

Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices

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In the civil justice system, judges engage in case management and settlement promotion more than they do in trials and judgment. Despite the importance of a judge's role in settlement, its empirical depiction and jurisprudential theorization are lacking. This gap is likely the result of a key characteristic of this judicial practice: it takes place 'off the record.' Using original data from a series of courtroom observations in pretrial settlement hearings in Israeli courts, we present new evidence and analyses of this important feature of civil litigation—which is also prevalent in many common law jurisdictions. Based on a thematic analysis of the observations, we discuss eleven structural features, techniques, and attitudes that characterize judges' courtroom settlement practices. We provide real-life examples of each theme, and discuss our findings in the context of the vanishing trial phenomenon.

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We argue that in today’s overburdened courts, where trials are the exception, judges often find themselves in a jurisprudentially peculiar position of trial gatekeepers. In this capacity, judges leverage their institutional authority and a host of techniques to persuade litigants to settle rather than to exercise their right to receive a reasoned judicial determination of fact and law. Thus, a striking dissonance emerges in trial courts: judges—the flagbearers of the justice system—present adjudication as an inferior option compared to settlement. In this process, judges’ settlement-promoting actions can cast a dismaying “shadow of the law,” that of an undesirable, lengthy, slow, costly, uncertain, unsatisfying, and—at times—even unfair path to justice. In its stead, the day-to-day pretrial reality of civil courts in Israel favors a jurisprudence focused on the goals of redress, compromise, finality, and cost-effectiveness. We elaborate on this understudied aspect of civil litigation, discuss ethical challenges it raises, and point to possible policy responses.

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I. INTRODUCTION

“[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”¹

Adjudication by trial and judgment is a rare sight in civil courts. A strong settlement culture characterizes civil litigation: settlements are “the modal civil case outcome,”² the court’s promotion of settlements is institutionalized by law,³ and settlements have become a central part of the “trial judge’s job description.”⁴ Despite the prevalence of litigation-related settlements and the centrality of judges to their achievement, the empirical depiction and jurisprudential theorization of judges’ role in such settlements are lacking. Moreover, there are critical concerns regarding the legitimacy of some of the techniques that judges use to promote settlement, the potential conflict of interest in which judges find themselves in this position, the relationship between judicial settlement practices and the public role of courts in upholding and promoting the law, and the appropriateness of integrating non-binary notions of justice and redress into courts. These questions all pertain to the image of the civil justice system that emerges from judges’ settlement practices: the manifestation of “law in action” that characterizes the daily work of trial courts, which constitute the largest share of the civil litigation process.

1. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV 12, 15 (1910).

2. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009).

3. See FED. R. CIV. P. 16 (C)(2)(I) (stipulating that “the court may consider and take appropriate action . . . [regarding] settling the case and using special procedures to assist in resolving the dispute” during pretrial conferences).

4. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 231, 234 (1995). Resnik points out that some local rules in federal district courts encourage the promotion of settlements by judges. *Id.*

A defining feature of judges' settlement-promoting activity is that it predominantly takes place "off the record," and in some jurisdictions, also confidentially. Thus, compared to other types of judicial conduct that are captured in formal documents and records, settlement-promoting activity is difficult to trace and study. Through a series of systematic observations of judicial settlement-promoting activities, we have conducted the necessary fieldwork to close this gap. We conducted the observations in Israeli trial courts—where the default rule is that all hearings, including pretrial case management and settlement hearings, are held in court proceedings open to the public.⁵

We report on eleven themes that emerged from our thematic analysis of the observations and provide concrete examples of judicial practices. Subsequently, we discuss the jurisprudential aspects of our findings. We find that in pretrial hearings, judges almost invariably advocate for settlement and against trial. The image that emerges from these pretrial hearings is of adjudication as an act of persuasion—a judge "negotiating" with the litigants about the desirability, or lack thereof, of taking their case to trial. In this negotiation, judges act as strict gatekeepers of the trial doors, emphasizing the negative aspects of litigation, trial, and judicial determination of outcomes. Our field observations provide surprising qualitative evidence of the explicitness, insistence, and reasoning that characterize judges' efforts to steer litigants away from trial and toward settlement. This is a peculiar position for formal agents of the justice system. While one may expect judges to advocate a favorable view of adjudication, during pretrial hearings the judges we observed typically attempted to dissuade litigants from pursuing trial and adjudication on the merits. In fact, the position judges exhibited seemed averse to the process of

