Marc Galanter, *A World Without Trials*, J. DISP. RESOL. 7, 10 (2006) 16–17 (noting "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).

and to respond accordingly."[10] According to one hypothesis, criticism of the judicial role, which began long before the 1970s,[11] may in itself have been enough to persuade judges that settlement was the better outcome, to be promoted and sought in the courtroom.[12]

The tactics pretrial judges[13] use to encourage parties to reach settlement in civil justice are varied – from leveraging procedure and time schedule to negotiating the case themselves.[14] With the consent of the parties, judges may meet with the parties separately in their chambers, taking offers from one party to another until reaching an agreed-upon offer.[15] One study, based on interviews and surveys of lawyers and judges, documented more than 70 judicial settlement practices.[16]

In criminal justice, plea bargaining constitutes the most common form of case disposition in the USA. In 2018, only 2 percent of federal criminal cases went to trial, and the percentages for most state courts were comparable.[17] The merits of plea bargaining lie in clearing high

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

[11] 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 nineteenth century in Europe and the USA. 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. COMP. L. 469 (2004).

[12] Galanter, *supra* note 2.

[13] The term "pretrial judges" here includes federal judges, state judges, and magistrates.

[14] 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).

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

[16] 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).

[17] For federal court figures, *see* UNITED STATES COURTS, U.S. DISTRICT COURTS – JUDICIAL BUSINESS (2018). For state court figures, *see* NICOLE WATERS, KATHRYN GENTHON, SARAH GIBSON & DIANE ROBINSON, COURT STATISTICS PROJECT DATAVIEWER (COURT STATISTICS PROJECT, 2019). *Cf.* an earlier report, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE

caseloads, though some studies have found that actual caseloads do not impact the number of pleas. Reducing the number of pleas even by a small fraction, it is believed, would "crash the system."[18]

State judges, other than in a handful of states that prohibit such judicial practice, can actively partake in the plea bargaining process between the prosecutor and defendant, making the pretrial or arraignment hearing a central forum for disposing of criminal cases; federal judges are prohibited from doing so, though some attempts have been made to change legislation in this regard.[19]

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 pretrial phase.[20] Though not all pretrial judges subscribe to the role of the settlement or managerial judge, this mainstream phenomenon has

BARGAINING RESEARCH SUMMARY (2011), where a plea bargain rate of 90–95% was estimated. S*ee 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.")

[18] RAM SUBRAMANIAN, LÉON DIGARD, I. I. MELVIN WASHINGTON & STEPHANIE SORAGE, 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.

[19] Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 331–34 (2016). The criminal pretrial was set in Article 17.1 of the US Federal Rules of Criminal Procedure in the 1960s. According to Article 17.1 of Federal Rules of Criminal Procedure Committee Notes – 2002 Amendment, "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." 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.

[20] Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982); King, *id; 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).

been gaining ground and intensity in the past decades, raising common dilemmas related to undue pressure in promoting settlement[21] 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 usually will not preside over the case, but this can happen in small localities.[22] The active stance of the pretrial judge has been reminiscent of some of the inquisitorial judges in continental legal systems, and scholars have interpreted it as a divergence from adversarialism.[23] The pros and cons of the settlement judge have been widely debated.[24]

1.1.2 A Similar Fate: Alternative Dispute Resolution

The term "mediation," which is the most well-known ADR process, may elicit expectations of a process that addresses the needs of litigants through dialogue. Unfortunately, ADR in major common law countries has generally gone through a similar process of falling from ideals to a bargaining reality. Much like the court system that has frequently adopted and promoted it, ADR often places efficiency concerns above its core values, such as face-to-face dialogue between the parties, which, with the popularity of caucusing, is quite rare.[25]

[21] Cratsley, *supra* note 16. Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, ARIZ. STATE LAW J. 1–38 (1994). King & Wright, *supra* note 19.

[22] King & Wright, *supra* note 19.

[23] *Id.,* Resnik, *supra* note 20. 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.

[24] See, *e.g.,* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U. L. REV. 145 (2011). *See also* Cratsley, *supra* note 16; Resnik, *supra* note 20.

[25] 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, *Conseqeunces 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 & Masahiro Suzuki, *Four Challenges in the Future of Restorative Justice*, 11(1) 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

The promotion of mediation by US and UK legal systems has led to a familiar cascade of co-optation.[26] Institutionalized mediation in England is targeted toward an efficient, speedy resolution of the case – much like adjudication or any other activity of the court.[27] It is often evaluative positional bargaining[28] – with mediators pointing out the weaknesses of each party's legal case – limited in time, and often conducted without dialogue between the parties. Mediators often shuttle between rooms (parties are not seated together) to negotiate a compromise.[29] In addition, parties may enter mediation merely as a necessary step to avoid cost shifting, since parties in the UK who refuse a mediation offer are exposed to cost sanctions.[30]

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* JOSEPH P. FOLGER ET AL. (EDS.), TRANSFORMATIVE MEDIATION: A SOURCEBOOK – RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS (2010).

