New Families of Legal Systems in Transition, and Implications for AI

Nofit Amir and Michal Alberstein***

Trial was once the litmus test for legal systems, allowing one to distinguish between legal families. However, in recent decades, trial has often become the exception rather than the rule, with many legal systems prioritizing and promoting settlement. In the U.S., for example, under 1 percent of civil cases are disposed of through trial. We propose a typology that accounts for current priorities of legal systems and the main mechanisms through which they dispose of cases.

The proposed typology is the result of a five-year empirical study of legal systems, analyzing data from court dockets, court observations, and interviews with legal actors. The study uncovers: 1) legal systems that have reshaped themselves to place an emphasis on pre-filing, creating disincentives to filing cases and trial while promoting settlement; 2) legal systems that place an emphasis on pretrial, allowing filing of cases but introducing incentives to help cases settle before they reach trial; and 3) legal systems that continue to place an emphasis on trial while allowing other forms of dispute resolution.

We show that each family differs in the aim of civil justice, the function of law, the nature of the judicial role, access to justice, and the institutional function of courts. Moreover, a pre-filing emphasis seems conducive to AI-based dispute resolution that may be developed in the future. The typology allows for a dynamic observation of legal systems as they transition from one family to another and has implications for legal reforms and harmonization.

I. INTRODUCTION 2

II. SETTLEMENT PROMOTION AS REORGANIZATION 5

A. Legal Systems with a Pre-Filing Emphasis 6

B. Legal Systems with a Pretrial Emphasis 9

1. Further Classification Within the Pretrial Family. 11

C. Legal Systems with a Trial Emphasis 13

D. The Continuum 16

1. Moving Along the Continuum: Recent Reforms...... 17
2. Things to Keep in Mind... 19

III. II. THREE FAMILIES: CORE PRINCIPLES THAT CHANGE WITH EMPHASIZED STAGE 20

A. Main Aim of Civil Justice System 22

B. The Function of Law in Resolving Disputes................ 24

C. Judicial Presence 27

D. Access to Justice 28

E. The Institutional Function of Courts........................... 30

F. Note on Convergence Between Criminal and Civil Justice 32

IV. CONCLUSION 37

I. INTRODUCTION

The concept of legal families has often revolved around the nature of trial—the reliance of judges on precedent vs. code, the passive or active judicial stance, the presence of a jury, presentation of evidence, and more.[1] However, trial has

---

* Ph.D. Candidate, Conflict Resolution, Management & Negotiation Program, Bar-Ilan University.

** Dean, Faculty of Law, Bar-Ilan University (SJD, Harvard Law School 2000). Principal Investigator of "Judicial Conflict Resolution Lab" (JCR). This research was supported by the European Research Commission (ERC) Consolidator Grant 647943/14 "Judicial Conflict Resolution (JCR): Examining Hybrids of Non-Adversarial Justice" (2016–2020). We would like to express our thanks to Elisabetta Silvestri, Donna Stienstra of the Federal Judicial Center, Rebecca Price of the District of Southern New York Mediation Program, and Valena Will of the Federal Office of Justice of Germany.

[1] For the traditional classification of legal families (translated into English and adapted from the French manuscript), *see* Rene David & John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 85 L. Q. REV. 499, 499 (1978); *see also* John H. Langbein, *The Influence of Comparative Procedure in the United States.*, 43 AM. J. COMP. L. 545,

become a rare phenomenon in common law systems and has a diminished presence in many civil law systems, as well.[2] In the U.S., under one percent of filed civil cases reach trial;[3] in England and Wales only three percent.[4] In civil law countries the rate is higher but trial is often no longer the exclusive method for disposing of civil cases.[5]

Studies have noted that many legal systems now manage cases at an early stage—in both civil and criminal justice—with the aim of disposing of them without trial.[6] However, there is no classification dealing with the ways in which many legal systems have moved their focus, in whole or in part, away from trial.

The need for the development of such a framing emerged during a five-year comparative study, which amassed empirical findings from court dockets, court observations, and interviews with legal actors. During this study we became aware of the broad gap between law in the books and law in action. The focus of legal actors and scholars is often on the exception (trial)—rather than the rule. Contemporary legal systems have introduced a wide range of mechanisms promoting settlement and abbreviated proceedings while guarding the gate to

553 (1995) ("Again and again when one turns to examine topics of divergence between American and Continental procedure, one finds that the great structural peculiarities of the Anglo-American tradition operate as barriers . . . . The jury system and our system of party-dominated fact-gathering so define the character of our civil and criminal procedure that it has been hard to absorb insights from the jury-free Continental system, with its mechanisms for judicialized conduct of fact-gathering."). Over the years, the classification as related to trial has been sometimes questioned or refined in the context of legal developments and possible harmonization trends; *see, e.g.*, Holger Spamman & Lars Klohn, *Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 275 (2016) (demonstrating in a simulation that the performance of judges provided with the same material did not differ along civil-common law lines); Allen Shoenberger, *Changes in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, 55 LOY. L. REV. 5, 5–7 (2009) (noting the increased use of precedent in civil law systems); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (stating that U.S. pretrial judges have diverged from the signature common law passive stance and have adopted active inquisitorial-like practices); G. Abolonin, et al., TRUTH AND EFFICIENCY IN CIVIL LITIGATION: FUNDAMENTAL ASPECTS OF FACT-FINDING AND EVIDENCE-TAKING IN A COMPARATIVE CONTEXT, 3 (C.H. van Rhee and A. Uzelac, eds., 2012) (exploring evidence taking in various legal systems).

[2] Marc Galanter called this "the vanishing trial" phenomenon; *see, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEGAL STUD. 459, 530 (2004) [hereinafter Galanter, *The Vanishing Trial*]; Marc Galanter, *A World Without Trials*, J. DISP. RESOL. 7, 10 (2006) [hereinafter Galanter, *A World Without Trials*]; Pablo Cortes, *A Comparative Review of Offers to Settle: Would an Emerging Settlement Culture Pave the Way for Their Adoption in Continental Europe*?, 32 CIV. JUST. Q. 42, 64 (2013); Paola Lucarelli et al., *Fitting the Forum to the Fuss While Seeking the Truth: Lessons from Judicial Reforms in Italy*, 36 OHIO ST. J. DISP. RESOL. 213, 214 (2020).

[3] *See* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

[4] *See* Statistics at MOJ, GOV.UK, https://www.gov.uk/government/organisations/ministry-of-justice/about/statistics (last visited Dec. 1, 2022).

[5] Cortes, *supra* note 2; Lucarelli, *supra* note 2.

[6] Resnik, *supra* note 1 (introducing the concept of managerial judges in civil justice); *see, e.g.*, Maximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY 377 (2021); Nancy King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEXAS L. REV. 325, 331–34 (2016).

trial. These mechanisms led to the emergence of new gravity junctions within the legal process, transforming law into action in ways that are not always apparent in law in the books.

The proposed classification includes: 1) legal systems that place an emphasis on the pre-filing stage—creating financial disincentives or bureaucratic obstacles to filing cases in court on the one hand and incentives to negotiating cases on the other; 2) legal systems that place an emphasis on the pretrial stage—keeping the option of filing cases open yet discouraging the option of trial through various measures, such as involvement of a judge to help settle the case or court-mandated alternative dispute resolution (ADR) mechanisms; and 3) legal systems that place an emphasis on the trial stage, while channeling disputes to other modes of dispute resolution, as well.

Many legal principles and practices are transformed when the emphasis on civil justice moves to an earlier stage. For instance, perspectives on access to justice change to include not only access to courts, but also—or even primarily—access to dispute resolution mechanisms.[7] The role of law differs among the proposed classifications, and even the "shadow of law"[8] in negotiation recedes as the emphasis gravitates to an early stage.[9]

Legal culture, too, may affect and be affected by the prevalence of trials.[10] We explore the effects of the different emphases on a range of core principles, showing that, taken together, the move to pretrial and pre-filing emphases may create new legal families that merit classification.

Looking at legal systems through the prism of emphasized stage allows for fluidity as legal systems transform from one emphasized stage to another through an ongoing process of legal reform. If one views emphasized stages on a continuum, with a pre-filing emphasis on one pole, a trial emphasis on the other, and a pretrial emphasis in-between, there seems to be a general movement of legal systems in the direction of a pretrial and pre-filing emphasis. In addition, a pre-filing emphasis may be conducive to a future in which artificial intelligence (AI) will be the third party, rather than a judge or mediator, as it contains several characteristics in common with AI-based dispute resolution.

This perspective on legal systems does not do away with the common law-civil law distinction, but rather interacts with it, providing a different lens through which it can be explored, providing benefits from the insights offered. As indicated in this study, common law systems seem to have a stronger emphasis than civil law systems on an earlier stage, emphasizing pre-filing or pretrial interventions. However, Germany's legal system seems close to a

---

[7] *Infra* Section II.D. *See also* Hadas Cohen & Michal Alberstein, *Multilevel Access to Justice in a World of Vanishing Trials: A Conflict Resolution Perspective*, 47 FORDHAM URB. L.J. 1, 33 (2019).

[8] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing the role of the shadow of the law during negotiation).

[9] *Infra* Section II.B; Galanter, *The Vanishing Trial*, *supra* note 2 (describing the "vanishing trial" phenomenon with an emphasis on practitioners).

[10] *Infra* Section I.C.

pretrial emphasis.

Section I will provide an overview of the three different emphases, closely examining the legal systems of the U.S., England and Wales, Italy, Germany, and Israel while also referring to other legal systems. It will then introduce a continuum on which legal systems can be placed according to emphasized stage, showing that legal reform can be analyzed from the perspective of moving along the continuum. Section II will discuss the implications of the differing emphases of legal systems on the main aim of civil justice, the function of law in resolving disputes, judicial presence, access to justice, and the institutional function of courts. Taken together, the different emphases seem to create three legal families. This section will also briefly touch upon criminal justice in relation to these trends and implications. Section III will combine the understandings of the previous two sections to explore the ways in which a pre-filing emphasis may create an AI-conducive environment.

II. SETTLEMENT PROMOTION AS REORGANIZATION

Settlement is not a new feature of legal systems, and has long occurred in the "shadow of the law."[11] However, purposeful and official promotion of settlement by legal systems is a relatively new phenomenon, occurring mainly during the past half century, beginning principally in the U.S.[12] During this period, a settlement culture promulgated by legal systems has swept across common law countries, and has gained momentum in other legal systems as well.[13] The widespread promotion of settlement (whether through ADR programs or incentives to settle) across continents[14] has caused a re-ordering of legal systems, and in some legal systems is accompanied by an accelerated "vanishing trial phenomenon."[15] In explaining the differing legal emphases that

---

[11] Mnookin & Kornhauser, *supra* note 8, at 968; *see also* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349 (1994).

[12] *See, e.g.*, Nofit Amir & Michal Alberstein, *From Transplant to Disintegration? A Comparative Study of the Judicial Role,* 37 OHIO ST. J. ON DISP. RESOL. 555, 581 (2022) (exploring settlement-related transplants spreading mainly from the U.S. to other countries); NADJA MARIE ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 42 (2009) (stating that ADR gained a foothold in Europe in the late 1980s, around a decade after the 1976 Pound Conference on ADR in the U.S., and close in time to the spread of ADR to Australia, Canada, and New Zealand); Simon Roberts, *Settlement as Civil Justice*, 63 MOD. L. REV. 739, 739 (2000); Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation*, 37 N.C.J. INT'L L. & COM. REG. 981, 982–3 (2012) ("Over the last two decades, the European Union (EU) has intentionally promoted mediation and other forms of ADR to advance access to justice goals, and it has done so with a high degree of intensity.").

[13] Amir & Alberstein, *supra* note 12, at 564–66; Cortes, *supra* note 2, at 43.

[14] Amir & Alberstein, *supra* note 12, at 564–66; Resnik, *supra* note 1, at 379.

[15] Galanter, *A World Without Trials*, *supra* note 2 at 23; *see, e.g.*, Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective,* 1 J. EMPIRICAL LEGAL STUD. 735 (2004); Ayelet Sela, Nourit Zimerman & Michal Alberstein, *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83 (2018); Maria J. Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U.L. REV. 87, 1713 (2012); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67

have emerged, we will take England and Wales, Italy, Germany, the U.S., and Israel as primary examples, while referring to other legal systems.[16]

A. *Legal Systems with a Pre-Filing Emphasis*

In England and Wales, litigation was officially declared a "last resort"[17] in the late 1990s following the Woolf Reforms, which largely shaped the current legal system. The reforms were introduced on the background of high costs of litigation and cuts to legal aid, and called for the management of disputes through pre-filing obligations promoting consensual resolution of civil disputes, other incentives to settle out of court, and, for the cases that reached court, active judicial case management.[18] As a result, pre-filing obligations have been set out in pre-action protocols (government descriptions of steps to be taken before filing a claim), along with other disincentives to civil litigation,[19] resulting in a large proportion of disputes being dealt with privately without involving courts.[20]

Though it is difficult to surmise how many cases would have been filed without these disincentives—precisely due to the legal system's promotion of private ordering without institutional involvement—it is worthwhile to note that according to a government report interviewing practitioners following the introduction of the first pre-action protocols, lawyers indicated a significant drop in the number of cases reaching court due to the protocols.[21] A later government report highlighted a continuous drop in filed cases in the years following the pre-action protocols, and attributed this drop to the newly instituted protocols.[22]

According to a review of the legal system following the introduction of pre-action protocols, legal costs are now frontloaded—meaning they are incurred before the filing of a claim in order to meet the protocols' detailed requirements

(2006); *see infra* Section II.