5. This constitutional principle is guaranteed in Basic Law: The Judiciary § 3: "A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law." See Basic Law: The Judiciary, 5748–1984, §3, SH 10 np. (Isr.). § 68 of Israeli Courts Law reiterates the rule and stipulates exceptions, including that "the court may authorize to hear motions for interim injunctions, temporary injunctions and other interim rulings behind closed doors." See Israeli Courts Law, §68(c), 5744–1984, 1123 LSI 198, (1984), as amended (Isr.) [hereinafter "Courts Law"]. Nonetheless, generally, the view among Israeli courts is that non-public hearings should be an exception, especially when their focus is to promote an agreement or settlement between the litigants. See HCJ 9305/12 John Doe vs. The State of Israel (2012) [Hebrew]; see also Summary of Ombudsman of the Israeli Judiciary Decision 348/18 *Judging during Strikes: The National Labor Tribunal is Unauthorized to Mediate or Conciliate Collective Disputes that Are Heard in It* (11 November 2018) [Hebrew], <https://www.justice.gov.il/Units/NezivutShoftim/MainDocs/348.18.pdf>.

litigation, the application of the law, and judicial determination altogether. While institutional, structural, or instrumental motivations may drive this practice, judges' actions in this regard generate a perception of trial as the inferior option compared to settlement.

We discuss the activities that we observed within the framework of Judicial Conflict Resolution (JCR) activities.⁶ We argue that JCR practices play a large part in shaping the image of law and litigation in contemporary courts. The “shadow of the law” is the shadow of an undesirable, lengthy, slow, costly, uncertain, unsatisfying, and, at times, even unfair path of justice.⁷ The “law in action” that dominates the civil trial courtroom favors the goals of redress, compromise, certainty, finality, and cost-effectiveness. The day-to-day practice of pre-trial hearings shapes the contours of a special form of “negotiated justice.” Instead of judicial determination of the merits of the case, litigants control the terms of the settlement. However, as these settlements are sanctioned by the court, judges play a central role in their achievement and exercise significant influence over litigants' willingness to settle and the terms of settlement.

Our methodological approach and data are unique in several respects. Previous studies of judicial settlement promotion have relied primarily on subjective self-reports of judges and lawyers, who were surveyed or interviewed about settlement practices.⁸ In contrast, our methodology of courtroom observations directly captures judges' settlement-related interaction with litigants and lawyers, in real-time, in the courtroom, and in the context of a concrete lawsuit. Furthermore, this direct observation of judges captures different kinds of information about the judicial role, such as “what . . . judges say when they write opinions, make rules, teach other judges, give speeches, present policy papers, testify before Congress, and act collectively.”⁹

6. See generally Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 *CARDOZO J. CONFLICT RESOL.* 879 (2015).

7. See generally Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

8. See, e.g., John Arnold Epp, *The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers*, 15 *WINDSOR YEARBOOK OF ACCESS TO JUST.* 82, 83 (1996); Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem-Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 *AM. J. TRIAL ADVOC.* 113, 114–17 (2009); Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 *GEO. J. LEGAL ETHICS* 51, 60 (2007); Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 *OHIO. ST. J. ON DISP. RESOL.* 271, 275–77 (2011).

9. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 *HARV. L. REV.* 924, 1032 (2000).

These types of public expressions are limited in the type of data they provide because “[j]udges . . . are reticent about talking about judging, especially talking frankly about it.”¹⁰ The data gleaned from our observations provide reliable evidence of specific JCR practices that judges use to promote settlement under the auspices of the court, as well as a unique understanding of the image of civil litigation that judges portray in day-to-day practice in courts.

