MANAGERIAL JUDICIAL CONFLICT RESOLUTION (JCR) OF PLEA BARGAINING: SHADOWS OF LAW AND CONFLICT RESOLUTION

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This article examines the role of the criminal judge in light of the vanishing trial phenomenon and the emergent reality of many doors to process legal conflicts in both the civil and criminal domains. It focuses on judicial conflict resolution (JCR), which is any activity conducted by judges in order to promote consensual disposition of legal cases, in “Plea Bargains Facilitating Days” (moqed) in Tel-Aviv Magistrate’s Court. We conducted quantitative and qualitative analyses of data collected from observations of 717 hearings in 704 criminal cases and found that, on average, 5.55 (SD = 3.62) hearings were required for disposing of a case, and the average duration of a legal proceeding from indictment to closure was 548.55 (SD = 323.17) days. In most of the hearings the judges’ role was confined to managerial-bureaucratic decisions intended to enable the negotiation between the parties. JCR activities occurred in only 16.9 percent of the hearings, and we identified six types of JCR practices in the promotion of plea

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bargains: narrow and broad facilitation of negotiations between the parties, forecasting the legal outcome, negatively presenting the judicial process, using lawyer-client relations to promote agreement, and using Alternative Dispute Resolution (ADR) techniques. These findings are compared to previous findings on the roles of judges in civil pretrial proceedings, and the more active role of the civil judge in promoting settlements is discussed. We further discuss the possibility of expanding a therapeutic and rehabilitative approach in the framework of criminal JCR during preliminary hearing days, which become today the main door of criminal justice.

Keywords: *criminal preliminary hearings, judicial conflict resolution (JCR), judge's role, criminal law, plea bargain, Alternative Dispute Resolution (ADR)*

INTRODUCTION

This article examines the role of judges in light of the criminal justice system becoming in recent years a multi-door arena. Consequently, the primary path for deciding criminal disputes is not the rendering of a judicial decision after a full evidentiary proceeding, but an agreement between the prosecution and the defense. The conception of the courthouse as a functional space in which the primary emphasis is on the efficient and effective processing of the legal case, with the adaptation of the forum to the type of dispute, emerged in the legal field in the civil context in the United States in the 1970s.¹ It was promoted by Frank Sander and was named “the multi-door courthouse.”² From the start, this concept appeared to be suited to civil, private disputes and disconnected from the criminal context. The main door to resolving disputes in this functional civil space was the mediation proceeding.³ Agreement by the parties was perceived a priori as unsuited and less adapted to public and criminal-punitive law. Mediation, in its egalitarian meaning of striving toward a broad-based agreement between the parties, was seen in principle as a proceeding that is unsuited to

1. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 FED. RULES DECISIONS III (1976).

2. *Id.*

3. Frank E.A. Sander & Lukasz Rozdeicert, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation Centered Approach*, 11 HARV. NEGOTIATION L. REV. 1 (2006).

situations of harm and violations of public norms for which the state prosecutes individuals.

Today, fifty years after Sander introduced the multi-door courthouse, it can be said that although civil mediation has not replaced adjudication as the principal proceeding, adjudication, in the sense of conducting a full judicial proceeding that includes evidence and ends with a reasoned judicial decision, has ceased to be the primary proceeding, and in certain U.S. states has almost entirely vanished.⁴ This process of disappearance of the main judicial proceeding has also occurred in criminal justice, turning the process of bargaining for a plea agreement into the primary channel for concluding criminal cases. Criminal justice too, then, has become a multi-door arena, such as the founders of the Alternative Dispute Resolution (ADR) movement could not have foreseen. Some of these doors are alternative, and often they receive most of the scholarly and academic attention. Significant alternatives to the criminal judicial proceeding today include in-depth processing of the criminal dispute in the framework of restorative justice proceedings or problem-solving courts. These are unique alternatives to the formal adversarial system in which dialogue and participation of various stakeholders are encouraged, emotions are expressed, and rehabilitative concerns are paramount.⁵

Nonetheless, the major developments in the fading of criminal adjudication as we knew it are not necessarily the emergence of constructive alternatives such as restorative justice. Just as the fading of civil adjudication did not lead to the entrenchment of mediation as the primary proceeding, so too in the criminal arena. Instead, one central door is gaining strength, one that is aimed at encouraging the prosecution and the defendant to reach an agreement before trial. This article examines the way judges promote a plea bargain at the preliminary hearing when managing this central door.

Underlying this article is the assumption that, in light of the scope of the vanishing trial phenomenon, wherein most criminal cases end in agreement, new roles emerge for judges that relate to processing the criminal

4. Gillian K. Hadfield, *Where Have all the Trials Gone—Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, (2004) (analyzing empirical data to answer the question as to how civil cases that are submitted to court are concluded).

5. See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 211–14 (1990), and the discussion below *infra* note 26.

conflict. This conflict usually starts with an interpersonal dispute in which a victim is often involved; over that dispute, a judicial framework is superimposed, which replaces the original dispute and removes it from the interpersonal realm. A criminal charge defines a dispute as a conflict with the state, and the defendant takes the victim out of the equation and aims at a resolution on the questions of guilt and of punishment.⁶ This formal framework leads to a discourse between professional actors—the prosecutor, the defense attorney, and the judge, the latter focusing in most instances on the negotiation over the charges versus the level of punishment within the plea agreement. A broader discourse may develop if human relations, the economic conditions, and the social conflict that led to the criminal offense are recognized as underlying it. Such discourse will acknowledge the criminal dispute as being connected to a defendant, a victim, a community, questions of rehabilitation, the realization of social rights, internalization of the norm and taking responsibility, and the prevention of further crime and addressing the conditions that led to it.⁷

The consensual framework of striving toward a plea bargain and the conduct of a preliminary proceeding give rise to a creative space in which it is possible to agree on many issues such as the description of the facts, the charge, the range of punishment, a specific punishment, transfer to a different alternative channel, deletion of an indictment, and suspension of proceedings, among other elements.⁸ This article examines the possibility of promoting such in-depth handling in a preliminary proceeding that is the central channel for conducting criminal trials today—*moqed* days. The *moqed* days, as determined by law, are meant for the conduct of preliminary proceedings on indictments, to limit the factual or legal dispute, in whole or in part. The purpose is to obviate the need for the presentation of evidence and bring the matter to a conclusion during the preliminary proceeding. To characterize the Plea Bargains Facilitating Day proceeding (*moqed* day) and gain an understanding of the judge's role in it, both in practice and in theory, we conducted quantitative and qualitative analyses on data collected from observations of 717 hearings in 704 criminal cases, in the Tel Aviv Magistrate's Court. Furthermore, we compared our

6. Michal Alberstein & Nourit Zimmerman, *Constructive Plea Bargaining: Towards Judicial Conflict Resolution*, 32(2) OHIO ST. J. ON DISP. RESOL. 279 (2017).

7. *Id.*

8. *Id.* at 291.

findings with previous findings in the civil domain, propose some explanations for the differences we found between judges' conduct in the two domains, and offer possible ways to close these gaps.

Section I will overview the plea bargain framework and its relationship to vanishing trials, conflict resolution, and the role of judges in preliminary criminal hearings both in general and in the Israeli context. It will further present our previous study on the role of judges in preliminary civil hearings; Section II outlines the research design and presents quantitative findings from our current court observation study. It provides descriptive statistics of several features of the preliminary hearing days and judicial activities conducted in them. Section III outlines recurring themes of judicial conflict resolution activities to promote plea agreements, including structural features, and provides detailed examples for their use; Section IV discusses the significance of these findings regarding our research questions and in comparison, to findings regarding the civil judge. The Conclusion will offer ideas regarding closing the gaps between the civil and criminal judge, and regarding the changing role of judges within the multi-door criminal justice arena.

I. CRIMINAL PRELIMINARY HEARINGS AND PLEA BARGAINS IN AN ERA OF VANISHING TRIALS

A. Plea Bargains and the Vanishing Trial

The vanishing trial phenomenon, evincing itself in the paucity of criminal trials ending with a full judicial decision, is not new.⁹ This phenomenon, described mostly in reference to the U.S. criminal justice system, includes two forces or primary factors. The first is the entrenchment and institutionalization of plea bargains as a central channel for concluding criminal cases.¹⁰ The second is the contraction of the criminal judicial proceeding and the transition to conducting proceedings in a condensed and shortened

9. The phenomenon exists also in the domain of civil justice. Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 7–9 (2017); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Ami Kovo, INCONSISTENT DEFENDANTS 49–51 (2009) (Hebrew); Malcolm Feeley, THE PROCESS IS THE PUNISHMENT 185 (1992).

10. George Fisher, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (documenting plea bargaining in early 19th century Massachusetts courts);

format (semi-summary trials), in the framework of the preliminary proceedings.¹¹ In many countries, including some that are inquisitorial, plea bargains and summary trials of various kinds have become a central tool for conducting criminal justice.¹² In recent years many countries have adopted a variety of waiver systems that include incentives of various types toward the reduction of punishment, lessening of charges, and modifications of the facts,¹³ which obviate the need to conduct a criminal evidentiary trial.¹⁴ Such arrangements have resulted in the majority of criminal cases ending without a full judicial proceeding: in Australia 61.1%, in England and Wales about 70%, in Scotland about 85%, in Georgia 87.8%, and in the United States 97.2%.¹⁵ Similarly, in Israel, it was found that 76.5% of the defendants, against which the criminal proceeding ended with a final judicial decision and sentencing, were convicted following a plea bargain.¹⁶

In the classical format of the adversarial system, the parties exhibit a contrarian attitude, and the court will decide after conducting a full evidentiary trial. In a plea bargain, the parties—the prosecution and the defendant or his attorney—do not confront each other in the courtroom; rather they negotiate outside the courtroom, in an endeavor to craft a mutual position that will be brought before the court for approval.¹⁷ The parties craft agreements as regards the details of the indictment according to which the

Mary E. Vogel, *The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency*, 35 J.L. & Soc'y 201 (2008).

11. Darryl K. Brown, *How to Make Criminal Justice Trials Disappear without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 159 (2018).

12. For a comparative overview of plea bargains within criminal justice systems, see the article in this volume by Béatrice Coscas-Williams and Michal Alberstein, *A Patchwork of Doors: Accelerated Proceedings in Continental Criminal Justice Systems*.

13. For the incentives to the various players, see also Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 164–67 (2012).

14. The Disappearing Trial: Towards a rights-based approach to trial waiver systems (Apr., 2017), <https://www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf>.

15. Guilty Pleas and Trials in each Circuit and District, Fiscal Year 2017. Source: U.S. Sentencing Commission, 2017 Datafile, USSCFY17, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table10.pdf>.

16. OREN GAZAL-AYAL, INBAL GALON, & KEREN VINSHEL MERGEL, RATES OF CONVICTION AND ACQUITTAL IN CRIMINAL PROCEEDINGS, Haifa University and the Information and Research Division of the Israel Supreme Court, May 2012 (Hebrew).

17. Shai Yaniv, *Plea Bargaining from the Judicial Angle—Changes and Consequences*, in ELIYAHU MATZA BOOK, Sec. 3: Criminal Justice, 341, 343 (2015) (Hebrew).

defendant will be judged, and even as regards the punishment to which he will be sentenced after confessing to guilt.¹⁸ A freely given confession of guilt in court leads to the conviction of the defendant and obviates the need to conduct an evidentiary proceeding to ascertain guilt.