[16] Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22 PEPP. DISP. RESOL. L.J. 263 (2022) (discussing the difference in emphasis among England and Wales, Italy and Israel).

[17] UK MINISTRY OF JUSTICE, The Practice Direction for Pre-Action Conduct and Protocols, Para. 1.8. ("Litigation should be a last resort . . . the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings."). *The Practice Direction was introduced in 1998. In England, alternatives to civil trial include* arbitration, early neutral evaluation by a judge and numerous ombudsmen schemes.

[18] *See* HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT (1996). The report was preceded by a report calling attention to the need to revamp the civil justice system; *see also* Heilbron-Hodge Report, Civil Justice on Trial - A Case for Change (1993).

[19] *See* NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION AND MEDIATION IN ENGLAND (Springer Dordrecht ed., 1st ed. 2012).

[20] *See* JOHN PEYSNER & MARY SENEVIRATNE, THE MANAGEMENT OF CIVIL CASES – THE COURTS AND POST-WOOLF LANDSCAPE, UK DEP. FOR CONSTITUTIONAL AFFAIRS REPORT (2005).

[21] *See* TAMARA GORIELY ET AL., MORE CIVIL JUSTICE? THE IMPACT OF THE WOOLF REFORMS ON PRE-ACTION BEHAVIOUR RESEARCH STUDY 43, U.K. JUST. MINISTRY REP. (2002).

[22] PEYSNER & SENEVIRATNE, *supra* note 20 (citing data from the Constitutional Affairs Statistical Branch; in 1998, the year before the reforms, 2,245,324 cases were filed annually; five years after the reforms, 1,571,976 cases were filed); *see also* Robert Dingwall & Emilie Cloatre, *Vanishing Trials: An English Perspective*, 2006 J. DISP. RESOL. 51 (2006).

(which vary according to case type).[23] In addition, the risk of cost sanctions for refusing a settlement offer or refusing an offer to mediate can also prevent cases from reaching court.[24] While abandoning a potential claim or accepting a poor settlement offer due to pre-filing costs or cost sanctions may sound undesirable, pre-action protocols may also cause the early sharing of information, thus contributing to settlement.[25]

Of the cases that are filed in court despite pre-action obligations, around 16 percent are defended.[26] The parties must then fill out an Allocation Questionnaire, in which the first section deals with settlement promotion (Figure 1 below):

A Settlement

Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.

For legal representatives only

I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle. ☐

For all

Your answers to these questions may be considered by the court when it deals with the questions of costs: see Civil Procedure Rules Part 44.3 (4).

1. Given that the rules require you to try to settle the claim before the hearing, do you want to attempt to settle at this stage? ☐ Yes ☐ No

2. If Yes, do you want a one month stay? ☐ Yes ☐ No

3. If you answered 'No' to question 1, please state below the reasons why you consider it inappropriate to try to settle the claim at this stage.

Figure 1. First section of Money Claims Allocation Questionnaire, UK Ministry of Justice.

[23] *See* LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, 1, 346 (2009).

[24] Regarding "offers to settle," if a claimant declines an offer to settle and receives the same or lower amount through judgment, "the court must, unless it considers it unjust to do so, order that the defendant is entitled to— (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and (b) interest on those costs." Civil Procedure Rules, 36.17(a–b), (2023) (UK); for an overview, *see generally* CHRISTOPHER HODGES & ASTRID STADLER, RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS 114 (Christopher Hodges & Astrid Stadler, eds., 2013).

[25] Dingwall & Cloatre, *supra* note 22, at 65.

[26] *See* UK Ministry of Justice website, at https://www.gov.uk/government/collections/civil-justice-statistics-quarterly (last accessed Jan. 6, 2023).

Only 56 percent of the defended claims—overall nine percent of *filed* claims—are allocated to track.[27] A small percentage reach a Costs and Case Management Conference and/or pretrial review (both presided over by a judge), and only three percent of filed cases reach trial. If we consider cases that would have been filed without pre-filing requirements, this percentage of cases reaching latter, post-filing, stages would be lower (this is an important distinction when comparing percentages between legal systems with and without pre-filing requirements). Thus, in England and Wales, the vanishing trial phenomenon has extended to vanishing court involvement and a significant decrease in filed cases. A move to focus on the *pre-filing* stage seems to have contributed to stemming the tide of cases even before the initiation of legal proceedings.

For disputants, the alternatives to civil trial include negotiation, mediation, ombudsmen services, and arbitration.[28] Mediation has largely become an assisted form of negotiation, with the mediators regularly shuttling between parties seated in separate rooms.[29]

Looking to England and Wales as a model to increase efficiency, other legal systems have adopted pre-filing obligations. In Australia, pre-action protocols for civil matters can be found (requirements vary according to territory). The extent to which they form a pre-action focused legal system would be explored by the effect on the number of incoming civil cases (in proportion to the population), the cost incurred by the pre-action protocols, and the nature of other disincentives to litigate (cost sanctions for refusing to mediate, etc.).[30] Israel has recently introduced an obligation for lawyers to negotiate before filing a claim, yet this obligation does not amount to a pre-filing focus (see *infra* Section I.D). Italy, too, has introduced pre-filing obligations: a free (except for lawyers' fees) introductory meeting on mediation for a minority (10-15 percent) of civil cases and assisted negotiation (see *infra* Section I.C). These requirements are peripheral at this time to the main emphasis of Italy's legal system on trial, as indicated by data on incoming litigious cases. The number of filed cases per 100 residents has not yet been reduced.[31] These examples demonstrate the small but perhaps incremental steps that can be taken by legal systems to begin to include an earlier emphasis on pre-filing procedural steps.

---

[27] *Id.*

[28] ANDREWS, *supra* note 19, at 91; *see also* Naomi Creutzfeldt & Ben Bradford, *Dispute Resolution Outside of Courts: Procedural Justice and Decision Acceptance Among Users of Ombuds Services in the UK*, 50 L. & SOC'Y REV. 985, 992 (2016).

[29] *See* Simon Roberts, A Court in the City: Civil and Commercial Litigation in London at the Beginning of the 21st Century 100 (William E. Butler & Michael Palmer eds., 2013); Amir & Alberstein, *supra* note 12, at 578.

[30] *See* Tania Sourdin & Margaret Castles, *Is the Tail Wagging the Dog? Finding a Place for ADR in Pre-Action Processes: Practice and Perception*, 41 Adel. L. Rev. 479, 487 (2020).

[31] *See* Eur. Comm'n for the Efficiency of Just. (CEPEJ) of the Council of Eur., *Study on the Functioning of Judicial Systems in the EU Member States: Facts and Figures from the CEPEJ Questionnaires 2012 to 2020*, at 419 (Apr. 6, 2022).

B. *Legal Systems with a Pretrial Emphasis*

In many ways, the U.S. is a decentralized legal system, in which federal districts and states have much flexibility to design legal processes. Nonetheless, pre-filing requirements are non-existent in federal courts and in most (if not all) state courts.[32] Courts are involved in the resolution of disputes through pretrial hearings and other settlement-promoting mechanisms, and only rarely (under 1 percent of filed civil cases) through trial. In other words, the focus of their legal system is on the stage between filing and trial—the *pretrial* stage.[33] This pretrial emphasis is implemented by pretrial judges and magistrates, who commonly encourage parties to settle through a variety of tactics; and by ADR programs promoted by the courts.

About one-fifth of filed cases in 2018 incurred no court action, this may be due to that fact that filing itself provides an incentive to settle a case. Aside from around the one percent that reached trial, the rest of filed cases were disposed of before trial either through court activity that does not include a hearing (e.g., are not defended and end with a default judgment), or through pretrial court mechanisms.

Pretrial court mechanisms—such as pre-trial conferences, court-promoted mediation, mandatory arbitration, or early neutral evaluation by a lawyer—vary between federal districts as well as various state systems.[34] Pretrial conferences led by a judge or magistrate are a common feature in the legal landscape though not the exclusive mode of disposition in the pretrial stage. Cases can be channeled to mandatory mediation, for instance, and in parallel undergo pretrial conferences.[35] In addition, judges assigned to a case may become involved through motions (e.g., motions to dismiss) though the case may be automatically referred to mediation or other court-approved pretrial mechanism.

Similarly, until recently, there were no pre-filing mandates in Israel, and a person/entity wishing to file a case is generally free to do so.[36] Yet only the small

---

[32] *See* Interview with Donna Stientstra, Senior Researcher at the Fed. Jud. Ctr. (Aug. 17, 2022), ("[When] obtaining data from all federal districts and looking at the Local Procedure Rules of a great number of federal districts and state systems, [the Fed. Jud. Ctr.] did not find pre-filing obligations. We cannot be absolutely certain that a state system has not introduced pre-filing obligations.").

[33] *See* Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. Disp. Resol. 155, 157 (2002) ("[f]or most cases, the pretrial process is all there is"); *see also* John H. Langbein, *The Disappearance of Civil Trial in the U.S.*, 122 YALE L.J. 522, 526 (2012) (attributing the lack of trials to the existence of pretrial, which he says is in effect the "nontrial"); *accord* Engstrom, *supra* note 3. For the prominence of pretrial in Israel, *see, e.g.*, Sela et al., *supra* note 15; Amir & Alberstein, *supra* note 12.

[34] *See generally,* Donna Stienstra, ADR in the Federal Districts: An Initial Report 22 (2011), https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf; *see also* LCvR16-2(B) (2023), *https://www.oknd.uscourts.gov/sites/default/files/madcap/Local%20Rules%20PDF.pdf* ("[a]ll civil cases set on a trial docket are automatically set for settlement conference before the settlement judge,"); *cf.* District of Southern NY (mandatory mediation in some cases), discussed below; *c.f.* the state system of Oregon (mandatory arbitration) discussed below.

[35] Interview with Rebecca Price, Dir. of the S. Dist. of N.Y. Mediation Program (Sep. 1, 2022).

[36] However, according to the Israel Civil Procedure Rules, a free introductory mediation meeting is

minority of cases (8.3 percent) reach trial, and only half of the cases that reach trial are actually decided by trial (the rest settle).[37] Pretrial conferences are currently the main method for disposing of defended cases (which constitute about 48 percent of filed cases).[38] Of the cases reaching pretrial in Israel, the large majority, 82 percent, are disposed of at this stage, usually through settlement, with or without the help of the pretrial judge.[39] As in the U.S., pretrial judges often take a hands-on approach to lead the parties to settle, using a variety of tactics, such as pointing out the weaknesses of each case and the disadvantages of a protracted trial, offering a settlement proposal, or exhorting the parties to settle.[40] Cases could remain in the pretrial stage for up to six hearings, during which the pretrial judge might discuss the case with the litigants while acting as a gatekeeper to the evidentiary phase.[41] The enactment of the revised Rules of Civil Procedure, which include limited pre-filing mandates and a recommendation limiting the number of pretrial hearings, may affect the frequency of trials moving forward.[42]

In Ontario, Canada—specifically in Toronto, Ottawa, and the County of Essex—a pretrial emphasis including mandatory mediation can be found. Mediation is mandated for all *non-family* civil cases subject to a list of exceptions (e.g., class action, bankruptcy, and insolvency) and unless an exemption is applied for and granted by a judge.[43] The parties pay for the mediation (although

---

required after filing a case over a specific sum; *see infra* Section II.D for information on reforms regarding the obligation.

[37] Amir & Alberstein, *supra* note 12; U.S. COURTS, TABLE C-4—U.S. DISTRICT COURTS–CIVIL JUDICIAL BUSINESS (SEPTEMBER 30, 2019), https://www.uscourts.gov/statistics/table/c-4/judicial-business/2019/09/30. For criminal cases, *see infra* Section II.F.

[38] Amir & Alberstein, *supra* note 12.

[39] *Id.*

[40] *Id.* For a description of judicial settlement practices and the debate they have raised, *see generally* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017); William P. Lynch, *Why Settle for Less? Improving Settlement Conferences in Federal Court*, 94 WASH. L. REV. 1233 (2019); Marc Galanter, "*. . . A Settlement Judge, not a Trial Judge": Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1 (1985); Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016). For official guidelines to judges regarding settlement in pretrial conferences, *see* JUDICIAL CONFERENCE OF THE U.S., COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, CIV. LITIG. MGMT. MANUAL, 71–90 (3rd ed., 2022). For focusing on judicial settlement, *see id.* at 82–90.