[26] Coy & Hedeen, *supra* note 25.; Carrie Menkel Meadow, *When Should I Be in the Middle? I've Looked at Life from Both Sides Now* in HOWARD GADLIN & 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.").

[27] Sue Prince, *"Fine Words Butter No Parsnips": Can the Principle of Open Justice Survive the Introduction of an Online Court?* 38(1) CIV. JUST. Q. 111 (2019).

[28] Nadja Alexander, *The Mediation Meta-Model: The Realities of Mediation Practice*, 12(6) ADR BULLETIN 126–31, 126 (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 end: "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.").

[29] SIMON ROBERTS, A COURT IN THE CITY, 5 (2013); Prince, *supra* note 27.

[30] HAZEL GENN, PAUL FENN, MARC MASON, ANDREW LANE, NADIA BECHAI, LAUREN GRAY & DEV VENCAPPA, TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE (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* judgment in 2004, which offered a nuanced interpretation of "unreasonable." Since then, there have been further conflicting judicial decisions on the matter.).

Thus neither the positivist vision of the judge meting out justice nor the idyllic vision of mediation creating meaningful dialogue and agreement has materialized in the USA or UK. 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"[31] – 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.[32] In Italy and Israel, the co-optation of mediation in some frameworks is less extreme, and deeper forms of mediation are not rare. However, mediation is underused and disposes of only a small fraction of the cases.

1.1.3 The Question

To date, neither the normative values of adjudication nor the fundamental values of ADR (improved communication, relation-building, addressing needs and the broader conflict) prevail. In their stead is a drive for efficiency in both courts and mediation sessions, providing abbreviated justice – at best. Courts in many countries have adopted abbreviated modes of trial to save judicial bench time and mediators have adopted evaluative styles that are reminiscent of the selfsame abbreviated procedures of judges in court.

Judges, in this setting, are expected to manage cases until they settle rather than provide a reasoned decision on the dispute – though, as our research shows, some judges view higher horizons for their role, lending insights to possible new trajectories. As legal systems implement digital systems to cut litigation costs, and technological efforts aim to replace judges with AI, the question of the value and place of the judicial role has reached a critical crossroads.

1.2 Continental Law Countries

The transition to the settlement judge described in the preceding sections is not as accentuated in continental European countries. Continental law judges more commonly decide cases on their merits, as settlement is not

[31] Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).
[32] Floyd, *supra* note 21.

as embedded in the legal culture as in common law jurisdictions.[33] Yet in continental law countries, too, judges have been encouraged through relatively recent reforms in civil justice to promote settlement between the parties and refer them to mediation when appropriate.[34] Whether this practice gathers momentum and turns into a full-fledged vanishing trial phenomenon remains to be seen.

The integration of settlement practices into the judicial role in continental law countries has occurred through an extensive web of borrowing – or "transplanting" – concepts from common law countries, especially the USA. Much borrowing occurs between legal systems, as has been widely commented upon in comparative literature: Today systems are often mixed.[35]

In continental Europe, various settlement transplants, as well as the introduction of abbreviated trials, have modified the inquisitorial nature of the judicial role, and shortened it significantly.[36] ADR, which began as an alternative movement in the USA in the 1970s, has been transplanted into most modern legal systems, resulting in both convergences and divergences between them, which put into question how close the legal systems have become. On the other receiving end, the common law judge becomes increasingly inquisitorial: making decisions on production of evidence, interrogating witnesses, and broadening discovery so that the adversarial nature of proceedings is modified and the facts are more easily discerned.[37] Thus, generally speaking, the two legal families have adopted the main backstops to protracted litigation from each other.

[33] *See* 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) CIV. JUST. Q. 42–67 (2013) (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.).

[34] Nofit Amir & Michal Alberstein, *From Transplant to Disintegration? A Comparative Study of the Judicial Role,* 37(4) OHIO ST. J. DISP. RESOL. 555 (2022); Paola Lucarelli et al., *Fitting the Forum to the Fuss While Seeking the Truth: Lessons from Judicial Reforms in Italy*, 36 OHIO ST. J. DISP. RESOL. 213 (2020).

[35] Maximo 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 (2004); 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(4) INTNL. J. EVIDENCE & PROOF 289 (2016).

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

[37] Resnik, *supra* note 20.

In the legal systems that we studied, 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. By siphoning disputes out of the legal system (through judicial referral to dispute resolution or through pre-action requirements such as mandatory mediation), legal systems are undergoing different transformations. We show that these transformations could be part of a common linear trend toward disintegration of the judicial role.

Chapter 2 will show three different transformations of legal systems through settlement promotion – in fact, three different melds of adversarial and inquisitorial justice. Though the three legal systems transplanted the same ideas, implementation at this time 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 past decade or so, the judicial role is still central. In Israel, settlement reforms have resulted in an emphasis on the pretrial stage, narrowing the judges' role. 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 the last section of Chapter 2.