At first, there were doubts about plea bargaining, which were followed by posing limitations on plea bargains. Over the years, judicial systems, including that in Israel, have gone from a stance of relative suspicion and the perception of plea bargains as a necessary evil¹⁹ to full-scale adoption of this channel as the high road to handling criminal justice proceedings.²⁰ Over time, the place of plea bargains has become established as a legitimate product of the criminal process. Boundaries and means of supervision have been consolidated, headed by the court that must approve the plea bargain.²¹ The approach adopted in some court decisions is a “balancing approach” according to which “the court must examine whether a proper balancing was done in the plea bargain between the benefit it grants the defendant—between the punishment it proposes, in comparison to the customary punitive norm given the severity of the offense and its circumstances, in the defendant’s circumstances—and the benefit in it to the public interest, in consideration of the purpose for which the bargain was made.”²² The stance the court seeks to promote encourages the crafting of plea bargains by confining the judicial involvement to defined questions, similar to the supervisory authority of the Court for Administrative Affairs.²³

18. Kenneth Mann, *Criminal Administrative Procedure: Plea Bargains, False Convictions of Defendants and Judicial Supervision*, in FAIR TRIAL? THE CRIMINAL JUSTICE PROCESS IN ISRAEL—FAILURES AND CHALLENGES (Alon Harel ed., 2017) (Hebrew).

19. HCJ 532/71 Bachmutsky v. State of Israel (1972) (Nevo database).

20. Oren Gazal-Ayal, *Deviation from the Bounds of Fitting Punishment*, in DORIT BEINISH BOOK (Keren Azulay, Itai Bar-Siman-Tov, Aharon Barak, & Shachar Lifshits eds., 2015) (Hebrew).

21. Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46(1) HOFSTRA L. REV. 63, 64 (2018); Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982); Cynthia Alkon, *Plea Bargaining: An Example of Negotiating with Constraints*, in THE NEGOTIATOR’S DESK REFERENCE 683 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017); and compare Bibas, *supra* note 13, at 150–53.

22. See para. 13 of Justice Beinisch’s decision in CJ 1958/98, *Anonymous v. State of Israel*, 84 57(1) 577 (2002).

23. HCJ 2859/18 Muhammad Harouf v. M.I., paras. 8–10, delivered on 11 Nov. 2011 (Nevo database).

On the similarity and connection between the administrative process and the criminal process and the judge’s role, see: Brown, *supra* note 21, at 63, 79; Gerard E. Lynch,

The central driving force for the development of these mechanisms was efficiency, but there are other factors as well. They include the development of the ADR movement and the recognition of possible alternatives to the judicial process, first in the civil domain and eventually in the criminal domain as well.²⁴

B. Plea Bargains and Conflict Resolution

In the early days of the ADR movement, mediation and other alternatives to a trial were seen as representing a strengthening of private ordering and autonomy. However, the criminal process in which plea bargains were used, was perceived as damaging to the public order. Fundamentally, the criminal process serves as a way to correct a violation of the social norm, by turning the interpersonal dispute into a public dispute over the violation of law and harm done to the public order. Based on various theories from the fields of sociology, psychology, and criminology, as well as therapeutic justice and restorative justice, it is possible to reexamine the criminal dispute as a complex social conflict. This mode of observation influences conceptions of the roles of the various actors, including the judge on *moqed* days.²⁵

The special alternative procedure for the criminal domain has been recognized as restorative justice, and it involves a direct meeting between the victim and the offender.²⁶ It also includes the offender taking responsibility and those with interest in the criminal process, including the

Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2121 (1998); Mann, *supra* note 18, at 217, 219, 256 (Hebrew).

24. Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563 (2009–2010); Alkon, *supra* note 21, at 683.

25. Alberstein and Zimmerman, *supra* note 6 at 283–84.

26. See Zehr, *supra* note 5, at 211–14 (for a paradigmatic presentation of the dichotomy between restorative and retributive justice); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2005) (discussing the relation of law and restorative justice and their complementary character); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727 (1999) (for an account of restorative justice as the default criminal justice mechanism, and for a suggestion to perceive conventional punishment as marginal); John Braithwaite, *The Practice of Restorative Justice: Holism, Justice and Atonement*, 2003 UTAH L. REV. 389, 392 (illustrating the prevalence of mediation among other ADR processes and an argument for “presumptive mediation”); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205;

community, participating in making decisions of how to correct the damage done. In the places where restorative justice is practiced, it appears today as merely a marginal side-door in the framework of the multi-door criminal courthouse, and we believe that aspects of it can be applied as an inherent part of the main door to the criminal process—the preliminary hearing and the promotion of plea bargains. We argue that the principles of conflict resolution and the application of restorative practices, as opposed to restorative justice in its full sense,²⁷ are relevant to conducting most of the judicial proceedings employed today to promote plea bargains.²⁸

The criminal conflict is a broader phenomenon than the legal dispute, and addressing it constructively requires judges to utilize unique skills and methods that can be borrowed from the conflict resolution field. Considering the phenomenon of the “vanishing criminal trial,” judges today, in any case, are required to address the reality of conflict and not only questions of legality. This necessity may become a broader terrain for more comprehensive and constructive processing of legal criminal conflicts.²⁹

C. The Role of the Criminal Judge in Preliminary Hearings

1. Preliminary Criminal Hearings as a Scene in Transition

Preliminary hearings for promoting and approving plea bargains are common today in various countries.³⁰ Preliminary hearings and plea negotiations are intended to advance the efficient use of judicial resources and lead to a reduction in trial costs, lessening of the discomfort caused to witnesses,

Hadar Dancig-Rosenberg and Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013).

27. On restorative practices, see Paul McCold & Ted Wachtel, In pursuit of paradigm: A theory of restorative justice, International Institute for Restorative Practices (www.iirp.edu/pdf/paradigm.pdf), August 12, 2003), <http://www.iirp.edu/pdf/paradigm.pdf>; Ted Wachtel, From Restorative Justice to Restorative Practices: Expanding the Paradigm, Address at the 5th International Conference on Conferencing, Circles and other Restorative Practices (August 5, 2004), http://www.iirp.edu/pdf/bco4_wachtel.pdf; Ted Wachtel, Defining Restorative, International Institute for Restorative Practices, IIRP Graduate School, 2016, https://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf.

28. See Alberstein & Zimmerman, *supra* note 6, at 288–94.

29. *Id.* at 294.

30. 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).

and mitigation of the uncertainty involved in a trial.³¹ These goals can be achieved by, among other things, setting a rigorous timetable, requiring the defendant's presence at the hearing, and his being represented by an attorney. Requiring the prosecution to reveal the evidence before the preliminary hearing is another way to force the prosecution to disclose all the evidentiary material in tandem with submitting the charge sheet. In this way, the information revealed in preliminary hearings helps to identify legal issues that can be resolved in the course of the hearing of the plea bargain.³²

The scope and the characterization of the involvement by judges in preliminary hearings to promote plea bargains is a matter of controversy. The initial inclination was to characterize their role as being a "passive judiciary."³³ This meant that the judge was constrained to approving the evidentiary basis of the agreement, ascertaining that the confession was freely given, and exercising a certain degree of discretion, in keeping with the type of plea bargain, in sentencing.³⁴ This approach was guided by the idea that the major discretion in these contexts is awarded to the prosecution. Empirical evidence regarding judges' degree of involvement in preliminary criminal proceedings is scarce. Two studies conducted in the 1970s provided the widespread perception that judges are involved in such proceedings only indirectly and impliedly, maintaining a façade of noninvolvement.³⁵ A recent study conducted by King and Rowan refuted this

31. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery before and after Proposition 115*, 48 AM. U. L. REV. 465, 503 (1998): "... Ideally, pretrial screening ensures that the court will use its resources to adjudicate genuine disputes."

32. *Id.*

33. ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 51 (1981).

34. Brown, *supra* note 11.

35. 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); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, Part I, 76 COLUM. L. REV. 1059 (1976); John Paul Ryan & James J. Alfani, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479 (1979) (twenty jurisdictions in fifteen states).

Alschuler's in-depth interviews revealed a world in which judges' involvement was mostly covert—a coping mechanism used by judges, though not in a systematic manner, in order to deal with the rise in caseload. The most common approach was to be indirect, hint, or flatter. Such judges were able to express their dissatisfaction with the prosecutor's inflexibility, hoping to persuade the prosecutor to offer a better deal, or express an opinion on the

perception and argued that judicial involvement in criminal negotiations is institutionalized and embedded today in many state legal systems in ways that were not predicted in the 1970s.³⁶ Analyses of 97 in-depth, semi-structured interviews with judges, prosecutors, and defense attorneys from ten U.S. states, pointed to a convergence between civil and criminal proceedings. According to the authors, thirty years later, the philosophy that changed how judges conduct themselves in civil proceedings at the end of the 20th century—from passive adjudication, based on the facts and the law alone, to a proactive and even aggressive stance that has been dubbed “managerial judging”³⁷—has gained a hold in criminal proceedings as well. King and Rowan suggest that judges’ increased involvement in preliminary proceedings is the outcome of the development of managerial techniques to expedite proceedings to cut costs due to budgetary constraints. Also, increased involvement can be attributed to the technological revolution that began in the late 1990s. On the one hand, the technological revolution made it possible to track and monitor the progress of cases and improve their managerial handling, and on the other hand, it led to the development of performance and efficiency measures that put pressure on judges to conclude cases quickly.

Even though the findings regarding greater involvement provide only a partial picture about judges’ involvement in preliminary hearings in the United States, since they refer a priori to states that allow judges’ involvement in promoting plea bargains,³⁸ an overall change of trend in this context is evident.³⁹ There are also intermediate approaches, such as in Hong Kong and New Zealand, where the defendants can request a forecast from the judge before relinquishing their right to a fair trial. In Continental countries, where plea bargains were introduced more recently, judges have been provided with various tools of intervention and supervision, as part of the inquisitorial tradition and at times in combination with the introduction

proper sentence, should the defendant confess. Alschuler found that efficiency was most often cited as judges’ central motivation to intervene. Ryan and Alfini conducted an empirical study, using surveys and interviews, to examine the typical methods of judicial involvement among criminal judges in 15 states. They lent support to one of Alschuler’s findings, namely that judicial involvement remains exceptional.

36. King & Wright, *supra* note 35.

37. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 278, 374, 379, 386 (1982).

38. Brown, *supra* note II.

39. See The Disappearing Trial, *supra* note 14 (Fair trials).

of adversarial elements and plea bargains.⁴⁰ In Germany, for example, defendants, prosecutors, defense attorneys, and judges are all, by law, parties to the negotiations over plea bargains.⁴¹ In Israel too, calls for the more active involvement of judges were heard already in the 1980s.⁴²

The role of judges in preliminary proceedings is related to theories concerning what a plea bargain is, in essence, and the social-institutional role of the legal system in handling relatively low-level crime.⁴³ The questions can be asked: Is the presence of judges aimed at disciplining the defendants?⁴⁴ Or perhaps to tire them through cumbersome, tedious, and incomprehensible preliminary proceedings in which they participate and to which they are forced to return again and again?⁴⁵ Is the purpose of the plea bargaining to facilitate a balancing among the individual and collective interests of the professionals in the courtroom? Does it take into consideration the given limitations and intended functions of the organizations the legal actors represent, as well as the influence of the environment in

40. Golan Luzon, *Judicial Conflict Resolution in Plea Bargaining as the Golden Mean between the Adversarial and Inquisitorial Legal Systems* (April 2019) (unpublished manuscript). In Italy, the judge is not bound to the parties' agreement, but is obligated to verify the voluntariness of the defendant's request or consent. The judge must review the legal qualification of the charges against the defendant and the applicability of aggravating or mitigating circumstances. If any of these prove to be problematic, the judge must reject the bargain agreement and revert to the ordinary proceeding.