[41] Sela et al., *supra* note 15.

[42] *See infra* Section II.D.

[43] *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, 24.1 (Can.); *see also, Mandatory Mediation for Civil Cases*, ONTARIO.CA (Nov. 29, 2021), https://www.ontario.ca/page/mandatory-mediation-civil-cases (explaining that mediation is required for most civil cases in the aforementioned areas). Since the year of implementation of this requirement, the number of filed civil cases in Ontario has dropped significantly, even though it is possible to file a case and only then continue to mediation. Statistics Canada (a government website) specifies Ontario statistics, showing an overall increase in case filings from 2005–06 until up to 2009–10. From 2009–10 (the period in which mediation became mandatory in some parts of Ontario), the number of case filings decreased consistently until 2017/2018 (2019 and 2020 are not included due to the coronavirus epidemic, which caused a sharp drop in case filings). The Ontario statistics cover the whole province, not just the areas in which

insurers of plaintiffs suing them in cases of car accidents can be required to pay the cost of mediation).[44] If the mediation is unsuccessful, the parties can go to court. Judicial settlement practices also seem to be common.[45]

A pretrial emphasis may have numerous advantages in terms of costs, time, and, depending on the judge, responsiveness to the needs of litigants.[46] However, the possible cost barrier to litigation ensuing from mandatory party-paid ADR could lead to ethical issues. Judicial settlement practices could also lead to questionable ethical dilemmas.[47] The benefits and risks of judicial settlement practices have been the topic of a broad discussion in the United States and have been probed in Canada and Israel as well, with the expansion of judicial settlement practices in pretrial conferences.[48]

1. Further Classification Within the Pretrial Family

Due to the large variation of possible pretrial mechanisms, legal systems with a pretrial emphasis can be further defined into subcategories according to the types of pretrial mechanisms they offer or require, their scope, and the cost involved. In this way, a continuum of the level of possible judicial involvement within the pretrial stage is constructed. On one extreme are legal systems implementing ADR programs as a primary focus (taking into consideration factors such as the mandatory, binding, and costly nature of the programs) while

---

mandatory mediation was implemented, and yet the drop in the number of cases is significant, indicating that the drop in those areas may be even more acute. *See* STATISTICS CANADA: CANADA'S NATIONAL STATISTICAL AGENCY , https://www.statcan.gc.ca/en/start (last visited Sep 21, 2023); for Ontario statistics, *see* ONTARIO DATA CATALOGUE, https://data.ontario.ca (last visited July 3, 2022). *See also* Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449, 2480 (2020) (stating that the limited data from Texas suggests that after the filing of a case, "the referral [to mediation] itself likely causes settlement," as many referred cases do not reach a mediation session. Perhaps similar reasoning might extend to the filing of the case with the knowledge that it will be referred to mediation).

[44] *See* Frank K. Gomberg & Jessie Gomberg, Commentary, *Rules of Civil Procedure Chapters, Disposition without Trial, Rule 24.1 - Mandatory Mediation, in Civil Procedure and Practice in Ontario* (Noel Semple ed., Canadian Legal Information Institute, 2021) (2012).

[45] *See* Michaela Keet & Brent Cotter, *Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking about Judicial Ethics*, 91 CAN. BAR REV. 363, 364–65 (2012) ("Today, judge-led settlement processes of one kind or another are commonplace across Canadian courts. The initiation of judges into mediation processes – which began well over twenty years ago – was not uncontroversial . . . Although form and philosophy vary greatly, few Canadian courts and jurisdictions are now without some version of judicial mediation."); Jean-Francois Roberge & Dorcas Quek Anderson, *Judicial Mediation: From Debates to Renewal*, 19 CARDOZO J. CONF. RESOL. 613, 613 (2018) (comparing judicial mediation in Canada and Singapore and noting both countries' "long-standing judicial mediation experiences.").

[46] *See* Tania Sourdin & Archie Zariski, *What Is Responsive Judging?*, *in* THE RESPONSIVE JUDGE 1, 1 (Tania Sourdin & Archie Zariski eds., 2018); *see also* Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U.L. REV. 145 (2011).

[47] *See, e.g.,* William P. Lynch, *Why Settle for Less: Improving Settlement Conferences in Federal Court*, 94 WASH. L. REV. 1233 (2019); John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. DISP. RESOL. 569 (2006).

[48] Keet & Cotter, *supra* note 45; Roberge & Anderson, *supra* note 45.

on the other are legal systems whose central pretrial mechanism is a settlement conference (or other similar mechanism) by a magistrate or judge.

For instance, the Southern District of New York has an automatic referral system that channels certain types of cases to free mediation; types of cases that are referred are often characterized by a cost of litigation that exceeds cost of recovery due to plaintiff caps or otherwise.[49] In parts of Ontario, mediation is mandated for a larger scope of case types and is paid for by the parties. Thus, these parts of Ontario may be considered more limited in terms of judicial settlement involvement than in the Southern District of New York.

The framework of mandatory *arbitration* in Oregon's state courts could be considered a still more comprehensive or stringent requirement since the result is a binding decision—unless appealed by one of the parties within one month (exemptions from mandatory arbitration can be requested).[50] Arbitration, paid for by the parties, is mandatory for filed civil cases up to $50,000 (as of this writing) where the relief claimed is recovery of money or damages, except for small claims. Only a small minority of civil cases have a value over $50,000, allowing for a regular jury or bench trial.[51]

In distinguishing among legal systems that have a pretrial emphasis, it is important that the "law in the books" (i.e., the local rules of civil procedure) be compared to "law in action." It may be surprising to find that some courts with automatic pretrial conferences may have, in fact, a very small percentage of cases going to pretrial conference, while courts with an optional "masters" mechanism (a paid decision by a lawyer) have a higher percentage of cases going to pretrial conferences.[52] Thus the distinction would optimally be based both on the rules of civil procedure (law in the books) and the actual flow of cases (law in action).

Another factor that contributes to distinctions among courts is the individual discretion of judges. Judges may decide to take a hands-on approach in cases

---

[49] Interview with Rebecca Price, *supra* note 35.

[50] *See* OR. REV. STAT § 36.400-36.425; *see also,* OREGON JUDICIAL DEPARTMENT, CIVIL JUSTICE IMPROVEMENTS TASK FORCE REPORT TO THE CHIEF JUSTICE, 26 (Jun. 20, 2018) (showing an expedited civil jury trial is possible for some types of cases instead of mandatory arbitration, yet according to a state report, this alternative is "underutilized").

[51] *See* OR. REV. STAT. § 36.400-36.425 ("Mandatory arbitration programs. (1) A mandatory arbitration program is established in each circuit court… (3) Each circuit court shall require arbitration under ORS 36.400 to 36.425 in matters involving $50,000 or less…"); *see also,* OR. JUD. DEP'T, ARBITRATION PROGRAM, https://www.courts.oregon.gov/courts/tillamook/programs-services/Pages/Arbitration.aspx; OR. JUD. DEP'T, SMALL CLAIMS, https://www.courts.oregon.gov/courts/multnomah/go/Pages/smallclaims.aspx.

[52] *See, e.g.,* U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY DISTRICT AND ACTION TAKEN,

DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2019, U.S. COURTS JUDICIAL BUSINESS REPORT, Table. C-4A (2019) (showing figures for the N. Oklahoma district, which has an automatic pretrial conference. However, data may not be accurate due to possible different reporting discrepancies between districts. Pretrial conference figures may seem low for this reason); Stienstra, *supra* note 32.

even when an automatic referral to ADR is in place (during the scheduling and discovery phase, or during motions). Their preference may be affected by their individual caseload or view on scheduling mediation earlier or later in the process.[53] Court observations and interviews would optimally be used to uncover such judicial practices to estimate the level and nature of judicial involvement within the pretrial stage.

C. *Legal Systems with a Trial Emphasis*

In many legal systems, the promotion of ADR and negotiation has altered the exclusivity of trial as a means to resolve disputes. However, legal systems may still maintain a trial emphasis. For instance, until the past decade or so, Italy's legal system had an almost exclusive emphasis on trial; in 2010, settlement was still considered "a dead instrument."[54] Yet due to high case backlog and repeated condemnations by the European Court of Human Rights regarding access to justice,[55] legislators introduced a mandatory mediation directive in 2010 for a wide range of civil matters.[56] The directive was met with resistance by the Bar and canceled by the Court of Cassations (Italy's constitutional court), which considered it unconstitutional.[57] Thus, in 2013, a revised directive was legislated and included a relatively narrow range of civil matters (amounting to about 10-15 percent of civil cases) for which an informational meeting on mediation was made mandatory.[58] In 2014, an assisted negotiation requirement was introduced, making it necessary for lawyers of the parties to communicate prior to the filing of a case.[59]

These pre-filing requirements, however, do not seem to have reduced the number of cases filed per population. The number of civil litigious cases filed per 100 residents in 2012, a year before the reform was initiated, is the same as it was in 2018 (prior to the Covid-19 pandemic).[60] In absolute numbers, the

---

[53] Interview with Rebecca Price, *supra* note 35.

[54] Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT'L & COMP. L. REV. 213, 230 (2010) (stating that "settlement procedure still remains a 'dead' instrument that is rarely used by the parties" and explaining that this may be due to "the lack of a culture of settlement."); *see also id.* at 220 ("Law suits are easily filed because the threshold requirements needed to commence a lawsuit are easily met. Every pleading that meets the basic requirements under Article 163 of the ICCP and is not barred by one of the main objections – e.g., expiration of the relevant statute of limitation, lack of jurisdiction, etc. – may proceed toward a final judgment."); *see also* Lucarelli et al., *supra* note 2.

[55] *See* EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, LENGTH OF COURT PROCEEDINGS IN THE MEMBER STATES OF THE COUNCIL OF EUROPE BASED ON THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (2018) (showing recent examples of European condemnations); Apicella v. Italy, App. No. 64890/01 Eur. Ct. H.R. (Nov. 10, 2004) https://hudoc.echr.coe.int/eng?i=001-67420 (finding that compensation provided by Italy for undue length of proceedings was "derisory").

[56] Decreto Legislativo 20 Marzo 2010, n.28, G.U. Mar. 20, 2010 n.28 (It.).

[57] *See* Lucarelli et al., *supra* note 2.

[58] Lucarelli et al., *supra* note 2.

[59] Lucarelli et al., *supra* note 2.

[60] EUR. COMM'N FOR THE EFFICIENCY OF JUSTICE, *supra* note 31 (showing the pandemic impacted

number of civil litigious cases filed dropped slightly, but this was commensurate with changes in population.[61]

In the framework of the reforms, judges were also given various settlement promotion tools, and the authority to refer cases to mediation.[62] Research conducted in the Florence first-instance court—one of the courts that led efforts to implement pre-trial resolution reforms—found that judges indeed issued settlement proposals and mediation orders when the case seemed appropriate (the reasons for sending cases to mediation must be explained in writing by the judge). The intervention of judges correlated with a higher rate of settlement.[63]

The overriding majority of filed cases reached trial (in comparison to around 1 percent of civil cases in the U.S. federal system) and, overall, 42 percent were disposed of through a judicial verdict.[64] It seems safe to estimate that in courts without a targeted program to implement settlement reforms the percentage of verdicts might be higher. In criminal justice, too, the rate of trial is high—accounting for the majority of criminal cases, (in contrast to the U.S., for example, where the rate of criminal trial is under two percent).[65] The combined measures introduced by reforms are credited with a significant drop in pending cases in the years following the reforms.[66]

In Germany, pre-filing obligations are not common: mandatory mediation was experimented with in some regions for some types of cases but was usually accompanied by resistance, proved unsuccessful and was withdrawn.[67] However,

---

court processes in many parts of the world, Italy included, and thus the analysis here takes 2018 as the end year to analyze the effect of pre-filing requirements on the filing of cases).

[61] *Population Total – Italy,* The World Bank, https://data.worldbank.org/indicator/SP.POP.TOTL?end=2021&locations=IT&start=2006 (last visited Sept, 21, 2023); *see also*, *Resident Population of Italy from 2012 to 2023,* Statista, https://www.statista.com/statistics/617477/resident-population-italy/ (last visited Sept. 21, 2023). Looking at the years between 2012 and 2018, one can see a rise in litigious cases filed in 2013, while 2014–18 are similar to 2012 in the number of incoming litigious cases. The uptick could have been caused by litigants trying to preempt the anticipated effects of the reform by filing quickly or the steep rise in population between 2012 and 2014. From 2014 to 2018 the population gradually decreased but remained larger than in 2012, accounting, perhaps for the slight rise in absolute numbers of filed cases but not in the number of filed cases per 100 residents.

[62] *Id.*; *Codice di procedura civile*, Arts. 185, and 185–*bis* [C.p.c] (It.).

[63] A program was conducted in collaboration with the University of Florence, in which graduate law students were trained as interns to judges to pre-screen cases appropriate for mediation. *See* Lucarelli et al., *supra* note 2.