41. The German version of plea bargaining was subsequently accepted by the Federal Court of Justice and written into § 257c of the Code of Criminal Procedure (StPO) in 2009. The legislation expressly authorizes "discussions" about a case "with a view toward expediting the proceedings." In its central new provision, the law allows judges to reach an "understanding" with the parties about the outcome of the case. Finally, in 2013, the German Constitutional Court upheld the constitutionality of § 257c, authorizing the negotiation of criminal judgments between the court and the parties. See Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 240/97, 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 195, para. 8 (Aug. 28, 1997), <http://www.hrrstrafrecht.de/hrr/4/97/4-240-97.php3?referer=db>. DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/09 (Ger.), available at: <http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf> (explaining the Federal government's official reasons for the new legislation).

42. See, e.g., Amnon Cohen & Einat Avnan-Moller, *Passive Judge or Active Judge—A Proposal for Active Judicial Involvement in Plea Bargains*, MISHPATIM 31(3) 2001 7 (Hebrew).

43. Feeley, *supra* note 21, at 352.

44. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977) (presenting a theoretical-historical overview of the development of modern theory of criminal law).

45. Feeley, *supra* note 9.

which they operate?⁴⁶ Does the preliminary proceeding offer a creative space in the framework of which the goals of a plea bargain and the judge's role can be expanded?⁴⁷ Are the principles of conflict resolution being used?⁴⁸ How can we improve this proceeding and make it less focused on efficiency and more fair, transparent, and of greater social-moral value?⁴⁹ These questions will guide us as we examine the activity of judges in *moqed* proceedings.

2. Judges' Role in Preliminary Criminal Hearings in Israeli Magistrate Courts

The percentage of criminal cases that end in preliminary hearings in Israel is very high. From a sample of 1,610 criminal cases that were heard in all the Magistrate Courts in Israel and were concluded in the years 2010–2011,⁵⁰ 91.8% ended at the preliminary stages, and only 8.2% were concluded during or after the evidentiary stage. The number of hearings in the preliminary proceedings in these cases was on average 4.21 (SD = 3.84), and the time elapsed from indictment until the conclusion of the case was on average 440.76 days (SD = 445.12). In recent years, in instances when the preliminary hearing failed to lead to reaching an agreement, or sometimes

46. *Id.* at 21.

47. Alberstein & Zimmerman, *supra* note 6, at 8–9.

48. *Id.* at 10–11: *Process emphasis*: A central theme that inspired the origin of the field of conflict resolution is the concept that “process matters,” and that each conflict requires a focused reflection about how to engage with this process. *Constructive future-oriented intervention*: In conflict resolution, process emphasis is combined with a positive mode of intervention. *Underlying hidden layer*: According to conflict resolution philosophy, the social conditions underlying legal disputes—those which constitute the criminal conflict—are the true essence of the crime that needs to be addressed. *Hybridity*: Complexity and deconstruction. The phenomenon of crime is always complex, and the common criminal process tends to oversimplify crime by constructing it as a polar answer of guilty or not guilty. *Relationship and emotions*: In their work, judges can refer to the reality that people are interconnected in relational networks, and can encourage constructive expression of emotions.

49. Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1432 (2003).

50. The calculations were performed on the basis of data from the database of the Judicial Authority's research department. Oren Gazal-Ayal & Keren Vinshel Mergel, *Criminal Procedure Database, the Judicial Authority's Research Department and Haifa University Center for Research of Crime, Law and Society*, May 2012 (Hebrew), <https://elyon1.court.gov.il/heb/Research%20Division/doc/Research1.pdf>.

even from the start, cases are referred to a proceeding called criminal mediation, which aims to help the parties craft a plea bargain.⁵¹

Judges in Israel hold preliminary hearings based on § 143A of the Criminal Procedure Law,⁵² which allows judges to ascertain the defendant's position regarding confessing or denying any guilt, to frame the factual or legal questions in dispute, to obviate the need for discovery of evidence, or to conclude the case in the preliminary hearing. A condition for conducting any such proceedings is that an attorney represents the defendant. This judicial activity, which occurs on *moqed* days, also includes decisions about referring cases to other alternative doors such as community court, criminal mediation, or in exceptional cases, restorative justice and "Sulha."⁵³

Judicial review of the content of plea bargains is restricted. In principle, these proceedings are administrative,⁵⁴ and the judge's activity in such proceedings in Israel is thereby constrained. Cases that are not disposed of in the preliminary stage, since the parties have not reached an agreement regarding either the facts, the guilt, or the punishment, are transferred to the main proceeding, which is conducted by a different judge.

51. Ami Kovo, *Criminal Mediation*, HA-MISHPAT (2018), 301 (Hebrew).

52. 143A. Preliminary hearing, Criminal law procedure [consolidated version] 5742-1982.

53. Uri Yanai & Shaukia Dvai, *Traditions for Resolving Criminal Conflict: Between the Sulh and the "Restorative Justice" Procedure*, in FROM HARM TO RESTORATION: RESTORATIVE JUSTICE AND RESTORATIVE DISCOURSE IN ISRAEL (Uri Yanai & Tali Gil eds., 2016) (Hebrew); Ron Shapira, *It's Time for a Sulh*, HA-PRAKLIT 48, 433 (2005-2006) (Hebrew).

54. Mann, *supra* note 18; Ron Shapiro, *From Criminal Enforcement to Administrative Enforcement*, HA-SANEGOR 205, 4 (2014) (Hebrew):

The administrative authorities have broad powers to enforce provisions of law by various means available to them. Sometimes, in the framework of the administrative procedure, the administrative authority is authorized to take steps and perform actions that infringe on basic rights in a similar degree to the infringement of the same rights in the framework of criminal procedure. In those cases, the law provides the administrative authority with tools to reach the same (or similar) outcome of applying sanctions, the goal of which is to regulate behavior, on two parallel tracks: the track of adjudication in a criminal framework, and the track of taking administrative measures. The administrative authority is sometimes authorized to employ sanctions of a punitive nature, similar in essence to the sanctions employed in criminal procedure, including fines, restrictions on movement, and even prolonged incarceration. In a large number of areas, the administrative authority has the possibility of choosing between enforcing rules of behavior by means of administrative procedure or criminal procedure.

Previous and exploratory studies⁵⁵ of preliminary hearings in Israel described the activities in them relative to other doors of the new courthouse, and with some limited reference to the role of judges. Danzig-Rosenberg and Gal examined various characteristics of *moqed* proceedings in courts in three cities in Israel using observations of approximately 100 criminal hearings.⁵⁶ They found that the structure of the proceeding corresponds in a certain sense to the “assembly line” metaphor: swift, brief, and focused hearings. The court devoted only a few minutes of attention to each case, and judges made considerable efforts to advance agreements between the prosecution and the defense and to encourage arriving at compromise-based solutions that would make it possible to conclude the case with a plea bargain. Nonetheless, according to their findings, judges also prominently adhered to the discourse of procedural rights and formal protections available to the defendants in criminal procedure. This safeguarding of rights was exhibited both by defense attorneys and by judges, who in many cases stood watch to ensure that defendants’ rights were not infringed.

Danzig-Rosenberg and Gal found that judges addressed needs and personal circumstances of the defendant only rarely. The judges exhibited some creativity in using various procedural rules to reach the desired (by them) outcomes, ascribing importance to considerations regarding the specific defendant before them. In some cases, the judges intervened in a future-looking manner, taking into account considerations regarding the defendant’s rehabilitation and personal circumstances to improve his prospects. According to Danzig-Rosenberg and Gal, “the diverse outcomes reflected in the sentencings indicate that the inside people, headed by the judges, adapted individual solutions for each case, using a more functional and less formal approach to process the legal conflicts before them.”⁵⁷

Even though a large part of the negotiating toward the signing of a plea bargain goes on behind the scenes, between the prosecution and the defense, Danzig-Rosenberg and Gal argue that the findings from their

55. See also: Yosef Zohar, *Criminal Law in the Shadow of the Bargaining Domain*, MECHKAREI MISHPAT (forthcoming, 2019) (Hebrew); Yosef Zohar & Moti Michaely, *Law in the Shadow of Bargaining: The Feedback-Recycling Effect of Plea Bargains*, ALEI MISHPAT II, 153 (2014) (Hebrew).

56. Hadar Dancig-Rosenberg & Tali Gal, “The Fast and the Furious”: An Empirical Study on Arraignment Hearings at Lower Courts in Israel, BAR-ILAN L. STUD. (forthcoming, 2019) (Hebrew).

57. *Id.*

observations point to the activism of the judges conducting the *moqed* hearings in these negotiations, which in many cases continue in the courtroom. They note that the judges “pushed the parties to reach an agreement, hinted at their position in various cases, made proposals and in various cases intervened in the considerations of the prosecution and the defense. Sometimes it seemed they were putting pressure on the parties, but not explicitly, to conclude the case in agreement.”⁵⁸

3. Judges’ Role in Civil Pretrial Hearings in Israeli Magistrate Courts

In the initial phase of the judicial conflict resolution (JCR) research project, which centers on the role of judges both in the criminal and the civil domains, we studied judges’ involvement in resolving civil disputes. Judicial conflict resolution (JCR) includes any activity by judges that aims to encourage an agreement between the parties to dispose the legal case without the need of a full judicial procedure and the writing of reasoned judgment. Preliminary research conducted by JCR team members revealed that in Israeli Magistrate Courts, 60% of filed civil cases did not progress beyond the filing phase, and 10% of filed civil cases terminated after pleadings were completed. Jointly, 70% of all filed civil cases were disposed of without ever reaching a judge. In these cases, the court played a primarily institutional role, delivering the message of the dispute between the parties and incentivizing them to resolve it. The pretrial and the evidentiary trial comprised 30% of remaining cases filed in court, wherein a judges’ involvement in resolving the dispute occurred. Of the cases, 19% were disposed of at the pretrial stage, either by court-approved settlements, judgment by way of compromise according to Article 79A of the Israeli Courts Law, or dismissal of charges by agreement or other ways of consensual conclusion, and 11% were disposed of in the course of or after an evidentiary trial.⁵⁹ These findings guided the JCR team’s decision to conduct its subsequent research on judges’ involvement in resolving civil disputes at the pretrial stage, as the central meeting site of litigants and judges. It is important to note that whereas in the criminal domain, different judges conduct the

58. *Id.*

59. Ayelet Sela & Limor Gabay-Egozi, *The Role of Judges in Adjudication, Settlement and Other Vanished Trials: Evidence from Civil Trial Courts* (November 2017) (unpublished manuscript).

preliminary hearing and the trial, but in the civil domain, the same judge conducts both the pretrial and the trial.

Courtroom observations conducted in the civil pretrial stage revealed lively and active intervention by the judges to resolve the dispute in cases that come before them. Further analysis of data gathered from the observations led to the identification of eleven features, techniques, and attitudes that characterize civil judges' courtroom settlement practices. Some of them were structural practices such as the judicial opening statement, in-the-courtroom/off-the-record interplay, the lawyer-client-judge interactional triangle, the use of court procedure, and legal costs. Others were settlement promotion techniques such as direct facilitation of litigotiation, prediction of the legal outcome, procedural contracts and quasi-arbitration, negative aspects of the legal process or outcome, and ADR techniques. Additional categories were carry-over effects in proximate hearings and a unique significance to the style and tone of judicial interventions. The image that emerged from these pretrial civil hearings was of adjudication as an act of persuasion; a judge is negotiating with the litigants about the desirability of taking their case to trial. In this negotiation, judges acted as strict gatekeepers of the trial doors, emphasizing the negative aspects of litigation, trial, and judicial determination.⁶⁰

II. THE CURRENT STUDY

Based on the findings in the civil domain, we set out to examine the modes and degree of judicial intervention in criminal cases. Given the broad powers granted to criminal judges at preliminary proceedings by § 143A of the Criminal Procedure Law, we sought to ascertain whether criminal judges, like their civil counterparts, also exhibit ample involvement in promoting plea bargains; and if so, we sought to study the various practices—their characteristics and prevalence—and the similarities and differences between judicial practices in civil and criminal cases. Choosing to focus on cases conducted on *moged* days stemmed from its being the only proceeding, the

60. Ayelet Sela, Nourit Zimmerman, & Michal Alberstien, *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 101, 114, 116–32 (2019). See Rule 140 of the Israeli Rules of Civil Procedure. The goal of the civil pretrial hearings is to simplify, shorten, accelerate, and increase the efficiency of the procedure, as well as examine settlement options between and with the parties.

only door, through which cases come to a hearing after an indictment has been handed down, whether or not the defendant has reached a plea bargain. Tel Aviv Magistrate's Court, which is one of 28 Magistrate Courts in Israel, was chosen as the site of our research because it handles the highest number of cases in Israel—almost 20% of all criminal cases.⁶¹

To capture in full the *moged* days, we sought to find out, among other things, how many cases were approved after plea bargains, and how many verdicts and sentences were given? In how many cases were efforts made to facilitate and promote agreements between the parties? How many cases were rescheduled due to technical reasons? How many were transferred to trial or an alternative door such as community court or criminal mediation? An examination of the judge's role in these proceedings affords a deeper understanding of judges' involvement in the management of criminal conflicts in the era of the vanishing trial.

As detailed above, the starting point for the current study was the preliminary civil hearings. It is important to note a prominent distinction between judges' roles in the two domains: the preliminary civil proceeding is conducted before the same judge who presides on the main case, whereas the preliminary criminal proceeding is conducted by the *moged* day judge, and the main case is conducted by a different judge.

A. Research Design

To characterize and describe the *moged* day procedure and understand the judge's role in it, in theory and practice, we employed a mixed-methods study. We conducted observations at courtroom hearings where we documented in detail judicial interventions and complemented the observations data with data from official court dockets and a public dataset of criminal cases.

1. Data Collection through Court Observations

In the course of 45 *moged* days between November 2017 and May 2018, we conducted observations of 717 hearings in 704 criminal cases in Tel Aviv

61. This figure was calculated from the data presented to the public in the 2017 Annual Report: Courts Administration, Department of Development, Planning and Budgets; Judicial Authority, Department of Economics and Statistics (Hebrew), https://www.gov.il/BlobFolder/reports/statistics_annual_2017/he/annual2017.pdf.

Magistrate's Court. The observations were conducted by 13 law students from the Clinic for Judicial Conflict Resolution and Mediation, in the courtrooms of 11 judges. The students' training for the task proceeded in four stages: In the first stage, the observers participated in a guided tour of the courthouse—its structure, the various officeholders, and administrative aspects. In the second stage, after becoming familiar with the observation reporting format designed by the research team, they conducted initial observations. In the third stage, the observation reporting format was updated based on the initial findings drawn from the observations and feedback from the observers after conducting the observations. In the fourth stage, observations were conducted in which the observers were asked to focus their attention on various aspects of judicial interventions and describe them in the most detailed manner. Among other things, they were asked to document the hearing chronologically—placing emphasis on the judges' remarks when addressing defendants and their representatives, the interaction between the various players in the arena, how the hearing was concluded, and its duration. They were also asked to describe physical gestures and provide a general description of the atmosphere and conduct in the courtroom. These data were enhanced by seminar projects of graduate students practicing law themselves, some of them criminal prosecutors and defense attorneys. These students provided additional data on judicial intervention in the preliminary proceeding. Each observation report included the case number, the judge's name, the duration of the hearing, how the hearing was concluded, whether another hearing was scheduled, whether the plea bargain was approved, whether the case was passed on to another court, and whether the case was closed.

2. Data Collection through Official Court Dockets

Due to the difficulties that arose in the data collection detailed above, as well as the need to complete the information for each of the cases, the research team looked up each case in the Net Ha-Mishpat system, the IT system of the Israeli district and Magistrate Courts. The complementary data included information on the indictment date, the number of hearings conducted prior to the date of the observation, the total number of hearings conducted in closed cases, the date of transfer of the case to an evidentiary hearing or community court, and the number of hearings in these courts. Likewise, for each of the observations, the electronic

protocol of the observed hearing was examined to double-check and fill in the details. An additional source of data was a sample that includes numerous data of criminal cases heard in district courts and Magistrate Courts, most of which were closed in 2010–2011.⁶² Out of the entire sample, which includes 2013 cases, we used the data from 312 cases heard in Tel Aviv Magistrate's Court.

B. Descriptive Statistics of the *Moged* Days

1. Number and Length of Preliminary Criminal Hearings

The *moged* days are situated within an intensive ongoing process of changes and improvements meant to increase the efficiency of the hearings and lead to the closure of a large number of cases without an evidentiary hearing.⁶³ To examine whether efficiency has indeed been enhanced in *moged* days, we compared several measures between criminal cases closed in Tel Aviv Magistrate's Court in 2010–2011 (period 1), and criminal cases closed in Tel Aviv Magistrate's Court in 2017–2019 (period 2). The first measure was the number of criminal cases closed during or at the end of an evidentiary proceeding. We found that in period 1, 5.1% of the criminal cases were closed at the evidentiary stage, whereas in period 2 the rate stood at 7.2%. However, this increase was not found to be statistically significant ($\chi^2 = 1.277$, $df = 1$, $p = ns$).⁶⁴

Notwithstanding, a comparison between the two measures of efficiency—the number of hearings held in each case, and the time elapsed from when the charges were lodged until the case was closed—turned up significant differences between the two periods (Table 1). The number of preliminary hearings rose from an average of 3.39 (SD = 2.2) hearings in period 1 to an average of 5.5 (SD = 3.62) hearings in period 2 ($t = -9.330$, $df = 740$, $p < .000$). Similarly, the time elapsed from when the charges were indicted until the case was closed rose from an average of 286.53

62. Gazal-Ayal et al., *supra* note 16.

63. Committee for the Examination of the Processes of the Judicial Proceedings of the Central District Courts (Criminal Procedure *Moged*), Committee Report (2011) (Hebrew) [hereinafter the Diskin Report]. The committee made no differentiations based on case matters and treated all cases uniformly.

64. It bears mention that only closed cases were included in the equation. Upon examination, out of the 704 cases we observed, 19.9% were transferred to an evidentiary proceeding.

Table 1. Means and standard deviation of preliminary hearings and length of criminal proceedings in Tel Aviv Magistrate's Court, 2010–2011 and 2017–2019.

	2010–2011 n = 311	2017–2019 n = 431	t	df
Preliminary hearing	3.39 (2.2)	5.55 (3.62)	–9.330***	740
Length (days)	286.53 (248.23)	548.55 (323.17)	–11.974***	740

(SD = 248.23) days in period 1 to an average of 548.55 (SD = 323.17) days in period 2 ($t = -11.974$, $df = 740$, $p < .001$).

In the Recommendations of the Committee for the Examination of Managerial Handling of the Judicial Procedures in the Central District (the Criminal *Moqed* System), members of the committee noted that their proposed changes might lead to a proportionate impairment of efficiency.⁶⁵ The above findings point to a substantial decline in efficiency between the two periods: an increase of about 164% in the number of preliminary hearings, and an increase of about 191% in the time required to conclude proceedings, almost twice as much. The scope of the present research does not extend to examining the entire complex of factors leading to this state of affairs and its implications. There could be an argument that more hearings indicate more fairness for defendants.⁶⁶ Nevertheless, it is clear that the committee goal of achieving efficiency and shortening the duration of the criminal process for defendants has not been achieved in the wake of strengthening and institutionalizing the preliminary proceeding.

65. Diskin Report, *supra* note 63, at 14: “The Committee was unable to obtain quantitative/statistical data that would unequivocally prove the efficiency of the *moqed* system, and there is a difficulty in reaching from the data it did obtain a firm conclusion in this matter, although they do serve as ‘initial evidence’ of it. Nonetheless, everyone seems to agree that the *moqed* system leads to greater efficiency of the judicial system and better time management of each and every judge.”

66. Although we present an efficiency decline between the two periods, we cannot draw strong conclusions about its relation to fairness. Our findings revealed that out of 498 (69%) of all rescheduled hearings, 75% were rescheduled due to factors that made it impossible to conduct a hearing, and 25% were rescheduled to promote a plea bargain. The assumption that some of these rescheduled hearings are related to more fairness, such as more information gathered by public defenders disguised by a request for deferrals or other motives, is possible.

Figure 1. Hearing outcomes in Tel Aviv Magistrate's Court, November 2017 to May 2018 ($n = 717$).

2. Preliminary Criminal Hearings' Outcomes

We examined how the hearings were concluded (Figure 1) and divided the various outcomes into four categories: *Case transferred*: 30 cases (4%) were transferred at the end of the hearing—28 to an evidentiary proceeding, one to criminal mediation, and another to community court. *Final stages*: 63 cases (9%) were in the final stages, with a judgment handed down in 49 cases and arguments regarding punishment heard in 14 cases. *Case closed*: 126 cases (18%) were closed at the hearings we observed: in 33 cases with sentencing; in 66 cases with judgment handed down, arguments regarding punishment heard, and sentencing; and the remaining cases were closed due to confession without conviction (5), dismissal of the indictment or its conversion to an administrative proceeding (13), postponement or suspension of proceedings (12), acquittal (1), and for a technical reason (2).

The largest category was *Reschedule hearing*, encompassing 498 (69%) of the 717 hearings we observed. Upon examination, the factors leading to the rescheduling of the hearing clustered into two subcategories. The first, impossibility of hearing, contained factors that made it impossible to conduct a hearing and comprised of 372 (75%) hearings of all rescheduling factors (Figure 2). The second, promotion of plea bargain, contained essential factors for reaching a plea bargain and comprised of 126 (25%) hearings of all rescheduling factors (Figure 3).