[64] *See* Lucarelli et al., *supra* note 2.

[65] *See* Langer, *supra* note 6 (mentioning that plea bargaining accounted for 19 percent of cases in Italy in 2013, while in the United States it accounted for 98 percent in 2014).

[66] EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, *supra* note 31 at 419 (providing the number of pending cases from 2012-2020).

[67] C.H. van Rhee, *Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective*, 4(12) ACCESS TO JUST. E. EUR. 7, 15-16 (2021); *see Christian Wirth & Daniel Eckstein, Mandatory Mediation in the EU,* 2015 FINANCIER WORLDWIDE MAGAZINE *(*October 2015*)* *(*"The continental European member states have adopted a relatively restrained approach. Although the Mediation Directive has led most European countries to open up further in the direction of ADR,

mandatory mediation still might exist for a small minority of cases in certain courts, as indicated by government statistics showing that a very marginal number of cases were dismissed for lack of a mandatory mediation attempt (0.02% in 2020, 0.01% in 2018).[68] Perhaps resistance to reforms in both Italy and Germany shows that legal culture can influence the acceptance or rejection of pre-filing mechanisms.

In Germany, judgments (excluding default judgments and procedural decisions) account for the disposal of 24.7 percent of cases in district courts (claims up to 5,000 euros) and near 30 percent in regional courts (claims over 5,000 euros)—a higher rate than in pretrial systems but relatively low rate for trial systems.[69] A mandatory conciliation meeting with a judge (close in nature to a pretrial conference) precedes trial[70] and accounted for 14.5 percent of civil case dispositions in district courts and 26 percent in regional courts.[71] If one looks at the data from Germany, one finds that the majority of civil cases that are disposed of through trial do so without an evidentiary hearing. Thus, while the percentage of judgments is higher than the percentage of judgments in pretrial systems, it seems Germany can be positioned somewhere between a trial and pretrial emphasis.

Some Eastern European legal systems that have only recently begun officially integrating ADR mechanisms may be studied to find if they have a trial emphasis, which would perhaps be more accentuated than the emphasis of the legal systems of Italy and Germany. According to the European Justice Scoreboard, four out of five of the countries with the highest ratio of incoming

---

they remain somewhat skeptical when it comes to mandatory mediation . . . . In Belgium, for example, there are only a few proceedings preceded by mandatory mediation. The situation is similar in Italy, where mediation is demanded only for certain types of proceedings. In Germany, the Netherlands, Poland and Portugal, for example, there is no general mandatory mediation either.”*)*.

[68] The German Federal Office of Justice prepared the statistics in English on this topic for the purpose of this research – on file with author (sent by email on Dec. 23, 2021). The sources used were Federal Statistical Office, Fachserie 10 Reihe 2.1 “Civil Courts”, 2018, 2019 and 2020.

[69] *Id*; *see also* Michael Berlemann & Robin Christmann, *Determinants of In-Court Settlements: Empirical Evidence from a German Trial Court*, 15 J. INSTITUTIONAL ECON. 143 1, 8 (2019) (examining a random sample of 2,360 case records in an intermediate German trial court (Amtsgericht) in Hamburg in 2009: “689 cases in our sample (37 percent) were resolved with a default judgment because one of the two parties failed to appear in court. In 173 cases, the defendant recognized the plaintiff ‘s claim. The claim was abandoned by the plaintiff in 24 percent of the cases because the suit was unsubstantiated or the parties successfully resolved the dispute without further court action. In a small number of cases (3 percent), the lawsuit aimed at a preliminary injunction. The remaining 860 cases led to court proceedings. In 279 of these cases, the parties eventually established an in-court settlement under the judge´s supervision and the dispute was resolved. In the remaining 581 cases (25 percent), the court had to promulgate a first-instance decision.”).

[70] *See* Michael Stürner, *Sharing Responsibility: The German Federal Court of Justice and the Civil Appellate System,* SUPREME COURTS UNDER PRESSURE

75-101 (P. Bravo-Hurtado & C.H. van Rhee, eds., 2021), (describing the development of a settlement culture in German courts and the emphasis on the first-instance court to dispose of cases through settlement); John Sorabji, *Managing Claims,* 6(1) PEKING UNIV. L.J. 179 (2019).

[71] German Federal Office of Justice, *supra* note 68.

litigious cases to population are from Eastern European countries.[72] This indication, along with other indications that these legal systems may have a more traditional trial focus[73] might make them interesting case studies.

In addition, the introduction of a wide variety of abbreviated trials to increase efficiency alongside settlement promotion can allow for a distinction between trial types within the trial emphasis. This is discussed in the chapter below.

D. *The Continuum*

Legal systems can be visualized on a continuum according to emphasized stage (Figure 2):

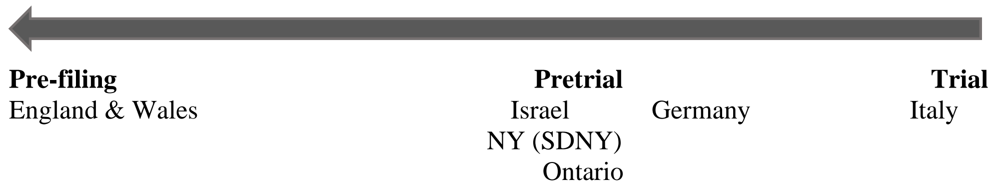

Figure 2: Legal systems placed on a continuum.

While this is not a precise representation, it generally reflects the emphases of the described legal systems.[74] As explained in the previous chapters, Italy retains a trial emphasis while Germany has more of a pretrial emphasis (as it implements mandatory judicial conciliation conferences and judicial settlement practices yet maintains a significant trial rate). Israel has a pretrial emphasis, as do courts in the U.S., which vary in court mechanisms used to promote settlement. The Southern District of New York is placed to the left of Israel due to its automatic mediation referral for some types of cases. Jurisdictions that have a wider scope of mandatory ADR (taking into account the types of cases referred to ADR, the cost of ADR, and whether it is binding in nature), such as areas in Ontario, can be placed to the left of the Southern District of NY since the prospects of judicial involvement in settlement are lower. Oregon's state system might be placed still further to the left due to mandatory arbitration paid for the parties which leads to a binding decision (with right of appeal for a limited time period). Since we did not have quantitative data on the law in action in Oregon we refrained from placing it on the continuum.

In England and Wales, pre-action protocols and a cost sanctions mechanism

---

[72] EUROPEAN COMMISSION, THE 2020 EU JUSTICE SCOREBOARD 7 (2020) (comparing the number of incoming civil and commercial litigious cases in first-instance courts; Romania, Lithuania, Poland, and Czechia).

[73] *See, e.g.*, Zdenek Kuhn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM. J. COMP. L. 531 (2004); Bartosz Karolczyk, *Pretrial as a Part of Judicial Case Management in Poland in Comparative Perspective*, 15 COMP. L. REV. 151 (2013) (describing the lack of pretrial conferences in Poland, making trial the first venue for cases).

[74] See Sections I.A, I.B, I.C.

for refusing offers to mediate or settle, discourage parties from filing claims in court or pursuing claims after they are filed. In contrast to Oregon state courts, which allow the filing of claims before initiating mandatory arbitration, in England and Wales the mere filing of a claim may be significantly prevented. This pre-filing emphasis seems to draw close to a "no-filing" emphasis, in which disputes are privatized and have limited governmental oversight.

Since legal systems often contain combinations of pre-filing, pretrial and trial components, the continuum could be visualized three-dimensionally with the main emphasis as shown above and smaller branches with less emphasized components protruding from it for each legal system. Neither is the placing of legal systems on the continuum static, legal systems can and do move along it, and the continuum can portray how reforms affect this movement.

1. Moving Along the Continuum: Recent Reforms

Efficiency concerns seem to be prodding legal systems leftwards on the continuum. In Italy, steps moving the legal system closer to the left side of the continuum are taken with each civil reform. During the Covid-19 pandemic, mandatory introductory mediation meetings were expanded to cases involving pandemic-related non-compliance with contractual obligations in an effort to offset a tide of litigation arising from government regulations during the pandemic.[75] In the last major reform, components of a pretrial emphasis included promoting judicial settlement practices mainly by:[76]

- authorizing courts to decide whether judges can be permitted to be trained in mediation (a matter of controversy due to views that adjudication and mediation should be kept separate);
- allowing judges to issue settlement offers throughout the entirety of trial (previously judges could only make offers until the summation of evidence); and
- requiring the presence of parties to the case (rather than solely representatives) at the first hearing (previously judges had discretion regarding whether to require party attendance).

---

[75] Elisabetta Silvestri, *Italy and COVID-19: Notes on the Impact of the Pandemic on the Administration of Justice*, 2020 3 ACCESS JUST. E. EUR. 148, 154 (2020).

[76] Legal Decree No. 206/2021 (Nov. 26, 2021), which is called *"Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of the alternative resolution tools of disputes and urgent measures to rationalize proceedings regarding the rights of individuals and families as well as in matters of forced execution",* published in the GAZZETTA UFFCIALE DELLA REPUBBLICA ITALIANA (Dec. 9, 2021) at https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2021-12-09&atto.codiceRedazionale=21G00229&elenco30giorni=false*; see also,* Gianfranco Gilardi*, Introduction. The Civil Justice Reform: From the Legislative Decree 1662/S/XVIII to the Delegated Law of 26 November 2021*, 206 Gazettta Ufficiale Della Republica Italiana (Nov. 29, 2021) https://www.questionegiustizia.it/rivista/articolo/introduzione-dal-ddl-1662-s-xviii-alla-legge-26-novembre-2021-n-206. (last accessed Dec. 3, 2022).

Components of a pre-filing emphasis include:

- a few additional issues requiring a (free) mandatory introductory mediation meeting;
- increase of tax benefits to encourage mediation; and
- strengthening the authority of arbitrators by allowing them to issue interim measures.[77]

In Israel, reforms that took effect in 2021 introduced pre-filing components while recommending the shortening of the pre-trial stage. The aim of proportionality was incorporated into the first chapter of the revised Rules of Civil Procedure (effective since January 2021),[78] and was transplanted from England and Wales, as described in the explanatory notes.[79]

Another step in the direction of a pre-filing emphasis in Israel is a requirement for a meeting between the lawyers of represented parties to discuss the case prior to the first hearing, including discovery of relevant documents.[80] This occurs after filing yet presents a mandatory step required before the pretrial stage, moving the emphasis to an earlier point in time. In addition, an introductory mediation meeting was made mandatory for claims over 40,000 NIS (lowering the bar, which was previously 75,000 NIS) regardless of legal representation, and expanding this requirement from courts in which a pilot was conducted to all courts.[81] The emphasis on pretrial is curtailed from the opposite direction, with the recommendation that no more than two pretrial hearings in first-instance courts are conducted.[82] Time will tell if judges actually limit the number of pretrial hearings according to the recommendation, and what these changes will mean for the number of cases advancing to trial.

In England and Wales, pilots are ongoing for an Online Court, which is expected to guide disputants through the pre-filing process (thus perhaps mitigating pre-filing costs and helping pro-se litigants), suggest alternative

---

[77] *Id.* Italy was one of the few countries that prohibited arbitrators from doing so. *See,* Nofit Amir & Michal Alberstein, *supra* note 16; *see also* Francesco Amatori, *Finally, Interim Measures in Italian Arbitration,* LINKLATERS (Jun. 6, 2022) [https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2022/18ode/interim-relief-reform-in-italy].

[78] ISRAEL CIVIL PROCEDURE RULES (2018) (enacted 2021) Art. 2.

[79] ISRAEL JUSTICE MINISTRY, EXPLANATORY NOTES TO CIVIL PROCEDURE RULES 6 (2021) (explaining that the idea for an overriding objective and proportionality were adopted from England and Wales; however, proportionality is given a different meaning in the explanatory notes, focusing in large part on the judge's expending of time on a case in proportion to the nature of the case rather than on the expenditure of litigation costs by the parties. Proportionality is also mentioned in regard to the parties' responsibility not to abuse the legal process by expending disproportionate means to the detriment of the opposing party) at https://www.gov.il/BlobFolder/news/16122020/he/16.12-explanatory.pdf.

[80] Art. 35, Civil Procedure Regulations, 579-2018 (enacted 2021) (Isr.).

[81] *Id.* at Art. 37.

[82] *Id*. at Art. 63.

dispute methods, and, if needed, refer them to the filing of the case. These pilots also include virtual hearings for certain case types. The combination of an online process with the current disincentives to litigation, however, is unlikely to lower costs drastically. Parties will contend with the same threat of costs if they refuse a settlement offer or an offer to mediate. "Between 2010 and 2018, half of magistrates' courts closed, along with more than one third of county courts."[83] The 1.2 billion pound program to digitize courts includes digitizing paper-based services, moving some types of cases online, introducing virtual hearings, closing courts, and centralizing customer services.[84] Digitization may actually move England and Wales rightwards on the continuum, from an inclination toward a no-filing emphasis to a more straightforward pre-filing emphasis, as the pre-filing phase will be supervised. In its current state, pre-filing is a privatized phase mandated by the legal system (compared to the state system in Oregon, for instance, in which cases are filed and only then diverted to mandatory arbitration).

In graphical terms, it seems that both Italy and Israel have made steps leftwards on the continuum. England, with the initiation of the Online Court may gravitate slightly to the right, farther away from no-filing and more prominently in pre-filing. An altogether different model may be presented by the introduction of AI-based dispute resolution (see Section III).

2. Things to Keep in Mind

The continuum is a general presentation that can provide a blueprint with which to create a more refined map of legal systems and add points of analysis between legal systems as expressed in theory and in practice. Its reliance on law in action is both its strong and weak point; strong in that it draws a realistic picture of legal systems as they operate in reality; weak in that gathering accurate data on the operation of legal systems is difficult and optimally would involve effort to go beyond official data to actual data in court dockets—which is more accurate though often incomplete.

For the sake of simplicity, this article, focused on civil non-family trials, has denoted trial as referred to by legal systems regardless of the variations, with the exception of small claims. While trial is often not a central feature of legal systems, it is still important to keep in mind that it can vary in nature among

---

[83] JUSTICE COMMITTEE, COURT AND TRIBUNAL REFORMS, 2019, House of Commons, HC 190, at 3; *see generally Modernisation Programme Risks Excluding the Most Vulnerable from Justice*, UK PARLIAMENT (Oct. 31, 2019), https://committees.parliament.uk/committee/102/justice-committee/news/99412/19odernization-programme-risks-excluding-the-most-vulnerable-from-justice/.

[84] COMMITTEE OF PUBLIC ACCOUNTS, TRANSFORMING COURTS AND TRIBUNALS: PROGRESS REVIEW, 2019, HC 27, at 3 (UK); Catrina Denvir & Amanda Darshini Selvarajah, *Safeguarding Access to Justice in the Age of the Online Court*, 85 MOD. L. REV. 25, 26–27 (2022). The Online Court is a result of a review of the legal system conducted by Lord Justice Briggs; *see* LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016).

and even within legal systems (e.g., intermittent versus consecutive hearings,[85] or with a focus on written rather than oral evidence).[86] Yet the basic aspects of the trial are common among legal systems—a public hearing in the presence of a neutral judge in which the decision is made according to law.[87] Moreover, both types of legal systems have come closer through the creation of abbreviated trials.[88]

It could be possible to classify a legal system as having more than one emphasis. For instance, expansive use of mandatory arbitration clauses in standard consumer agreements (which the U.S. Supreme Court tends to uphold, allowing this pre-filing emphasis, unlike courts in most other countries),[89] could mean that consumer disputes could be catalogued as having pre-filing characteristics in terms of the core implications discussed below (Section II).

III. II. THREE FAMILIES: CORE PRINCIPLES THAT CHANGE WITH EMPHASIZED STAGE

A basic claim we promote in this paper is that the changes in the emphasis of legal systems and the shift of the center of gravity of the legal process have implications that change basic notions of law. The pre-filing, pretrial and trial emphases each create a different legal family, in which core legal principles carry divergent meanings. Table 1 below summarizes some central legal functions and concepts as they are expressed in legal systems according to their emphasized stage. These are further explained in this section as far as the scope of this article allows.

---

[85] John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 830–31 (1985) (suggesting, among other things, advantages of "episodic" hearings to a "single-and-continuous trial").

[86] *See generally* Anna Nylund, *The Structure of Civil Proceedings-–Convergence Through the Main Hearing Model?*, 9(2) CIV. PROC. REV. 13 (2018) (comparing common law and civil law systems and among types of civil law systems).

[87] *See* Galanter, *The Vanishing* Trial, *supra* note 2, at 460 (noting that the definition of trial for the purpose of reporting varies among states).

[88] Amir & Alberstein, supra note 16, at 301. It would be interesting to examine how the use of virtual hearings during the pandemic might have brought legal procedures among legal systems closer at that time; *see* Silvestri, *supra* note 74, at 151 Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings during the COVID-19 Pandemic and Beyond*, 115 NW U. L. REV. 1875 (2021); *see* Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211 (2022); Masood Ahmed & Claire Pennells, *Online Courts Take the Stage,* 7746 NEW L.J. 18 (2017).

[89] Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 189 (2019).

Table 1. Three Legal Families.

	Pre-Filing Family	***Pretrial Family***	***Trial Family***
Main aim of civil justice system	Settlement without court intervention	Settlement, partly facilitated by a judge and/or court administration	Judicially-led application of rules
Function of law in resolving disputes	Role of law is obscure	Shadow of the pretrial judge, who combines law with settlement considerations.	Judicially led application of law; corresponding shadow of law in negotiations
Judicial presence (1st instance courts)	Rare	Central in bringing about settlement	Central in implementing the law
Decision making	Left to the parties	Diffused (parties and judge)	Mainly the judge
Access to justice	ADR-oriented	Pretrial and ADR-oriented	Trial and ADR
Institutional function of courts	Low	Medium	Medium

A. *Main Aim of Civil Justice System*

Over two decades ago, Simon Roberts, speaking of England and Wales, noted "a growing recognition of 'settlement' as an approved, privileged objective of civil justice."[90] In his opinion, the main departure of the Civil Procedure Rules (CPR), introduced following the Woolf Reforms, from the previous regime of civil justice was the institutional recognition of settlement as an aim, even a preferred aim.[91] This approach greatly differed from the previous *laissez faire* approach that did not interfere with the work of lawyers in negotiating a settlement. The legal system moved to encourage settlement through a variety of pre-action obligations and incentives and declared litigation a "last resort."[92]

Subsequently, due to unremittingly high litigation costs in England and Wales and further reforms, [93] a few words were inserted into the overriding objective of the CPR: "(1) . . . enabling the court to deal with cases justly *and at proportionate cost*."[94] While the concept of proportionality (meaning the sum being claimed must be proportionate to the legal costs expended to attain it) had previously been emphasized during the Woolf Reforms, it had not been formally stated in the CPR. Since high legal costs remained a problem following the Woolf Reforms, the concept was inserted explicitly into the overriding objective. As documented in court observations in the London County Court, judges take their mission to ensure proportionate costs seriously, reflecting the emphasis on this concept, which is also instilled through judicial training.[95] Judges often refer to their obligation to ensure proportionality during Case and Cost Management hearings, even referring to this obligation several times during a hearing.[96]

The added goal of proportionality inserted into the CPR could be interpreted as giving priority to high-value claims (as the costs claimed might be more likely to exceed litigation costs). Nonetheless, high-value claims, too, are preferably settled regardless of their precedential value as demonstrated by the variety of disincentives to litigation. In other words, the public aim of norm-setting and implementation seems to have receded into the background.

The aim of justice along with proportionality as stated in the overriding objective is limited to court action ("justly by the courts"). Thus, in fact, the

---

[90] Simon Roberts, *Settlement as Civil Justice*, 63 MOD. L. REV. 739, 739 (2000).

[91] *Id.*

[92] *Id.* at 742; *see also* Masood Ahmed, *Bridging the Gap between Alternative Dispute Resolution and Robust Adverse Costs Orders*, 66 N. IR. LEGAL Q. 71, 72 (2015) ("One of the defining features of the Woolf reforms was its attempt to shift the focus in civil litigation away from the traditional adversarial culture of resolving disputes to one which was centered on a philosophy of party cooperation and, more significantly, on settlement. As Lord Woolf made clear in his 1996 Final Report, 'the philosophy of litigation should be primarily to encourage early settlement of disputes.'").

[93] LORD JACKSON, *supra* note 23.

[94] CPR 1 (1998) (emphasis added).

[95] LORD JACKSON, *supra* note 23, (Vol. 2).

[96] Amir & Alberstein, *supra* note 12, at 584.

"overriding" objective of the CPR misses some of the CPR's own rules affecting parties mainly outside of court. CPR Rule 36, which, through an extensive list of clauses, regulates parties' settlement offers by providing cost sanctions if the parties continue to trial and the award is equal to or smaller than the award offered in settlement, is most relevant outside of courts, where settlement offers are made. Striving towards justice seems difficult to measure when accompanied by a lack of oversight, and thus the objective of civil justice is largely focused on settlement.[97]

In pretrial focused legal systems, in contrast, access to pretrial judicial oversight is relatively facile. Yet the main focus of the legal system remains on settlement—facilitated by the court by efficient administration of cases, a mandatory court program and/or pretrial judge. The pretrial judge encourages parties to dispose of the case—at times by giving a legal prediction of the outcome or pointing out the merits of a case. This is not necessarily a neutral application of the law since the aim of the pretrial judge is to settle the case (see *infra* Section II.B). In other words, the focus of legal justice is mainly on reaching settlement with the involvement of the judge who applies both the law and settlement practices for this purpose. As stated in *Neary v. Regents of the University of California*:

> The primary purpose of the public judiciary is 'to afford a forum for the settlement of litigable matters between disputing parties. We do not resolve abstract legal issues, even when requested to do so. We resolve real disputes between real people. This function does not undermine our integrity or demean our function. By providing a forum for the peaceful resolution of citizens' disputes, we provide a cornerstone for ordered liberty in a democratic society.[98]

The goal of civil justice in trial systems is to implement the law (whether through rules or precedent). The incorporation of ADR and other settlement promotion mechanisms in systems with a trial emphasis has not gone so far as to unsettle that main aim, which is considered essential in the attempt to achieve fairness, preserve order, and develop public norms.[99]

Yet trial systems that are beset by backlog, such as Italy, need to deal with the paradox that "too much trial" also creates access to justice problems due to

---

[97] *See* Welsh, *supra* note 40; see also Resnik, *supra* note 1, at 379. Perhaps the planned Online Court, which may introduce oversight of the pre-filing phase, is a step in altering this equation.

[98] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 193-194 (2003) (adding at footnote 111: "In dissent, Justice Kennard responded: More than just a dispute resolution service, the judiciary is an integral part of our government. Working in the context of actual disputes, courts interpret and enforce the policies adopted by the legislative process, striving always to give those policies coherence and vitality. Thus, when a trial court renders judgment in a particular case, it is not just deciding who wins and who loses, who pays and who recovers. Rather, the ultimate purpose of a judgment is to administer the laws of this state, and thereby to do substantial justice.").

[99] *See* Guido Calabresi, *Two Functions of Formalism: In Memory of Guido Tedeschi*, 67 UNIV. CHI. L. REV. 479, 479-488 (2000).

delay. Thus the objective of Italy's last legislative decision on reforms (on November 2021), as inserted into the title of the legal decree, was: "*increasing the efficiency of civil trials, reviewing alternative dispute resolution mechanisms and taking urgent measures for rationalizing the procedures regarding rights of individuals and families as well as enforcement procedures.*"[100] The decree aims to reduce the duration of trials by at least 40 percent, as one of the objectives set out for the country by the EU in order to access the resources provided in the National Recovery and Resilience Plan.[101] Despite the title of the reforms, they do not lunge to an efficiency extreme but rather take previous reforms forward, as explained in Section I.D. However, the objective of efficiency, interpreted as reducing the duration or dependency on trial demonstrates how Italy's legal system is moving along the continuum towards a pretrial/pre-filing focus and is in the process perhaps of modifying the aim of civil justice.

B. *The Function of Law in Resolving Disputes*

Legal rules and precedent (the latter most relevant in common law countries) have traditionally created a body of norms implemented in court and forming a "shadow" in negotiation.[102] In negotiation theory, this shadow is related to the "best alternative to a negotiated agreement" and "worst alternative to a negotiated agreement" both of which influence negotiations.[103] In legal systems with a trial emphasis, the parties weigh the expected trial outcomes and factor them into negotiations along with other considerations, such as costs, emotional turmoil and time.[104]

When the emphasis of the legal system moves to *pretrial*, the function of legal rules becomes less direct. Pretrial judges and magistrates may use the law

---

[100] Legge 26 novembre 2021, n.206, G.U. Dec. 9, 2021, n.292 (It.); *see* Gianfranco Gilardi, *Introduzione. La riforma della giustizia civile: dal ddl 1662/S/XVIII alla legge delega 26 novembre 2021, n. 206* [*Introduction. The Civil Justice Reform: From the Legislative Decree 1662/S/XVIII to the Delegated Law of 26 Novemebr 2021*, 206], G.U. (Nov. 29, 2021) https://www.questionegiustizia.it/rivista/articolo/introduzione-dal-ddl-1662-s-xviii-alla-legge-26-novembre-2021-n-206 (last accessed Dec. 3, 2022).