Figure 2. Factors leading to rescheduled hearings due to the impossibility of hearing in Tel Aviv Magistrate's Court, November 2017 to May 2018 ($n = 372$).

As shown in Figure 2, the main factor that made the hearing impossible was the defendant's not showing up (41%), followed by, in descending order: request for postponement by the defense in order to meet with the defendant, complete the information in the case, or learn the case in its entirety (26%); postponement in order to settle the representation (12%); postponement due to waiting for the completion of a review by the Probation Service or by the Commissioner of Service Work (12%). The remaining postponements (11%) were due to the preparation of arguments regarding punishment, the defense counsel is not showing up, waiting for the judge's decision, and other reasons.

Members of the Diskin Committee referred to the subject of rescheduled hearings mainly in connection with cases scheduled for an initial hearing. At this juncture, the Committee's members argued, a significant share of defendants do not show up at all, and a significant share of those who do show up ask for and receive a postponement to allow the defense to study the evidentiary material and, if necessary, speak with the prosecution.⁶⁷

67. Diskin Report, *supra* note 63, at 4–5.

Figure 3. Factors leading to rescheduled hearings for promoting a plea bargain in Tel Aviv Magistrate's Court, November 2017 to May 2018 ($n = 126$).

Upon examination of the data, however, a different picture emerged. Defendants' not showing up to the initial hearing accounted for less than a third (30.5%) of all no-shows by defendants at hearings. The remaining no-shows (69.5%) occurred, at decreasing rates, in the following hearings. The issue of defendants' representation at the initial hearing constituted less than half (47.8%) of all issues of representation at hearings, so this constitutes a delaying factor in the following hearings as well. As a function of defendants not showing up and the issue of representation, defense counsels' requests for a postponement in order to study the evidentiary material were also spread over several hearings. About a third (34.7%) of these requests were submitted at the first hearing, 20% at the second, 15.8% at the third, 8.4% at the fourth, and the rest at following hearings.

The main factor for requesting a postponement in the category of promoting a plea bargain (Figure 3) was the need for negotiations between the defendant's attorney and the prosecutor regarding a plea bargain (70% of the hearings). Waiting for a community court report regarding suitability accounted for 15% of the postponement requests, 12% of the requests concerned examining the possibility of combining cases, and 3% concerned examining the viability of a conditional bargain.

The above-described findings indicate that, first, the shift of the criminal conflict into the preliminary stage has not necessarily increased the efficiency and effectiveness of criminal case management. On the contrary, we found that criminal cases today spend more time in the legal system than before the reforms, and that the number of preliminary hearings for each case has increased, as has the time elapsed between the case opening and its disposition. Second, we found that most of the preliminary hearings involved minimal activities of judges and resulted in scheduling another hearing to enable the negotiation between the prosecution and the defense to happen outside the court. In many of the hearings, some technical conditions were missing, such as the nomination of a defense attorney or the presence of the defendant. In some hearings, substantive negotiation should have developed following the conditions that had already materialized. The active role of judges, if any, was relevant for those cases in which the defendant had arrived, the information had been accumulated and exchanged, but an agreement had not been reached between the parties. In such cases, which constituted only a small portion of the overall pool within a typical hearing day, judges became involved in encouraging agreement between the parties. Our observations, described in the following section, were conducted to capture these activities.

III. JUDICIAL ACTIVITIES TO PROMOTE PLEA BARGAINS

In cases in which the technical conditions for promoting negotiation between the parties have matured, by law the *moqed* days allow considerable intervention by the court in an attempt to bring the parties closer to a plea bargain. The court can avail itself of inadmissible evidentiary material that has not yet been lawfully submitted,⁶⁸ and § 143A, detailed above, constitutes the normative framework allowing such activities.⁶⁹ Given that

68. Kovo, *supra* note 51.

69. Proposed Criminal Procedure Law (amendment no. 65) (Plea Bargain) 5770-2010, Government Decision 536: "In this proposed law it is proposed that the use of plea bargains in the law enforcement system in Israel be regularized, in order to design clear and transparent standards for the implementation of this arrangement." Also proposed is the anchoring of the court's power to intervene in the crafting of a plea bargain, only in the framework of a preliminary hearing in the framework of § 143A, the purpose of which is to end the

Figure 4. Types of judicial interventions ($n = 149$).

judicial interventions in the Israeli courts were not documented prior to our research, the primary goal of the observations we conducted was to identify and characterize judicial interventions. We found judges' involvement in only 121 hearings (16.8% of the total 717 hearings observed). In some of the hearings, more than one judicial intervention was observed, so altogether we documented 149 judicial interventions. Our observations enabled us to capture judicial involvement as regards resolving the conflict and promoting a plea bargain, in a fuller and more precise way than recorded in the formal documentation of most of the hearing protocols.

Analyzing the observations led us to identify six analytical categories of judicial involvement that serve as organizing categories for discussion and comparison to the "civil JCR themes" (Figure 4). The most common judicial intervention as regards resolving the conflict and promoting agreements was to encourage the parties to begin or continue conducting negotiations outside the courtroom, sometimes in cooperation with other elements in the prosecutorial system. This practice—facilitation of negotiation between the parties—manifested in two versions, narrow and broad. In the narrow version (32% of judicial interventions), the judges generally sent the parties outside to discuss their differences. In the broad

proceedings, or in the framework of a hearing conducted after the start of the trial, as if it were a preliminary hearing, for the purpose of promoting the possibility of ending the hearing with a plea bargain.

version (18% of judicial interventions), the judges attempted to gauge the differences between the parties and proposed ways to narrow them by dealing with the obstacles to progress in negotiations. Together, these two practices accounted for 50% of all judicial interventions.

Reflection and prediction of the legal situation constituted 13% of judicial interventions. From the ad hoc viewpoint of the preliminary judge, who serves mainly as an informational source and neutral expert, it is important to consider the legal aspects of the case and previous judgments on the same matter. The legal evaluation of the case may be aimed at one or the other side or both, in such a way as to establish a clear basis for continued negotiation.

Another practice, which accounted for 11% of the judicial interventions, and which also cuts across legal domains, was to emphasize negative aspects of the full procedure or its consequences. This included declaring that conviction brings considerably more severe punishment, or stating that the public interest does not align with conducting an evidentiary proceeding. This category refers to judges' regard for the negative aspects of turning to an evidentiary proceeding or its outcomes rather than to any positive regard for an alternative, i.e., conducting negotiation and crafting a plea bargain.

Another judicial practice, which accounted for 17% of the judicial interventions, relates to the lawyer-client-judge interactional triangle. This practice often consists of the judge appealing directly to the represented defendant and encouraging him to cooperate. Alternatively, the judge may appeal to the defense counsel, elaborating on his role vis-à-vis the defendant about the preliminary proceeding and promoting a plea bargain.

Finally, 8% of the judicial interventions gave expression to the judges' conflict resolution role and the use of ADR techniques: regard for the broader aspects of the criminal conflict, including the defendant's life circumstances and future, regard for the victim even if she is not present,⁷⁰ encouraging the taking of responsibility and fostering a commitment to and participation in the criminal process and rehabilitation.

In 20% of the hearings, the judicial intervention was multifaceted, featuring a combination of practices. Likewise, the practices were employed within a wide-ranging axis of judicial intervention, although we observed mainly a narrow format of intervention, with deeper judicial involvement

70. The victim of the crime has almost entirely vanished from the preliminary proceedings in Magistrate's Court, with one exception: when the victim of the crime came to a hearing in a case regarding which he had also filed an appeal with the High Court of Justice.

in only a few cases. In what follows we detail each of the six categories, providing illustrations of the use of these practices.

A. Direct Facilitation of Plea Agreements

Facilitating direct and unmediated discussion and the conduct of a negotiation between the parties outside the courtroom was the most common intervention and constituted half (50%) of all the observed judicial intervention.

1. Narrow Facilitation: Deferral to the (out-of-court) administrative negotiations

In the narrow version, the practice is manifested mainly in postponing the hearing for the sake of conducting a negotiation outside the courtroom, encouraging and even pushing the parties to speak with each other. The judge may suffice with nudging the parties to speak with each other, for example: “Have you tried to negotiate here outside? Go outside with the prosecutor and close a deal.” In another case, the judge scolded the prosecutor: “Why only next month? In such cases, it is necessary to set a meeting as fast as possible.” This is the most common way in which a judge proposes to or explicitly instructs the parties to start or continue negotiating directly with each other. The intervention may also include subtle pressure to reach an immediate agreement:

It’s worth your while to close the case today, because the prosecutor, who is the head of the team, is sitting outside today. If you close the case today, the prices will be more affordable . . . So you should go out to speak with the prosecutor.

“Go outside to consult with the senior prosecutor . . .” The judge interrupted the prosecutor, “You don’t conduct an evidentiary proceeding for nothing. Not on my watch.” In still another case, the judge suggested to the defense counsel, “I am not scheduling an evidentiary hearing before you sit down with the prosecution . . . If it doesn’t work out with the prosecutors, I’ll do mediation for you,” finally adding, “You should listen to the background voices coming from the direction of the prosecutors in the courtroom.”

Sometimes sending the parties outside was meant to allow one of them to digest or think again about the continued progress of the case. For example, one judge asked the defense counsel to leave the courtroom and

explain to the defendant his legal situation, adding that he was scheduling another date for a hearing in the hope it would be canceled because they would reach a plea bargain. Usually, this type of intervention would lead to the scheduling of another preliminary hearing, at the initiative of the parties or on the court's proposal. For example:

Perhaps you should approach someone above the head of the team with whom you can reach an understanding. For that, you will certainly need time, and therefore we will postpone the date of the hearing.

On the other hand, we also found a case in which the application of this practice did not lead to continued negotiation:

This isn't a simple case at all. It's not certain you'll be able to close it this way . . . However, theoretically, with what would you persuade him if he denies any guilt? . . . Are you sure you don't want to postpone and study the case? . . . So it's certain that you can't reach an agreement? Have you tried together to understand what each side's bottom line is?

2. Broad Facilitation: Efforts to close gaps and overcome barriers to settlement

In the broad version, judicial intervention is characterized by efforts to bridge the gaps between the parties and remove obstacles that delay or prevent reaching a plea bargain. The intervention may take the form of appealing to a party to soften an entrenched position to allow the negotiation to continue:

Why not concede a little? [I] don't understand the prosecution's position here; it does not stand to reason. What do you want? . . . I have nothing more to offer, it's not appropriate. Therefore, I am obliged to postpone the hearing so that you will hopefully find an agreed solution by yourselves.

The judge may give each party an indication of the worthwhileness of the deal taking shape between them. For example, one judge postponed the hearing to allow the parties to agree on the punishment, but noted that the proposed punishment was within the proper range and therefore unlikely to change: "So what good will the postponement do? Take into consideration that if this is the proposal, it's not certain that it will change." Contrarily, she whispered to the prosecution: "It's not a large sum." In another case, the judge turned to the prosecution and asked: "Why don't

you agree to the bottom of the punishment range? After all, the defendant has a driving license, only he doesn't have a taxi driver's license." Another example of the judge turning to one side in an attempt to close the gaps between the parties:

I'm not saying what I'll sentence, but I'm only saying what I propose . . . If they are unwilling to repair, there's nothing I can do . . . I haven't passed sentence . . . Sometimes another month is preferable . . . In open-ended argumentation, anything can happen.

In other cases, the judge appealed to both parties in an attempt to bring them closer to an agreement. For example: "Show me there's a punishment range less than four months," said the judge to the defense counsel. "We're asking for six," said the prosecutor. "You too are exaggerating a lot," said the judge. "You've got to reach a compromise in the range of four months." In another case, the judge summed up as follows: "There are superfluous charges here. I understand that in these cases a method is being described. As to my standards, I demand precision work. It's a case with flaws, but you know that the court can also convict on the strength of the testimony too. You've got all day to talk about it . . ."

The judicial intervention may refer to the terms that the parties are required to agree on and evaluate them: "Look at the ranges I've set and adjust to that . . . I can see that there is a willingness to make corrections . . . The mental state is something that is taken into consideration." Sometimes the intervention might include a proposal from the judge about the possible contours of a settlement. For example, one judge asked, "How do you see the end of this case?" To which the defense counsel replied, "I didn't ask for the case to be dismissed, but . . . I didn't succeed in getting anywhere with the prosecution." The judge then cited a similar case, suggesting, "Maybe try to reach a similar plea bargain, three months of service work." Further, in the hearing, the judge referred the defense counsel to another case that might be helpful to her.

In another case, the judge proposed a framework for the continued factual investigation and for promoting negotiation outside the courtroom:

I'm not asking whether he reported the theft of his telephone, but it can be checked through the correspondence in the telephone . . . It doesn't sound logical to me that his telephone was stolen, and they left him the picture and everything . . . It's a nice version . . . It needs to be checked whether he

bought another telephone . . . Gentlemen, you've got work to do . . . The burden passes to the defendant, I agree . . . Even if you have a good case, it's worthwhile to hear proposals.

B. Prediction of the Legal Outcome

In the course of the hearings, the judge may give the parties an assessment of their legal situation and provide a neutral prognosis about the anticipated legal outcome. This happened in 13% of the interventions we observed. In these cases, the judicial intervention goes beyond the narrow bounds described above, taking account of the circumstances of the case and the legal questions. Even though the judge will not be conducting the trial if the parties do not reach an agreement, the information she provides is of great importance to them, since it reflects a neutral professional opinion of the quality of the evidence. The following is an example:

The amount creates a legal presumption that it's not for self-consumption. It'll be very hard to convince a judge that it's for self-consumption. It's a large amount, and there are two kinds of drug.

Alternatively, as regards evidentiary difficulties, one judge declared:

It's not a case of only trespassing, the question is actually whether it's them or it's not them.

A judge may refer to the nature of the offense or the severity of the anticipated punishment:

In my opinion, that isn't the proper range of punishment following the offense. Show me examples of verdicts. This is a matter of conversations without a meeting or a camera . . . What you're showing me is different from our case.

In another case, the judge said:

The offense here is assaulting an elderly victim, for that, I always give the upper punishment threshold . . . It should be a double-figure number here. That is exactly the reason that the prosecution will offer what the court cannot . . . You cannot have a single figure here . . . An elderly person is a circumstance. The defendant will not see the lower bar.

The prediction might also be cast as a reflection of the complicated legal situation in the case:

It's true that you are under arrest in the other case, but there is logic to joining the cases, and here you are. In cases of breaking and entry, we generally give twelve months. Here we also have a trespassing attempt. The second case is graver in that it's from the recent past. Do you understand? It's not that simple. It's at least thirty months. I'm comparing what happens if I told you now to make an open argument. It's an entirely different range.

In a different matter, the defense counsel suggested technically joining cases and obtaining a review, to which the judge replied:

That could be a good option, but it's not sure to reduce [the sentence]. The thing here is that it's their [the prosecution's] strongest argument, that two months after the review he committed an offense again. If you want to cut down another four months, it's only with therapy. Don't forget that he [the defendant] can't receive the lower bar of the punishment. Consider it.

In some cases, the judicial prediction relates to the bargaining zones discussed by the parties and brought to the judge's attention:

I agree with the prosecution's ranges. I have no legal justification for overlapping some of the suspended sentences . . . I am not pushing for the sake of applying pressure but for the public interest.

The judicial evaluation, in the form of reflection or prediction, may be explicit:

This isn't an assault offense; assault is problematic, it should be referred to as resisting arrest . . . The outcomes are the same . . . This isn't a case for evidentiary proceeding, and the indictment is incorrect. Stay with the same punishment and at least let him confess to what he's done. The charges should be different.

Alternatively, it may be implied:

There's a problem because the "truck" already hit the road . . . moreover, it's not a simple case. What you're asking for, in a difficult case of offenses including breaking and entry, assault, and threats, is non-conviction . . . It's like asking to let them light a torch [at the Independence Day ceremony] for the State of Israel.

In any event, the judicial evaluation is clear enough to provide the parties with the information they need to continue negotiating. Although the "neutral judicial evaluation" is delivered with the necessary qualifications as regards when it is delivered, it does reflect the reciprocal relations

between the negotiation outside the courtroom and the happenings and judicial involvement regarding the plea bargain in the course of the hearing inside the courtroom. Considering the judges' broad authority to intervene in the conduct of the negotiation between the parties and help move it forward, the practice expresses a deeper involvement concerning the circumstances of the offense, and the strengths and weaknesses of the case as they appear at the point in time in which they are examined. It is a hallmark of the bulk of judicial work having become heuristic—an approximate assessment reliant on judicial expertise, but which assumes a lack of enough information for full confirmation. This kind of judicial activity, which is based on evaluating the written evidence by the judge without fully conducting the oral hearings, is reminiscent of the inquisitorial system.

C. Negative Aspects of the Legal Process or Outcome: Legal Aversion

This category deals with judicial attempts to persuade the parties to accept or prefer the possibility of closing the case at the preliminary hearing with a plea bargain, considering the negative implications and risks involved in holding a full evidentiary proceeding and judicial decision. The practice, which recurred in 11% of the interventions, includes emphasizing the negative aspects of conducting a trial and evidentiary hearings. The judges often emphasized the uncertainty of conducting an evidentiary proceeding, for example: "The District Court reversed the decision and acquitted him because it determined that a knuckle-duster is not a weapon." Alternatively, the court may point out to the defendants the inherent risks of taking the case to trial:

You have got to understand: you could be convicted, and to the same degree could be acquitted. The thing is that if you are convicted on a charge of breaking and entry, the punishment is severe.

In another case, the judge emphasized to the defense counsel:

You have the option of presenting evidence. However, you should know that if such a case goes to an evidentiary proceeding, it goes to imprisonment because this is a very grave case. You need to explain that to the defendants. If the prosecution offers you a suspended sentence, take it. This is a case for imprisonment, not for service work.

Judges expressed their reservations about a full procedure, sometimes detailing the price tag involved in conducting a full trial. Alternatively, they would refer to the risk or harm to the public interest, as well as to the case and its circumstances not being suitable for such a procedure, for example: “This isn’t a case for evidence, and it’s a shame to conduct an evidentiary proceeding in such a case.” Similarly, in another case, the judge mused out loud: “It’s impossible to reach an agreement? No good will come to anyone from conducting an evidentiary proceeding in this case.”

In another case, the judge emphasized,

It’s possible to set an evidentiary hearing, to hear witnesses, to come to a decision and sentencing, but the price of such conduct is not necessarily a price of justice that the accuser has the interest to avoid. Therefore, one should make and exhaust all efforts to avoid evidentiary hearings in cases where possible.

The perception of the full trial, which is the assumed model for achieving justice and finding the truth within the criminal justice system, emerges as a very doubtful, unnecessary, and sometimes dangerous process that parties should try to avoid by any means. In various cases, the judges expressed their displeasure and disappointment at the failure of the negotiation: “I must say to the prosecutor that I am dissatisfied, and I will ask that the senior prosecutor is summoned to the next hearing.” We also observed judicial references to their role as gatekeepers. To a defense counsel who said, “it cannot be helped, we have to set an evidentiary proceeding,” the judge replied:

I will decide. What does it mean, there is no other choice? Nobody’s closing anything for evidence, there is no such thing. A defense counsel doesn’t have any right to transfer a case for evidence.

The judicial interventions described above revolved in their entirety on negative presentation of the possibility of conducting a full evidentiary proceeding leading to a reasoned judicial decision and sentencing. We did not find any focus by the judges on the positive aspects of promoting a plea bargain and the defendant’s taking responsibility for committing the offense. To be precise, the judges exploited the full procedure to present the “worst alternative to a negotiable agreement” (WATNA) outside the negotiation—the trial.

D. The Lawyer-Client-Judge Interactional Triangle

The defendant's presence at preliminary criminal hearings enables the judge to address him directly and to enlist him in various ways in crafting a plea bargain and closing the case. Addressing the defense counsel, in the defendant's presence, may serve in effect as a channel for addressing the defendant indirectly. Direct discourse with the figure of authority—the judge—serves as a means of overcoming the defendant's resistance, enlisting his cooperation, and encouraging the defendant to take responsibility.

In the course of the hearings, the judge may directly address the defendant, who by the nature of the hearing is required to be present.⁷¹ The direct interaction between the judge and the defendant may take various forms and serve various purposes. Sec. 143A(b) authorizes the judge to ascertain whether the defendant denies or confesses to the facts claimed in the indictment. For example, a judge addressed the defendant, "You decide what happens with you, but what went down there?" In another case the judge, reading from what was apparently a police report, said, "You ran amok in the vehicle, and the police sprayed you with pepper gas, and then you bit them . . . Do you confess? Are you clear-headed?"

The judge may share with the defendant her perception of the strengths and weaknesses of the case as she understands them, ascertain the defendant's needs and expectations, enlist the defendant to take part in the hearing and in the crafting of a plea bargain in his matter, and discuss with him the significance of conducting an evidentiary proceeding. Judges may also act this way to soften the objections of defendants. Whether the objections stem from the defendant's not wanting to damage his relationship with other defendants, the judge may address the defendant and explain that he can confess without harming his relationships with his friend; he won't inform on his friend if he confesses to the offense, and he doesn't become a witness against his friend. The judge may address doubts the defendant may have as to what is best for him. For example, in a case where the defense counsel spoke with the defendant and explained to him the importance of the Probation Service, the judge intervened and told the defendant it was his best chance and worthwhile for him to cooperate.

71. § 126 of the Criminal Procedure Law determines that "[a]bsent a different instruction in this Law no person shall face criminally proceedings but in his presence."

Eventually, the defendant relented, the judge expressed his satisfaction, and the hearing was postponed.

In another hearing, the judge summed up, addressing the defendant, “You will be directed to be examined by the Probation Service. Bring much patience with you.” In another case, the defendant, who was represented by counsel, was perceived as failing to do what was required of him in the framework of the standard requirements within the track of case processing. The prosecutor said, “The defendant does not show up for anything, not at the Prison Service, not at the police stations. I ask that this hearing not be postponed; it is an abuse of the system here.” The judge turned to the defendant and asked, “Why don’t you show up for anything?” Eventually, the judge postponed the hearing, clarifying that it was for the last time.