[101] *Id.*

[102] *See* Denvir & Darshini, *supra* note 81, at 26 (stating that "the outcomes that emanate from the formal justice system, when coupled with the 'coercive power of the state', play a key role in establishing the normative expectations that govern the behaviour and negotiations that occur in the informal dispute resolution setting. The court's role as arbiter and enforcer of legal outcomes operates to give substance to individual and collective rights. Whilst courts may remain peripheral to the experience of civil justice for many individuals, their operation and existence is of fundamental importance for individual civil justice outcomes and for society at large."); *see also* Mnookin & Kornhauser, *supra* note 8; *see generally* Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice* 24 YALE J. L. & HUM. 397 (2012).

[103] ROGER *FISHER* & WILLIAM *URY, GETTING TO YES (1981) (introducing the concept of the best alternative to a negotiated agreement, or BATNA);* Francisco Andrade et al., *Using BATNAs and WATNAs in Online Dispute Resolution*, JSAI Int'l Symp. On A.I. 5, at 8, 17 (2009).

[104] Mnookin & Kornhauser, *supra* note 8, at 986 (introducing the concept of the shadow of the law, "the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips -an endowment of sorts.").

to persuade parties to settle: 1) through prediction of the legal outcome, 2) by pointing out the weaknesses of each case, and 3) by factoring in the law as a consideration in judicial settlement offers or the rarer practice of judicial arbitration.[105] Since in many cases pretrial is "all there is"[106] (i.e., very few cases continue to trial), the judge's first impression forms the shadow of the law. This impression is based, among others, on written documents, prediction, and heuristics. The judge and the lawyers know that a first impression can change with the presentation of evidence in trial, but since the probability of trial is low, parties assess the outlook of the pretrial judge and factor it into negotiations to reach a settlement. In court observations, pretrial judges themselves may refer to previous settlements that they have encouraged[107]—in other words, they use the same tactic to influence negotiations, referring to themselves.

The application of law by the pretrial judge is often not straightforward, since it can be affected by the desired end result—settlement. For instance, to an overconfident party, the judge may point out weaknesses for the purpose of settlement rather than give an overall assessment of the case.[108] This settlement-promoting stance is part of the shadow of the pretrial hearing. Lawyers negotiating a settlement, even if they have not reached the pretrial stage, may comment that the judge will offer a compromise, and suggest what it would be, creating a shadow of law determined by predictions of judicial settlement proposals.[109]

In other words, the best alternative to a negotiated agreement has changed. For claimants, the best alternative to negotiations preceding pretrial is not the receipt of full compensation for claimed damages but rather the most one would receive in a settlement following an optimal first impression by a pretrial judge. If a party wants to create a shadow of law more focused on legal rules and precedent, the prospects of continuing to trial (rather than stopping at pretrial) must be presented as credible.[110]

Legal systems that emphasize the pretrial stage and mandate ADR mechanisms (e.g., mediation, some form of arbitration, or early neutral evaluation by an attorney) create a more complex shadow of law. This shadow

---

[105] Yuval Sinai & Michal Alberstein, *Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 739 (2015); for general settlement practices of pretrial judges, *see* Ellen E. Deason, *Beyond Managerial Judges: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017); Amir & Alberstein, *supra* note 12; Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1 (1985).

[106] Resnik, *supra* note 33, at 157.

[107] Amir & Alberstein, *supra* note 12.

[108] *Id.*

[109] John Lande, *The Role of Law in Legal Disputes*, KLUWER MEDIATION BLOG (Aug. 6, 2021), https://mediationblog.kluwerarbitration.com/2021/08/06/the-role-of-law-in-legal-disputes/ (describing "ordinary legal negotiation" (OLN) or "norm-based negotiation." Using this approach, lawyers try to reach a reasonable agreement based on shared norms, which typically are the expected court outcomes or typical agreements in similar cases).

[110] *Id.*

of law includes the law to be applied in the ADR mechanism as well as the law applied by the judge during motions or pre-trial conferences at any time before, during, or after the use of the ADR mechanism. The probability that the case will move forward in court after the use of the ADR mechanism also affects the shadow of trial. Courts that place more obstacles or greater disincentives to moving on to court after failure of ADR thus limit the shadow of law as applied in court.

The emphasis on the *pre-filing* stage alters the significance of law even further, especially in pre-filing systems that have extensive pre-filing requirements (which preclude court involvement). The low prospects of trial, low prospects of institutional involvement, and relatively small number of judicial decisions, all erode the role of legal rules and the shadow of law. The realistic best or worst alternative to a negotiated agreement that one party can present to another (or to itself) can be unrelated to any form of judicial involvement—i.e., an assessment during pretrial or a verdict at trial. It might be expected that in this setting, reference to other settlements would take the place of legal precedents. Yet, while settlements are referred to,[111] the process and causes for reaching an outcome are not public or documented in a way that would allow for a realistic comparison, as would be the case if the outcome became legal precedent.[112]

The overall result is that bargaining can occur largely free from the shadow of the law, or even the shadow of other settlement agreements. This can be compared to whole areas of law largely resolved through arbitration in the U.S., where mandatory arbitration clauses in a variety of contracts, including consumer and employment agreements, are enforced.[113] In addition, large swathes of insurance claims are resolved through "settlement mills,"[114] where business models, rather than legal considerations, take the forefront, setting sums which undercut serious claims in favor of satisfying the large bulk of small, and even spurious, claims.[115] While government reports in England and Wales have recognized that court decisions are, in many cases, vital for the success of ADR—i.e., the shadow of law facilitates private ordering[116]—the legal system

---

[111] Amir & Alberstein, *supra* note 12, at 604.

[112] Resnik, *supra* note 1, at 406.

[113] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. REV. 679, 684 (2018) (stating that mandatory arbitration "effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies"); Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 189 (2019) ("If the law is indeed underdeveloped, or even frozen in industries where virtually all account agreements include an arbitration clause (such as securities and app-based ride-sharing), parties trying to settle disputes arising out of those account agreements are negotiating in the shadow of murky legal norms and a 'black hole' of arbitration outcomes.").

[114] Engstrom, *supra* note 3, at 2133.

[115] Engstrom, *supra* note 3, at 2133.

[116] UK CIVIL JUSTICE COUNCIL, ADR AND CIVIL JUSTICE INTERIM REPORT 1, 9 (Oct. 2017), https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-

has not yet created credible options for litigating cases. However, the Online Court that is in preparation may provide a partial remedy by introducing supervision into the pre-filing phase and possibly lowering pre-litigation costs.[117]

Another change in the function of law when the focus is on pretrial or pre-filing involves the role of precedent. Depending on the rareness of trial, the reservoir of precedents and types of cases that can be litigated may decrease to the point that the shadow of law may be non-apparent. Thus, even if parties want to negotiate in the shadow of the law, it may be difficult to do so.

C. *Judicial Presence*

In trial-focused legal systems, disputants file cases in court without substantial pre-filing obligations and expect their cases will be adjudicated. In other words, the judge maintains a central adjudicative role and presence. In Italy, a country where ADR has been incorporated but which still emphasizes trial, the role of the first-instance judge consists mainly of adjudication and subordinately of diagnosing cases for mediation (the extent of the latter function varies among judges and courts).[118] In certain cases, the judge might try to persuade the lawyers that the case is appropriate for mediation, yet, at least in observations conducted in the Florence first-instance court, will usually not try to force it upon them.[119] Judges are present in a large proportion of filed cases, adjudicate many of them, and use judicial settlement tools in limited fashion.[120]

In pretrial-focused legal systems, disputants also file cases in court without substantial pre-filing obligations. Yet adjudication is largely replaced by judicial bench time[121] to dispose of the case in the pretrial stage. Judges have a central role in the settlement of cases through a variety of techniques in pretrial,[122] while actually adjudicating a smaller portion of them. In some pretrial jurisdictions, where judges are allowed to conduct ex parte negotiations in chambers, the judicial presence may not always be public.[123]

---

justice-20171017.pdf.

[117] Ahmed, *supra* note 87; *see also* Denvir, *supra* note 83, (describing concerns regarding digital proficiency of the disputants).

[118] Lucarelli et al., *supra* note 2, at 216–17.

[119] Lucarelli et al., *supra* note 2.

[120] Lucarelli et al., *supra* note 2.; Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22 PEPP. DISP. RESOL. L.J. 263, 272 (2022); *see supra* Section I.C., (discussing cases where parties must attend an introductory mediation meeting before the first hearing in court, yet this is true only for a minority of cases).

[121] Ayelet Sela & Limor Gabay-Egozi., *Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice*, 47(3) J. L. & SOC'Y 468, 468 (2020).

[122] Amir & Alberstein, *supra* note 12, 559–60; Deason, *supra* note 40, at 83; Michael Berlemann & Robin Christmann, *Determinants of In-Court Settlements: Empirical Evidence from a German Trial Court*. 15(1) J. INST. ECON. 1, 144 (2019). Nadja Marie Alexander et al., *Mediation in Germany: The Long and Winding Road*, GLOB. TRENDS IN MEDIATION (2003).

[123] Resnik, *supra* note 1, at 410; Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUSTON L. REV. 1343, 1381–82 (2000).

In contrast to the two families of legal systems described above, which involve significant judicial presence, the pre-filing family does not position the judge at a central junction to help resolve disputes. Due to extensive pre-filing obligations that incur costs and require time and effort, judicial presence is rare. The judicial role may consist mainly of behind-the-scenes, largely automatic functions such as allocation of filed cases to track and default judgments.[124] In a small minority of cases, judges may perform case management and adjudicative roles.

The 2020 European Commission for the Efficiency of Justice (CEPEJ) Evaluation Report (evaluating 2018 data) may provide an indication, however anecdotal, of the centrality of judges in the different families. According to the report, there are 11.6 professional judges in Italy per 100,000 inhabitants.[125] In Israel, there are 8.2 judges per 100,000 inhabitants.[126] In England and Wales, the ratio of judges to population is low: 3.1 judges per 100,000 inhabitants. In comparison, in its 2008 report, analyzing data from 2006 in England and Wales, when there were fewer pre-action protocols, the ratio was more than twice as high, 7 judges per 100,000 inhabitants.[127] In Italy, in 2006, the ratio was 11:100,000, similar to the 2018 figure (Israel is not listed in the 2008 report). Of course, the emphasized stage of the legal system may not be the only factor affecting the figures.[128]

Relatedly, decision-making in civil cases is led by the judge in the trial family. In the pretrial family, it is diffused between the pretrial judge/magistrate and disputants, sometimes with the involvement of other court-mandated mechanisms. In the pre-filing family, decision-making in civil cases is generally left to the disputants.

D. *Access to Justice*

The concept of access to justice has evolved over the years from mere access to courts to a range of other issues, including ADR and legal aid.[129] In the context of this article, the way ADR is integrated into the definition of access to justice changes with emphasized stage. If ADR were merely additive, access to justice would entail free access to trial as well as to ADR. However, access to dispute

---

[124] PENNY DARBYSHIRE, SITTING IN JUDGMENT: THE WORKING LIVES OF JUDGES (2012).

[125] European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems Evaluation Report, 2020 Evaluation Cycle (2018 data), Part 2, Country Profiles, 50 (2020).

[126] *Id.* at 102.

[127] European Commission for the Efficiency of Justice (CEPEJ), *Eur. Jud. Sys. Evaluation Rep.*, 2020 Evaluation Cycle (2018 data), Part 2, Country Profiles, 96 (2020); European Commission for the Efficiency of Justice (CEPEJ), *Eur. Jud. Sys. Evaluation Rep*, 2008 Evaluation Cycle (2006 data), https://rm.coe.int/16807477. There are no such reports pre-dating the Woolf reform that led to pre-action protocols.

[128] GORIELY ET AL., *supra* note 21; *see also* PEYSNER & SENEVIRATNE, *supra* note 20.

[129] Richard Moorhead, *Conditional Fee Agreements, Legal Aid and Access to Justice*, 33 U. BRIT. COLUM. L. REV. 471 (2000); *see also* Cohen & Alberstein, *supra* note 7.

resolution often competes with access to trial, especially when dispute resolution mechanisms are mandatory or highly incentivized by legal systems.

In the trial family, access to justice still often equates to access to trial, with dispute resolution introduced as an additional option—or, as in Italy, a quasi-mandatory option for a small proportion of civil disputes ("quasi" since the obligation only entails one free introductory mediation meeting). However, the easy filing of cases and unobstructed route to trial can contribute to case backlog, which may itself hinder access to trial.

In the pretrial family, access to court is maintained but less so access to trial. Other options—access to a pretrial judge, to court-connected mediation, and other ADR options—are more readily available and only a minority of cases proceed to trial. In contrast, in the pre-filing family, dispute resolution mechanisms are the central form of justice to which parties have access. Parties expend costs to fulfill pre-filing obligations and risk cost sanctions if they do not accept a settlement offer or offer to mediate,[130] making access to courts difficult.

In other words, the interaction between access to trial and access to ADR differs in the different families: from 1) a mainly additive ADR component; to 2) a component that, together with abbreviated mechanisms such as pretrial, competes and may take the place of trial (as the latter is disincentivized); and to 3) a dominant component of access to justice that, along with negotiation, largely takes the place of trial and pretrial.

The emphasized stage may not only influence the interaction between trial and ADR options but also the *nature of* ADR. The promotion of ADR by legal systems often "co-opts" ADR, infusing it with the legal systems' efficiency concerns and subordinating, and even doing away with, the goals of dialogue or solutions to contend with underlying issues.[131] Mediation in the U.S. and England and Wales often consists of a shuttling between the parties sitting in different rooms, with various bargaining proposals.[132] The most stalwart

---

[130] *See* Section I.A.; *see* UK CPR, Part 36.17(3)(a—b) ("Offers to settle") (if a claimant declines an offer to settle and receives the same or lower amount through judgment, "the court must, unless it considers it unjust to do so, order that the defendant is entitled to— (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and (b) interest on those costs.").

[131] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or The Law of ADR,* 19 FLA. ST. U. L. REV. 1, (1991); Patrick G. Coy & Timothy Hedeen, *A Stage Model of Social Movement Co-Optation: Community Mediation in the U.S.*, 46(3) SOCIO. Q., 405, 421 (2005); Roberts, *supra* note 29; DAME H. GENN ET AL, MINISTRY OF JUSTICE RESEARCH SERIES, TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE (2007).

[132] Roberts, *supra* note 29; Carrie Menkel Meadow, *When Should I Be in the Middle? I've Looked at Life from Both Sides Now*, EVOLUTION OF A FIELD: PERS. HISTORIES IN CONFLICT RESOLUTION, 437 (Howard Gadlin & Nancy A. Welsh eds., 2020) ("Another concern is the growing practice, in private mediation, for more evaluative, no-joint-session, shuttle-diplomacy forms of mediation. Major litigation, commercial, employment, and divorce mediation have now become professionalized, organized, and institutionalized as well as commercialized, so that in my home town of Los Angeles, the norm is now closer to dispute management by a mediator who shuttles back and forth between the parties, "selling" solutions or settlements, without any or much quality face-to-face time.").

warriors of mediation have lamented the loss of its founding principles, as well as the loss of disputant choice.[133]

Access to justice is of course not only affected by the emphasized stage, but also by litigation costs,[134] which may in turn cause legal systems to choose a pre-filing or pretrial emphasis.[135] The Woolf Reforms and subsequent reforms in England and Wales, which led to a pre-filing emphasis, is a case in point. The Woolf reform was compiled into a report titled "Access to Justice." The reform was introduced on the heels of numerous cuts to legal aid, which left most of the population without recourse to courts due to high legal costs. By obligating parties to negotiate before filing a case and incentivizing them to use dispute resolution mechanisms on the one hand, and providing judges with cases management tools to control the cost of litigation in the cases that did reach them on the other, it was hoped that parties might find redress. While the reforms seem to have encouraged a negotiation culture, one of the outcomes of the pre-filing obligations was a frontloading of legal costs.[136] Thus trial avoidance occurs not only due to disincentives to trial (such as possible cost sanctions for rejecting a settlement or mediation offer) but also due to the original impetus of the reform: litigation costs. High litigation costs, which are more prevalent in common law countries,[137] may be one reason for the general preference of these countries for pre-filing and pretrial emphases. It may be a chicken-and-the-egg scenario; when trial is costly and thus undesirable, legal systems may, intentionally or unintentionally, put mechanisms into place that in effect further deter parties from pursuing this channel.

E. *The Institutional Function of Courts*

It is a well-documented feature of the litigation landscape that filing a case in court can jumpstart negotiations.[138] This is part of the courts' "institutional

---

[133] Menkel-Meadow, *supra* note 128, at 437 (stating that ADR was supposed to be an additional choice to trial and not a substitute for it. Menkel-Meadow was one of the founders of the ADR movement).

[134] ASHER FLYNN & JACQUELINE HODGSON, ACCESS TO JUSTICE AND LEGAL AID: COMPARATIVE PERSPECTIVES ON UNMET LEGAL NEED 7 (Asher Flynn & Jacqueline Hodgson eds., 2017); RABEEA ASSY, INJUSTICE IN PERSON (2015); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 647 (2017) (noting the proliferation of pro se litigants in U.S. state civil courts).

[135] *See*, *e.g.*, Carlo Vittorio Giabardo, *Should Alternative Dispute Resolution Mechanisms Be Mandatory? Rethinking Access to Court and Civil Adjudication in an Age of Austerity*, 44 EXETER L. REV. 25, 28–29 (2017) (stating that due to high litigation costs and an age of austerity, mediation can provide access to justice).

[136] GORIELY ET AL., *supra* note 21, at 279; PEYSNER & NENEVIRATNE, *supra* note 20, at 7.

[137] Cortes, *supra* note 2, at 61.

[138] *See, e.g.*, Lande, *supra* note 105, at 4 (stating that demonstrating willingness to litigate is important for collaborative negotiations); Berlemann & Christmann, *supra* note 118 at 148 (studying courts in Germany, they found that of a random sample of 2,360 case records, the claim was abandoned by the plaintiff in 24 percent of the cases because the suit was unsubstantiated or the parties successfully resolved the dispute without further court action. In addition, 173 other cases

function," which is manifest in cases where "no significant discretionary judicial activity takes place and only the court's institutional power and authority are in operation."[139]

The ability to file a claim without pre-filing obligations is often the most effective, timely, and inexpensive way for individuals (especially consumers) to garner the attention of otherwise unresponsive companies and organizations.[140] As noted in Section I, a substantial portion of filed cases involve no court action (i.e., they are withdrawn or abandoned); presumably settlement accounts for a significant part of such cases.[141] The need for a filing option to incentivize responses to claims, whether through negotiation or submission of defense pleadings, is demonstrated in the excerpt from Bielski v. Coinbase Inc. below:[142]

> Bielski alleges that, after the scammer drained his account, he turned to Coinbase for help. He encountered a customer-service nightmare . . . Bielski initiated a "live chat" with a Coinbase representative, which turned out to be a mere bot that provided canned responses. Bielski then called the specific customer service "hotline" specified in his user agreement, as to where to get help for a compromised account. He was once again unable to speak with a human. Bielski then wrote two letters to Coinbase at its San Francisco office pleading for help. It was not until this lawsuit that Coinbase deigned to respond, albeit again with only automated inquiries . . .

This case demonstrates that an emphasis on pre-filing—which in effect, significantly postpones the filing of a case—does not always promote settlement; this especially may be true when unresponsive parties are involved. In the pursuit of a legal system that is affordable, blocking the free access to courts might be self-defeating. On the other hand, free access to courts can lead to nuisance suits.[143]

In pretrial and trial families, the court's institutional role in resolving

---

were resolved because the defendant recognized the claim); Fiona Rotstein & Kimberlee Weatherall, FILING AND SETTLEMENT OF PATENT DISPUTES IN THE FEDERAL COURT, 1995-2005 13 (Intellectual Prop. Rsch. Inst. Of Austl. Working Paper No. 17/06, 2006) (analyzing filed patent cases, they note that a high proportion of cases that settle early may partly due to "cases in which the issue of proceedings is a strategy used by a party to indicate their seriousness or to move negotiations forward"); Sela & Gabay-Egozi, *supra* note 117 at 473; *see also*, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. ECON. & ORG. 898, 900 (2013) ("the mere filing of a motion in a case hastens settlement.").

[139] Sela & Limor Gabay-Egozi, *supra* note 117, at 473.

[140] Notably, consumer ombudsmen schemes do not usually have binding authority, and thus unresponsive companies may not heed demands to communicate.

[141] *See generally* Lucarelli et al., *supra* note 2; *see also* Sela & Gabay-Egozi, *supra* note 117.

[142] *Bielski v. Coinbase Inc.*, No. C 21-07478 WHA, 2022 WL 1062049, at *1 (N.D. Cal. Apr. 8, 2022). https://casetext.com/case/bielski-v-coinbase-inc

[143] *See, e.g.*, David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, INT'L REV. L. ECON. 42, 42–51(2006) (discussing ways to deal with nuisance claims and prevent them from being filed).

disputes is functional but in different ways. In pretrial systems, in which the probable outcome is court-promoted settlement (e.g., through judicial prediction, judicial negotiation), there is a strong incentive to settle the case, since it will probably settle anyway. Since it is almost a given that claimants will not receive the full sum they may be entitled to in a court-promoted settlement, negotiations may be conducted under that assumption. In the trial family, the backdrop to negotiations is a judicial verdict that may fully vindicate the claimant. This can induce the defendant to settle on a reasonable sum or to even give claimants the full sum to which they are entitled (however it also promotes trial and perhaps encourages the defendant to drag time to avoid a verdict).

This function of courts to incentivize settlement is marginal in the pre-filing family if it includes extensive pre-filing obligations. The often complex, regulated path to filing a claim may lead parties to abandon their claims or settle for a smaller amount than they would in other systems. In another article, we have discussed the benefits of looking at legal systems through the prism of the individual disputant, rather than repeat players such as corporations and public bodies, and thus creating human-centered legal design.[144] Perhaps in the filing of claims, a distinction in favor of individual litigants could be made in legal systems that have pre-filing requirements.[145]

Courts also incentivize normative behavior, i.e., the knowledge that the law can be enforced through trial has a role in preventing undesirable behavior, and in preventing disputes. Thus, if the option to access courts and trial is unrealistic this may affect social behavior. Of course, a legal culture of cooperation is also a socially desired norm, but perhaps a realistic prospect of trial is needed for its promotion.

F. *Note on Convergence Between Criminal and Civil Justice*

Components of the described trends found in civil justice may be found in criminal justice as well[146] and may have far-reaching implications for the function of law, judicial presence, access to justice, and other core principles of justice. Legal systems have introduced mechanisms such as criminal pretrial, plea bargains, or out-of-court disposals (e.g., cautions or deferred prosecution), which can significantly replace or abbreviate trials.[147]

The mix of alternatives and their preponderance, as well as the role of the

---

[144] Amir & Alberstein, *supra* note 76.

[145] *Id.*

[146] Sari Luz Kanner et al., *Managerial Judicial Conflict Resolution (JCR) of Plea Bargaining: Shadows of Law and Conflict Resolution*, 22 NEW CRIM. L. REV. 494 (2019); King & Wright, *supra* note 6 at 331–34.

[147] Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76 (2015); Jacqueline S. Hodgson, *The Future of Adversarial Criminal Justice in 21st Century Britain*, 35 NCJ INT'L L. & COM. REG. (2009); Nicky Padfield, *Judicial Rehabilitation? A View from England*, 3(1) EUR. J. OF PROB. 36 (2011) (noting the vast use of fixed penalty notices).

judge in relation to them, varies among legal systems. In the U.S., Israel, and Germany—which have a pretrial or close-to-pretrial emphasis in civil justice—the judge may take a hands-on approach to reaching plea bargains. In the U.S. and Israel, where prosecutors and defendants regularly reach plea bargains, judges may implement a variety of judicial settlement practices to encourage the prosecution and defendant to settle, much like they do between parties in civil justice.[148] In Germany, judges directly negotiate with the defendant's counsel to obtain a confession in return for a reduced sentence:

> [T]he presiding judge of the first-instance court that is responsible for deciding a pending criminal prosecution engages in a negotiation with the defense counsel who represents the defendant. Their negotiation envisions an exchange, a bargain. In return for the judge's agreement to reduce significantly the punishment that would result if the court were to find the defendant guilty after a full trial on the evidence, the defendant will confess the charge against him. The court then convicts the defendant, relying heavily upon the confession, which greatly shortens the trial and simplifies the work of the court.[149]

In contrast, in England and Wales, which has a pre-filing emphasis, judges have active case management roles during the trial itself,[150] but do not generally take part in negotiations.[151] The greater part of criminal cases are disposed through guilty pleas that judges must approve but are not usually involved in obtaining. This non-intervention in settlement is reminiscent of limited judicial intervention, if any, in settlement in civil cases.

Unlike the previously mentioned legal systems, in which plea bargaining is common (though less so in Germany, which, as mentioned in Section I.D., is situated between a pretrial and trial emphasis), Italy's legal system still focuses on trial as the main route for the disposal of criminal cases. Plea-bargaining has a relatively small presence.[152] The judge retains an adjudicative function for a large portion of cases, yet at times this function is shortened through a variety of forms of abbreviated criminal trials utilized to accelerate legal proceedings.[153]

Thus, at least in these five countries, it seems that the emphasis on civil

---

[148] King & Wright, *supra* note 6; Kanner et al., *supra* note 142; Amir & Alberstein, *supra* note 12; Ami Kobo, *Criminal Mediation*, 24 HAMISHPAT (2018) (Hebrew).

[149] John H. Langbein, *The Turn to Confession Bargaining in German Criminal Procedure: Causes and Comparisons with American Plea Bargaining*, 20 AM. J. COMP. L. 1 (2022) (stating that the practice of confession bargaining seems to account for a majority of white collar crimes).