Sometimes the intervention appears to buttress the defendant’s trust in his defense counsel or in the nature of the legal procedure being conducted in his matter. This is needed especially because most defendants are represented by the Public Defender’s Office and met their counsel on the day of the first hearing in the courtroom. For example, a judge addressed the defendant, assuring that deal offered to him was fair:

Did you see what is written? Do you understand? . . . The verdict was corrected in your favor; they dropped the drug possession charge and wrote that you sold the drugs to friends. I assume that you’re aware of that?

In another example, in a hearing involving an unrepresented defendant, as regards the question of her agreement to the appointment of counsel, the defendant addressed the prosecutor and asked to meet with her to close the case in her matter. The judge intervened and explained to the defendant that it was important she gets a lawyer who would protect her rights:

DEFENDANT: I promise to think about it. If I take a lawyer, will justice then come to light?

JUDGE: Here we apply the law, not necessarily doing justice, but we use the tools of justice.

DEFENDANT: But I told the defense counsel all the problems I have, and he said to me that he doesn’t handle them.

JUDGE: [explaining patiently] The defense counsel can only help you with the criminal case . . .

DEFENDANT: I'm tired, and I want to finish with everything today.

JUDGE: It's your right to stand firm, but know that we are here for you, to explain to you.

In some cases, the judge addressed the defendant to enable the defendant to speak for himself, either about the offense committed and taking responsibility for it or about his future or his life circumstances. This practice also relates to the next category of judicial intervention, concerning its conflict resolution aspects.

Judicial intervention within the interactional triangle might also take the form of addressing the defense counsel for the sake of, among other things, indirectly enlisting the defendant or elaborating on the defense counsel's role in the preliminary hearing and in promoting a plea bargain.⁷² In one case, the following exchange took place between the judge and the defense counsel:

JUDGE: From my experience, in such cases, it's worthwhile that you meet with the prosecution.

COUNSEL: I'm not sure, because there is an issue regarding the defendant's age.

JUDGE: It's worthwhile you meet with them and that the defendant will confess his guilt and take responsibility.

COUNSEL: I'm not sure the defendant will agree.

JUDGE: That's why you're a lawyer, and you need to help the defendant understand what the right thing to do is.

In another case, the judge had criticized the prosecutor and the defense counsel because of their failure to reach an agreement, and addressed them both: "Do me a favor: as soon as you succeed in explaining to the defendant and me what do you want, you can apply to the Court." The defense counsel started to protest, but the judge quickly cut her off:

72. See King & Wright, *supra* note 35, at 364–65. The findings from King and Wright's interviews indicated that judges, prosecutors, and defense counsel didn't always ascribe the judicial intervention to a desire of the judges to manage and supervise the pace of cases, nor to efficiency as the only advantage. The interviewees reported that judges' intervention advanced their interests in various ways.

That is enough, Madam. I'm postponing the hearing, and meanwhile, I hope you settle the matter. You have the power to make a change for the better . . . You are the one handling the defendant. You have more power than I have. Good luck.

E. ADR Techniques: Conflict Resolution Intervention and Building Commitment

Manifestations of therapeutic intervention and intervention in an attempt to arrive at an in-depth resolution of the criminal conflict are not foreign to criminal jurisprudence, in that judges take note of the chances of rehabilitation, the taking of responsibility, and remorse on the part of the defendant.⁷³ However, we found broader therapeutic intervention only at the margins, in only 8% of the interventions, and mainly in the form of ascertaining the defendant's authentic understanding and internalization of the significance and severity of his actions.⁷⁴ We also observed several instances of encouraging the taking of responsibility and expression of remorse, as well as a reference to the defendant's future and ascertaining his self-perception on the day after serving his sentence. The following is an example of such an exchange:

JUDGE: What are you going to work at after being in prison?

DEFENDANT: I am going to work in the kitchen of a restaurant.

JUDGE: That is work that will provide you with a salary, but it is not good for the diet.

Another instance concerned a defendant involved in several cases, one of which was being conducted in another courthouse. The defense counsel

73. It can be said that managing a negotiation to craft a plea bargain—whether it's a “closed plea bargain” that also determines the sentence or an “open plea bargain” in which the judge must pass sentence—in itself strips away some of the discretion awarded the judge in a way that also narrows the judicial involvement in therapeutic aspects, rehabilitative aspects, taking of responsibility, prognostic thinking, etc.

74. The requirements of voluntariness and understanding were much emphasized in the Diskin Report (*supra* note 63), which restores to the judge on *moqed* days the duty of ascertaining that the defendant's confession was freely given and that after direct interlocution with the defendant, she finds that the defendant understands the details of the charge and the implications of his confession. The committee referred to CJ 1958/98, *Anonymous v. State of Israel*, 84 57(1) 577, 596 (2002).

sought to examine the possibility of transferring the defendant's matter to community court. The judge decided that the Probation Service would conduct a complimentary review. The defendant addressed the judge, requesting to have all matters concluded, and read a personal note:

My grandmother is a widow . . . I'm someone who has done his thing; I have been spit upon; I have been thrown from the stairs until my ribs got quashed . . . I am sorry from the depths of my soul. I want to end this chapter of my life.

The prosecutor argued that they could not make an offer to conclude all the cases without authorization from the prosecutor in the additional case being conducted in another courtroom. The defendant interrupted her, protesting against the delay. The judge intervened and scolded the defendant: "You cannot talk to the prosecutor like that." The prosecutor repeated that the sentencing proposal was awaiting authorization by the prosecutor in the additional case. The judge asked for that prosecutor's name, stating: "I will call him myself if necessary . . . This can be dealt with today."⁷⁵

The judicial involvement included, during or at the conclusion of the judicial proceeding, referring to rehabilitation, expressing empathy for the defendant and his life circumstances, his feelings and the feelings of those around him, addressing with a personal tone or creating an atmosphere of opportunity. For example, in a case in which the defendant claimed to have stolen perfume because he had nowhere to live, the judge said:

In the matter of an apartment I'm not sure there's anything I can do, but I will note in the protocol generally that the defendant needs an apartment . . . In the matter of the present case, the theft of the perfume . . . Do you understand that if you confess, you will be convicted and receive a suspended sentence and fine? However, I will ask that you not be given a fine but a pledge. Do you know what a pledge is? You sign a commitment that if you steal again, then you'll have to pay the sum. That is your pledge.

"Thank you, Your Honor," said the defendant. "It's been pleasant talking with you." "Likewise talking with you," said the judge. "Good day."

In another case, the attorneys announced that a report had been received that the defendant was suited to community court. "That is best for the

75. Already at that very hearing we observed an attempt by the judge's chamber to make contact with the other prosecutor.

defendant,” the judge gladly declared. “Community court is a bonus. Community court is like an elite unit,” and she approved the postponement of the hearing. This kind of judicial involvement is made possible by, among other things, addressing with a personal tone and informal, extra-legal language, with the judge positively framing the defendant’s situation and the proceeding, and searching for creative solutions or schemes in consultation and cooperation with the prosecution, defense attorneys, and the defendant. All of this may also create a commitment to the plea bargain on the part of the defendant. For example, after listening to the defense counsel in one case, the judge said:

I would very much like to help him because this concerns a high range of punishment, and I don’t want to do him any harm. Therefore, if you find a way to rehabilitate him, I will help you and approve a postponement.

Subsequently, the judge turned to the defendant and explained the criminal procedure to him, emphasizing that he had to cooperate with the Probation Service: “I very much want to help you, but if you don’t cooperate, you’ll go to jail. The defense counsel and I won’t be able to do anything.” She then also expressed empathy, and tried to enlist the defendant in the rehabilitative procedure and create a constructive commitment: “You’re a good lad, and you have a future ahead of you, so it’s worthwhile you get a grip on yourself.”

In another case, after having listened to the defense counsel and the defendant, the judge declared:

Do you know what can be done? We’ll simply keep postponing it. I am willing because when someone comes and gives me a report that he is doing good progress with therapy, then I’m willing that he’ll stay there. You should not spoil anything.

The judicial involvement in the cases described above, combining principles of conflict resolution in a way that addresses the roots of criminal conflict, hints at the potential of the preliminary hearing to serve as a locus for constructively handling the various aspects of the criminal conflict.

F. Structural Characteristics of the Preliminary Hearings

In addition to the judicial resolution activities described above, we found expressions for two structural characteristics that have also been found in

the civil pretrial research: the carryover effect between the hearings and conducting hearings without a full and complete record.

1. Carryover Effect in Preliminary Hearings

In the criminal domain, the preponderance of hearings scheduled for the same time and the crowd of those awaiting their turn in the courtroom have much significance for understanding the work of judges. Currently, about 40 to 60 preliminary hearings appear on the log on the days devoted to that purpose for each *moged* judge; in the past, even more.⁷⁶ The duration of each hearing varied considerably, ranging from two minutes to 30 minutes or more in exceptional cases. However, the defendants and even the representatives (especially since most of them represent several defendants) are present in the courtroom throughout most of the day or moving into and out of the courtroom in accordance with what's happening inside it (e.g., they are asked to step outside and continue talking or to address the person in charge of the prosecution waiting outside the courtroom).

The preliminary criminal hearings observations were conducted over several hours in the same courtroom. In many instances we observed judges referring to the daily load of hearings, or repeated remarks or expressions hinting at the expectation that the parties would make progress in their negotiations. For example, one judge repeatedly asserted that she was not telling an innocent person to confess, but it could expedite the procedure, and the defendant would receive a reduced sentence. This statement having been repeated frequently during that day of hearings, it is not improbable that people sitting in the courtroom heard it when it was not directed at their matter. In another courtroom, the judge rejected a request by the defense and the prosecution that she help them bridge the last gaps between them ("help over the last hurdle"), determining that they must continue conversing outside the courtroom and return with a substantial settlement, in light of the workload she faced.⁷⁷ Moreover, in another case, the judge noted that the day of hearings features a heavy workload and does

76. See the Diskin Report, *supra* note 63.

77. The defense counsel asked for the judge's help in reaching a settlement. In his opinion, the offer as it stood was harsh to the defendant. The judge said: "I can't do the last hurdle now. Reach a firm agreement and let me know. You asked for it to be antedated and I did that, now you do yours."

not allow her to examine why a negotiation was not progressing, and therefore she rescheduled the parties.⁷⁸

The density of hearings and their high number is the most urgent issue, and not under the judge's control in the sense that she cannot decide to hold fewer preliminary hearings. This is not a practice implemented by a specific judge, but in actuality, the *moqed* day and its traits are part of the circumstances surrounding the criminal process of every defendant in Magistrate Court. This in itself contributes to incentivizing or encouraging the parties to reach agreements and plea bargains, and the judge has a central role in this context.⁷⁹ As was also concluded regarding civil hearings, in such a setting, the judge's activities and pronounced attitude regarding conflict resolution in any given case might impact not only the parties involved in the particular case but also those who wait inside the courtroom for their hearing. "As a result, judicial practices in one hearing or series of hearings may set the tone for settlement discussions in subsequent hearings."⁸⁰

2. In the Courtroom, Off the Record

Another structural characteristic that recurred in the criminal domain as well as in the civil one concerns the discourse that develops at the preliminary hearing outside the protocol. Judges are authorized to deviate from the rule and conduct a hearing without full documentation in the protocol. Such discrepancy between the documentation in the protocol and the oral hearing was observed in the preliminary civil proceedings, and it is explicitly expressed in and significantly influences the hearing taking place in the courtroom. In the criminal domain, we did not capture an explicit oral reference in the courtroom to the issue of protocol and the scope of documentation. We examined all the protocols of the preliminary hearings

78. There was a large gap between the parties regarding the sentence, with the defense counsel asking for service work and the prosecutor demanding incarceration. The defense counsel asked the judge whether she could help them, as it was a large gap. The judge scheduled another date for the hearing, saying: "We won't do it today, there's no time for it. We'll set a date and discuss it properly."

79. According to King and Wright, judges who held hearings in the presence of all the litigants in the cases scheduled for that day reported that this format pressures the sides into being rational, and it is helpful to representatives who are inexperienced and apparently to the defendants, too. See King & Wright, *supra* note 35 at 343.

80. See Sela et al., *supra* note 60, at 131.

we had observed in the criminal courtrooms and compared them to the observation records. We found out that although we witnessed judicial activities to promote agreement in the courtroom, as aforementioned, such activities were almost absent from the hearing protocols. Judicial activities, some of them vigorous, were summarized to a formal judicial decision in the protocol. This finding was surprising, given the major role of judges in some of the cases in promoting agreements. Conversely, lawyers' and defendants' speech was documented in a more detailed manner in the formal records. Regarding the lawyers, however, they appear to be aware of the format whereby the hearing is documented only partially or concisely in the protocol.

IV. SIMILARITIES AND DIFFERENCES BETWEEN THE ROLE OF JUDGES IN PRELIMINARY HEARINGS IN CIVIL AND CRIMINAL CASES

The findings from our observations provide answers to our questions regarding the extent and nature of judges' involvement on the *moqed* days. As noted above, 69% of the preliminary criminal hearings were rescheduled to grant time and opportunity to the parties to study the case, complete their evidentiary material, meet with each other, and reach an agreement by themselves. Of the rescheduled hearings, 31% occurred due to the defendant not showing up, and judges voiced their displeasure occasionally with this phenomenon. All in all, in only 16.8% of the observed preliminary criminal hearings did we find judicial involvement in what we define as criminal judicial conflict resolution (JCR).

We found that the criminal judges were engaged mostly in administrative and managerial activities and supervised the management of the out-of-court negotiation process between the parties at all stages. This involvement was almost not apparent in the courtroom, where it seemed that in most of the hearings, no active judicial involvement was required. Conversely, in the civil domain, the vast majority of cases arriving in front of a judge in the pretrial stage are ready in all aspects for a substantive deliberation. Civil judges conduct a preliminary proceeding in only 30% of the cases, while 70% of the cases are closed without ever reaching the judge, in contrast to the criminal process, in which judges conduct all of the cases. This feature provides the opportunity for the preliminary civil hearing

to serve as a site for resolving the dispute more holistically than in the criminal domain.

It follows that the judicial involvement differs in both essence and extent between the civil and criminal domains. The criminal judge must accompany all stages of the negotiation between the parties until a plea bargain is crafted, and is also present when technical aspects of the negotiation between the parties impede its progress. The civil judge, on the other hand, receives the case for pretrial after the negotiation efforts between the parties have failed, and procedural preliminary proceedings have been completed before the first pretrial.

Despite various differences between the criminal and the civil domains, we found that in the few cases in which intervention occurred, there were several recurrent judicial interventions, similar to those we found in our civil observations study. First was direct facilitation of plea agreements, which as noted above was ranked according to the degree of judicial involvement: narrow, referring to deferral to the (out-of-court) administrative negotiation, and broad, referring to efforts to close gaps and overcome barriers to settlement. We found similar judicial involvement in the civil domain, namely, direct facilitation of litigotiation. There too we found relatively narrow involvement. Judges might address the parties' motivation to reach an agreement and encourage each to ask the other to negotiate (outside the courtroom), sometimes even to require their attorneys or representatives to hold consultations before rejecting compromise offers made. In the criminal domain, we found that this theme was especially prevalent given the passivity expected of the judge in reviewing the prosecution's decision.

Prediction of the legal outcome was an additional theme we found earlier in the preliminary civil hearings.⁸¹ In this regard, the distinction should have been especially prominent between the preliminary civil proceeding, which is conducted before the same judge who presides over the main case, and the preliminary criminal proceeding, which is managed by the *moqed* day judge. Supposedly, in the civil proceeding, there should be an excess of caution since judges know their prediction may seem like the final decision in the next stage of the trial. However, judges did not shy away from providing a prediction of their decision throughout the proceeding, noting that they might change their minds. In effect, their active

81. *Id.* at 122–24.

involvement in prediction throughout the civil process made their prediction seem like a unique type of “adjudication as persuasion.” In the criminal proceeding, even though the judge is not the one who will decide the case, we found that judges exercised redoubled caution about how they reflected the parties’ legal situation to them. Despite the difference between the criminal and civil domains from the aspect of the judge sitting at the preliminary hearing, in the preliminary criminal proceeding, too, the prediction and reflection of the legal situation by the judge are of great importance. Perhaps this is even more important than in the civil proceeding, as the defendant present in the courtroom hears the judicial assessment from an authority figure whom he trusts much more than his appointed counsel, and this is a crucial reality test for him.

Prediction is also associated with our following theme, the lawyer-client-judge interactional triangle. This theme too was identified in the civil domain as helping to promote an agreement. In this regard, the primary emphasis in the criminal context is the apparent need of the defendant, in some instances, to have the judge directly address him. As noted above, the judge’s involvement may help to overcome the defendant’s objections and enlist him to cooperate with the defense counsel or other professionals. Furthermore, by directly addressing the defendant regarding the case or the agreements taking shape, the judge may instill confidence in the defendant that he is properly represented. A judge addressing the defendant directly may also bolster the latter’s trust in the propriety of the proceeding and in the counsel representing him—an attorney whom he usually first met in the courthouse at the arraignment, without having chosen him. Undoubtedly, although we found involvement in the interactional triangle in the civil process, its significance differs if only because in the civil process, the litigant usually chooses his representative. However, in both domains, the judge’s role, when directly addressing the litigants, is to enlist and establish their trust in the proceeding and their representation. Additionally, it aims to overcome failures or conflicts of interest of the representatives (e.g., considerations of attorneys’ fees in the civil domain, or considerations of pressing charges in the criminal domain).

Another theme that is common to both domains is highlighting the negative aspects of the legal process or outcome—legal aversion. In both the civil and criminal settings, this category of JCR practices emphasizes the potential negative aspects and costs of proceeding to trial with the lawsuit or criminal case and adjudication on its merits. Furthermore, judges discuss

a range of potential direct and indirect costs that litigants may incur during litigation. The costs entailed by a full criminal judicial proceeding were also discussed by the *moqed* judges, with the necessary adaptation. This underscores that the preliminary proceedings are the primary and preferred door that judges “market” to the parties, as they elucidate the difficulty of providing the full service, i.e., conducting a full trial. Judges in preliminary hearings are gatekeepers who hold the parties at the hallway to the trial, portraying it as the worse alternative to their bargaining opportunities.

Also, common to both domains is the theme of ADR techniques. On the one hand, the *moqed* judge’s role is more similar to that of a mediator or mediating judge. She is not the one who will decide the case, but since it is decided to conduct an evidentiary proceeding, she is given greater access to information, whereas all the information, protocols, and content of the preliminary hearings are denied to the judge in the main proceeding. On the other hand, the actual involvement is not similar to that of a mediator, as we saw to a certain extent in the preliminary civil hearing. Judicial involvement in the criminal proceeding that includes techniques borrowed from ADR was observed in only a few of the criminal hearings, manifesting itself in the adoption of soft elements meant to promote commitment and therapeutic aspects, some restorative practices, responsibility-taking, rehabilitation, and prevention concerns.

Overall, there are at the same time profound differences as well as similarities between civil and criminal judges’ activities in preliminary hearings. One difference that stands out is the nature of their activities—more managerial in criminal and more consent-oriented in civil. A prominent similarity is the negative portrayal of the trial stage and the gatekeeping function. Comparing the two arenas enriches our understanding of judicial activity in promoting conflict resolution and of ways to improve both civil and criminal conflicts.

CONCLUSION: BEYOND MANAGERIAL JUDICIAL CONFLICT RESOLUTION?

This article has presented new findings on the role of judges in preliminary criminal proceedings, including a quantitative and qualitative characterization of their activity in managing the main proceeding offered today to those who enter the gates of criminal justice for low-level crimes. This

characterization was developed based on the comparison to the judicial activity in civil proceedings and an examination of the differences between the types and extent of such interventions in the two domains.

To conclude our study of *moqed* days, we began with expectations for a door that is driven by efficiency and is handled by a relatively passive judge. We found a process that time-wise is less efficient, judges who are active only in a small portion of the hearings, and a lot of technical managerial activities that are focused on establishing the necessary conditions to begin the negotiation the plea agreement. When comparing these findings to the civil study, we found that despite the recurrence of various themes of judicial activity to promote agreements in both the criminal and civil domains, the criminal arena is special in that it is relatively passive and characterized by a preponderance of postponements and administrative actions that are often the result of lack of communication between the parties.

We found that during the preliminary proceedings, the judges function as gatekeepers and employ a variety of practices to exhaust that function, to obviate the need to conduct a further evidentiary proceeding in the case. In most of the hearings that we observed, the judges' role was confined to managerial and bureaucratic decisions, mostly technical, intended to enable the parties to craft the terms of the plea bargain by themselves. Only in a small share of cases, the judges took an active role in promoting the plea bargain's terms, mainly when the parties ran into difficulties agreeing by themselves. In a tiny fraction of the cases, their intervention was of a therapeutic nature or fulfilled some other restorative or rehabilitative role.

Considering the gaps between the civil and criminal judicial roles as exposed in this article, possible ways to close them may be by transferring most of the managerial activity to an active secretariat, which would ascertain that a meeting with the judge comes after certain conditions have matured for intervention in the wake of an unsuccessful negotiation. Such an experiment has been conducted at Nazareth Magistrate's Court, wherein the court secretariat monitors the scheduling of a meeting between the defendant and the defense counsel before the arraignment day and makes sure that all the defendants show up on arraignment day. Relieving the judges of the procedural and administrative management of the proceeding will close the gap between civil and criminal managerial aspects, and may allow the judges to devote more adjudication time to expand the

JCR activities during the hearings, thereby deepening their handling of the broader conflict. More active judges in preliminary hearings will increase the trust in the court systems, as some studies today indicate, and judges should not defer from providing predictions and addressing broader perspectives of the criminal conflict.⁸²

Beyond the efficiency and managerial goals, which are not adequately fulfilled as our study demonstrates, the possibility of promoting a therapeutic and preventative approach in the framework of criminal judicial conflict resolution during the arraignment days is a challenge that can be answered in our view in several ways: first, by targeted training for judges to conduct plea facilitation while using conflict resolution methods and restorative justice ideas; second, through expansion of the other doors of the criminal multi-door courthouse and developing modified versions of them in the mainstream door of preliminary hearings; and third, by transforming legal education and the study of criminal law to include elements of rehabilitation, therapy, and conflict prevention. Judges in criminal cases can go beyond the managerial and gatekeeping role while providing a fresh and constructive perspective on the role of law in preventing conflicts and promoting rehabilitation and healing.

82. See King & Wright, *supra* note 35, at 364–88.