[150] R.L. Denyer, *The Changing Role of the Judge in the Criminal Process*, 14 INT'L J. EVIDENCE & PROOF 96 (2010).

[151] Amir & Alberstein, *supra* note 12.

[152] Riccardo Montana, *Procedural Tradition in the Italian Criminal Justice System: The Semi-adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles*, 20 INT'L. J. EVIDENCE & PROOF 289 (2016); Amir & Alberstein, *supra* note 12; Langer, *supra* note 6.

[153] Amir & Alberstein, *supra* note 12.

justice, especially as it pertains to the judicial role, may reflect components of criminal justice regarding the extent of use of plea bargains and the nature of the judicial role. Another aspect that might be interesting to compare is the extent of use out-of-court disposals (somewhat comparable to pre-action protocols in civil justice since their prerogative is to dispose of cases before they reach court). Out-of-court disposals can be found in all five legal systems.[154] Further research might examine whether the use of out-of-court disposals and pretrial, as well as the extent of the wider trend of the administratization of justice,[155] correlate with the emphasized stage in each legal system.

III. CREATING AN AI-CONDUCIVE ENVIRONMENT?

As demonstrated in Section I, ongoing reform seems to be moving some legal systems in the direction of pretrial and pre-filing emphases. The effects of this movement on core legal principles are described in Section II. While these described processes are important in themselves, here we combine them to show that a pre-filing emphasis may be conducive in time to AI-based dispute resolution. We claim that the absence of judges and courts, as well as the ambiguity regarding the function of law in resolving disputes through negotiation creates a vacuum in which new modes of authority, geography, and "law" may emerge.

AI technology, which is the machine analysis of large quantities of data to optimize outcomes (with the aim of creating human-like or even superhuman intelligence), is already in use in legal systems for administrative purposes[156] and in law firms for the purpose of legal prediction and analysis.[157] There have

---

[154] Peter Spivack & Sujit Raman, *Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008); Oriana Binik, *Testing for Adults in the Milan area. Analysis of the Application of an Innovative Measure in the Italian Sanctioning Landscape*, IT. REV. CRIMINOLOGY 16 (2018); Langbein, *supra* note 145; Ami Kobo, *Criminal Mediation*, 24 HAMISHPAT L. REV. 301 (2018); Nicky Padfield, *Judicial Rehabilitation? A View from England*, 3 EUR. J. PROBATION 36 (2011) (noting the vast use of fixed penalty notices for many high volume offenses); Richard Young, *Street Policing after PACE: The Drift to Summary Justice*, *in* REGULATING POLICING: THE POLICE AND CRIMINAL JUSTICE ACT 1984 PAST, PRESENT, AND FUTURE 149 (Ed Cape & Richard Young eds., 2008).

[155] Langer, *supra* note 6.

[156] ADMIN OFFICE OF THE U.S. CT., FISCAL YEAR 2022 UPDATE: LONG RANGE PLAN FOR INFORMATION TECHNOLOGY IN THE FEDERAL JUDICIARY 6 (2022) ("A standard set of development and integration platforms are being adopted within the administrative support arena. The platforms include low code, robotic process automation with artificial intelligence, service bus for application programming interface centric integration, business intelligence and workflow solutions. The goal is to leverage these tools to reduce historical custom code complexity and replace it with standards-based platforms that enhance security, improve quality, provide consumer-friendly user experiences, and reduce the time to market for administrative support products and services.").

[157] Ayelet Sela, *Can Computers Be Fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. DISP. RESOL. 91 (2018); Andrew G. Ferguson, *The Big Data Jury,* 91 NOTRE DAME L. REV. 935 (2015); Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497 (2018).

been other AI-supported initiatives to help parties assess their alternatives.[158] Expanding AI to adjudication has also been attempted.[159] AI in the dispute resolution context means a machine-based analysis of a massive pool of data on disputes, disputants, law and a wide variety of other factors to optimize the end result.

Currently, the end result is *not* for the most part a judicial decision. The end result could be an AI recommendation to disputants on how to pursue their disputes, taking into account legal prediction, the interests and emotions of the disputants, and more. Such a platform has received EU funding for development.[160] This is quite different from a binding decision created through AI, which would dramatically change core concepts of legal systems analyzed in this article.

For instance, the decision-making process—which gravitates from judicial decision making (trial family) to diffused decision making by the judge and disputants (pre-trial family) to disputant-based decision making (pre-filing family)—would, in a legal system governed by AI, largely be hidden from the disputants themselves. They might receive an output, but the process of analyzing big data through AI is considered too complex to enable the understanding of the interaction between factors that lead to a decision.[161] This too-complex-for-comprehension component of AI has already led corporations using AI to claim that they have no oversight regarding outcomes, including discriminatory ones.[162] The implications of using AI instead of human third parties is now being studied through an EU research grant, with the aim of understanding how such AI processes can be designed to be fair.[163]

---

[158] Andrade et al., *supra* note 99.

[159] In Holland, an E-court was established to adjudicate cases between consumers and health insurance companies based on a machine-learning algorithm. This resulted in numerous complaints of unfair judgments and judicial attempts to intervene in the decisions. *See* Leny De Groot-van Leeuwen, *Pushing Cases Away from Judges*: *Causes and Consequences* 3 NIMJEGEN SOCIO. L. WORKING PAPER SERIES 1, 12 (2019), https://repository.ubn.ru.nl/bitstream/handle/2066/210201/210201.pdf?sequence=1.

[160] See *Eur. Res. Council Proof of Concept Grant, List of Selected Principal Investigators (by Country of Host Institution)*, at 5 (2022), https://erc.europa.eu/sites/default/files/document/file/erc-2021-poc-results-list.pdf.

[161] Andreas Theodorou & Virginia Dignum, *Towards Ethical and Socio-legal Governance in AI,* 2 NATURE MACH. INTEL. 10, 10 (2020).

[162] *Id.* at 10 ("Lufthansa's prices for flights within Germany increased up to 30%. Lufthansa's response to an enquiry from the German consumer protection organization was that the algorithm acts autonomously and beyond the company's direct control. At the time of writing, Apple and Goldman Sachs are under investigation by New York's Department of Financial Services for discriminatory decisions made by the application system used in their newly launched credit card; male applicants for the card received significantly higher credit limit than their female spouses, even if the latter had higher credit scores. When applicants tried to appeal these credit limits, the response was that the algorithm makes the final decision and its actual decision-making system is a black box that cannot be challenged."); *see also* Iria Giuffrida, *Liability for AI Decision-Making: Some Legal and Ethical Considerations*, 88 FORDHAM L. REV. 439 (2019).

[163] *See Eur. Res. Council Consolidator Grant Proposal, The 'Vanishing Third Party': Access to Justice, Procedural Justice and Substantive Justice in the Age of Dispute Resolution Automation*, at 8 (2021),

The "shadow of law" would also be altered, for how much law would AI-based dispute resolution utilize in proportion to other factors? Since the AI decision making process is largely autonomous and not premeditated in a way that can, without intervention, retain control over the result, the shadow of law could be transmuted to something altogether different than we recognize today. Efforts are being made on the institutional level to deal with the ethical aspects of AI-based judicial decisions, such as the 2018 European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment, which has presented five general principles to be adhered to while using AI for judicial decision making.[164] Yet translating general principles into on-the-ground autonomous machine learning has proved to be complex.[165]

The table below (Table 2) compares some core aspects of the three emphasized stages with AI. These will be further discussed below.

Table 2. General Comparison of AI and the Three Families of Emphasized Stages

	AI	**Pre-Filing**	**Pretrial**	**Trial**
Judicial presence	-	Marginal	+	+
Access to courts	-	Marginal	+	+
Function of law in resolving disputes	Obscure	Obscure	Shadow of the pretrial judge, who combines law with settlement considerations	Judicially led application of law
Main aim of civil justice	Application of algorithm without court intervention	Settlement without court intervention	Settlement, partly facilitated by a judge and/or	Application of legal norms

https://erc.europa.eu/sites/default/files/document/file/erc_2021_cog_results_sh.pdf; Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U.L. REV. 165, 181 (2017); *see* Tania Sourdin, *Judge v. Robot: Artificial Intelligence and Judicial Decision-Making*, 41 U.N.S.W.L.J. 1114 (2018).

[164] *See* EUR. COMMISSION FOR THE EFFICIENCY OF JUST., COUNCIL OF EUR., EUROPEAN ETHICAL CHARTER ON THE USE OF AI IN JUDICIAL SYSTEMS AND THEIR ENVIRONMENT (2019), https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment.

[165] Theodorou & Dignum, *supra* note 157; Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1,1 (2019) ("Due process depends on narratively intelligible communication from persons and for persons that are not reducible to software . . . To preserve accountability and a humane legal order, these reasons must be expressed in language by a responsible person.").

			court administration	

Disposing of disputes in legal systems with a pre-filing emphasis already: 1) marginalizes the roles of humans that have traditionally been involved in the case (e.g., judges, magistrates, and court clerks); 2) reduces access to courts and moves dispute resolution largely to the digital space (e.g., negotiations between lawyers are today often conducted by email or Whatsapp; online dispute resolution); and, 3) mystifies the role of law, since the parties are left to themselves to negotiate without a realistic court option hovering in the background (the shadow of law recedes).

However, while these factors (lack of judicial presence, lack of access to courts and relatedly the digitized geography of disputes, and the obscure function of law) have much in common with potential AI-based dispute resolution, the main aim of the legal system is significantly different. The lack of court intervention features dominantly in both, yet the main aim of AI is a binding decision—hearkening back to trial—while the main aim of pre-filing is settlement. Indeed, a swift computerized process made possible by AI may make the prospects of settlement slim indeed.

By chipping away at the authority of judges—by, at first, introducing additional means to resolve disputes in the trial family, and, second, turning judges into settlement promoters with very little binding activity in the pretrial family, and then giving them only marginal presence in the pre-filing family—a vacuum of authority is finally created in the pre-filing family. AI can more easily fill that vacuum than compete with perceptions of the necessity of the judicial role.

This is not to say that AI-based dispute resolution cannot occur in pretrial and trial families, only that the conditions seem more conducive in the pre-filing family. In all three families, digital communication to resolve disputes has received a significant boost due to the coronavirus pandemic. Disputants may have become more accustomed to the idea of handling disputes through the Internet. To disputants sitting in their living rooms, the leap from a virtual hearing with a real judge or a mediator to an automated one might seem smaller than the leap from a courtroom hearing to an automated process. Thus, the concept of AI-based dispute resolution is a formidable challenge for all three legal families.

IV. CONCLUSION

While the distinction between common law and civil law still has relevance, its ability to provide an organizing paradigm through which legal systems can be analyzed has waned.[166] As legal and technological developments occur at a fast pace and require timely analysis, a gravitational organizing paradigm

[166] *See, e.g.,* Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012).

might prove critical to understanding and predicting trajectories of legal systems. We offer this typology in the hope that it may contribute to the development of such a paradigm—and in the process reap insights into the future of legal systems.

The gravitation to an earlier emphasis affects core aspects of legal systems. The function of law changes dramatically, as does the judicial role and its centrality. Access to justice is also transformed by the move to an earlier emphasis, resulting in divergent interactions between access to trial and access to ADR. The main aim of civil justice changes from judicial application of law, to settlement with court involvement, to the private ordering of disputes. The ability to harness the institutional role of courts is also dramatically reduced in the pre-filing family.

In general, common law systems seem to have a stronger emphasis than do civil law systems on earlier stages. However, this tendency, too, differs among countries, as demonstrated by the common law systems of the U.S. and England and Wales, the mixed legal system of Israel, and the civil law systems of Italy and Germany.

The strength of the empirical approach underlying the typology depends on reliable data to uncover the illusive gap between law in the books and law in action. Legal systems should take steps to ensure consistent and accurate reporting for the benefit of researchers, disputants and society at large. Governments can compare official figures with actual court docket data to help gauge accuracy; and docket data can be made more complete through the development of best practices regarding court protocols. Moreover, creating forums for judicial reflection and discussion on settlement practices can improve the understanding of the nature of judicial involvement in each legal family. A few of these steps were performed in limited form in our research. We believe that performing them on a wider scale that governments are capable of would introduce much needed clarity as well as insights on developing trends.

Current trends to develop AI-based dispute resolution—not only to support dispute resolution, but also to produce binding decisions—pose a conceptual challenge to legal systems as we know them. In the pre-filing family, more than others, the reality on the ground seems relatively conducive to AI-based dispute resolution as the latter continues existing trends, specifically, the mystification of the role of law, and the marginal involvement of first-instance judges and courts in the resolution of disputes.

Barring a conscious effort by legal systems to reverse trends, a gradual movement leftwards on the continuum coupled with increased technological capabilities might lead toward judge-less, AI-governed binding decisions on disputes. However, if the Online Court in England and Wales indeed increases access to the court system and to judges, it may demonstrate that trends can be reversed, and perhaps legal systems must reach the pre-filing end of the continuum to bounce back.

***