This Article forms part of a rich literature about the changing nature of civil litigation: a declining rate of trials, a prevalent settlement culture, and a gravitation of judges toward case management and settlement-promoting roles.¹¹ In this literature, the nature and merit of settlements are subject to debate. One strand of scholarship focuses on the risks and negative effects associated with settlements. It builds on the idea that settlements are a form of privatization and that they erode the important public role of courts in promoting values and declaring norms.¹² Another strand of scholarship celebrates the positive changes effectuated by the settlement culture.¹³ It suggests that settlements create a space for nuanced and complex modes of conflict resolution that foster non-binary notions of justice and may improve the legal processing of disputes.¹⁴ Some authors further suggest that judicial case management does not undermine the role of courts in administering justice, but rather provides specific “signals to the parties, the lawyers, and the public that justice is being served with fidelity to the values of participation, neutrality, trustworthiness, and dignity.”¹⁵

We contribute to this literature a thematic analysis of judges’ settlement practices, gleaned from our original observational data, as well as a jurisprudential consideration of the “law in action” that is reflected in them. Specifically, we outline the procedural mechanisms and ad hoc techniques that judges use to promote settlement, the central role that judicial power and authority play in this respect, the variety of judicial attitudes that shape litigants’ motivation to settle,

10. RICHARD POSNER, *HOW JUDGES THINK* 6 (2008).

11. See *infra* Section II.B.

12. See, e.g., Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619 (1995); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 783 (2004).

13. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L.J.* 2663 (1995).

14. See Alberstein, *supra* note 6, at 889–90.

15. Steven S. Gensler & Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds up to One*, 48 *NEW ENG. L. REV.* 475, 486 (2014).

and the potential “structural conflict of interests” that judges find themselves in. This discussion informs the debate about the nature and merit of judges’ promotion of settlements, raises questions about the ethicality of some the observed judicial practices, and calls for rethinking the policies that direct some of these cases to court and the training and regulation of judges.

This Article proceeds as follows: Section II places the discussion of the role of judges in promoting settlement in the context of the vanishing trial phenomenon, the discourse on the evolving role of judges, previous research on judicial settlement promotion, as well as on current data about case terminations in the studied trial courts. This review both identifies the potential for judicial involvement in case settlement and explains the ways in which our chosen methodology and study population overcome the limitations of previous studies in this field. Section III describes the methodology and findings of our series of 200 observations in pretrial case management hearings in civil courts of original jurisdiction. We outline an initial typology of specific JCR practices using several organizing themes that pertain to the degree and type of judicial intervention, the depiction of the legal process and outcome, references to non-legal interests, and a broader perspective of conflict. In Section IV, we discuss jurisprudential aspects of the judicial practices we observed. We discuss the significance of judicial authority on the exercise of JCR practices, and the positioning of judges as trial gatekeepers who negotiate with parties about whether to enter through the litigation door. In our view, these practices comprise a significant part of the “law in action” of courtrooms, which reflects a practice of judicial persuasion rather than determination, and the stronghold of values such as certainty, finality, cost-effectiveness, and efficacy over the application of law. Finally, we discuss ethical aspects and regulatory implications of the study.

II. CAPTURING JUDGES’ INVOLVEMENT IN SETTLEMENT

A. *Vanishing Trials, Rising Settlements and Evolving Judicial Roles*

Courts face enormous caseloads. It is inefficient and impractical, and in many respects undesirable, to resolve all of these cases by trial and judgment. Only a fraction of lawsuits terminate following a full trial. This ongoing trend has been the subject of multiple studies over

the years.¹⁶ It is commonly known as the “vanishing trial phenomenon.”¹⁷ This phenomenon reflects the finding that the number of cases filed in court has increased over the years and that most of these cases are terminated without a trial. Reporting on the vanishing trial in American courts, Marc Galanter suggests that growing caseloads have prompted courts to shift some of their efforts from trials to early resolution of cases at the pretrial stage.¹⁸ In this way, the vanishing trial phenomenon is linked to the formation of a “settlement culture,”¹⁹ which has led to changes in the judicial role.²⁰

It is important to note that, in the context of civil litigation, different “empirical” definitions have been attributed to the term “settlement.”²¹ Some have used the term as a proxy for plaintiff litigation success.²² Others have viewed settlement as any case settled out of court or dropped after settlement discussions fail. And others refer to

16. See, e.g., Herbert M. Kritzer, *Adjudication to settlement: shading in the gray*, 70 JUDICATURE 161 (1986); Robert Moog, *Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina*, 6 J. EMPIRICAL LEGAL STUD. 147, 151–53 (2009) (summarizing additional studies); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636–39 (1994).

17. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2004).

18. See Galanter, *supra* note 17, at 501. This notion is consistent with the finding that courts in federal trial districts with higher caseloads generally have lower trial rates. See Shari Seidman Diamond & Jessica Bina, *Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 656–57 (2004); see also Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 23 (1990).

19. D. Michael Risinger, *Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not With a Bang, but a Whimper)*, 60 UCLA L. REV., 1620, 1648–49 (2013) (discussing factors affecting “the rise of a settlement culture and the near disappearance of the jury trial”) (emphasis added); see also Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 410–11 (2004) (pointing to “the settlement culture to which judges are now accustomed”).

20. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 560–61 (2012) (noting, as part of the discussion on the relationship between large caseloads and judicial pressure to settle, that England courts established a “policy of using aggressive judicial case management to diminish the incidence of trials” and suggesting a similar approach is evidenced in “the 1983 revision of Federal Rule 16”); see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 323–24 (1982) (pointing to evolution of managerial judging “from a set of techniques for narrowing issues to a set of techniques for settling cases” and to the fact that “managerial judging can cause some cases to settle that would otherwise go to trial”).

21. See generally Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009).

22. See e.g., *id.* at 129–30.

settlement as a measure of litigated disputes that were resolved without final adjudication on the merits.²³ In this Article, we define settlement from a dispute resolution perspective, as an agreement between the litigants about a resolution that ends the litigation.²⁴ This definition differentiates settlement from multiple modes of disposition, including judicial determination of the merits of lawsuits, dismissal of cases on technical or procedural grounds (such as lack of jurisdiction), and default judgments granted as a result of defendants failing to respond to lawsuits.

While scholars disagree as to whether settlement promotion is a desirable function of courts,²⁵ they have long recognized that in today's courts, settlement is a central component of judges' work.²⁶ They have also offered various conceptualizations for it. Resnik refers to "managerial judging," pointing to judicial "schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible."²⁷ Resnik and others explain that managerial judging originally emerged as a set of techniques to narrow issues to be addressed trial. However, against the backdrop of the perverse incentives created by the rules of civil procedure, it later became a dispute resolution method for inducing settlements.²⁸ This conceptualization is evident in the language of both the American and Israeli rules of civil procedure.²⁹ Relatedly, Galanter coined the term "litigotiation" to describe "the strategic pursuit of a settlement

23. See e.g., Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1951–56 (2009).

24. Note that a voluntary dismissal of the case (withdrawal of the filed claim) may also be considered a form of settlement process.

25. See generally Luban, *supra* note 12 (reviewing socio-legal-political arguments for and against promoting settlements in courts, by differentiating between a public-life conception and a problem-solving conception of courts). See also Elliott, *supra* note 20, at 325 (explaining that the "uses of the managerial powers of judges and masters to promote settlements are controversial"). Cf. Langbein, *supra* note 20, at 561 ("[S]o long as adjudication is preserved as a viable alternative, the litigants' choice to settle a case is voluntary, and facilitating settlement is sound public policy").

26. See Marc Galanter & Mia Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1993) (noting that "[j]udges have embraced active promotion of settlement as a major component of the judicial role"); Yeazell, *supra* note 16, at 648 (noting that "[d]iscovery, joinder, and judicially guided settlement discussions . . . which often include alternatives to litigation . . . now dominate civil lawsuits").

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

28. *Id.* at 379–80; E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986).

29. See *infra* Section II.C.

through mobilizing the court process.”³⁰ Specifically, litigotiation entails “a process of maneuver and bargaining ‘in the shadow of the law’ . . . pursuing remedies in the presence of courts.”³¹ One of the authors of this Article, Michal Alberstein, conceptualized judicial promotion of settlement along the lines of generic modes of conflict resolution: negotiation, mediation, arbitration, dialogue facilitation, problem solving, restorative justice, and dispute system design. She argued that “judges are often parties to the negotiation as to whether to adjudicate the legal conflict, third parties in an effort to mediate it, arbitrators as to guiding rules of compromise, and facilitators of dialogue, problem solvers and dispute designers.”³² Whichever conceptualization one subscribes to, it is clear that judges play an active role in the litigation landscape not only in the small subset of cases that are tried and adjudicated on the merits, but also in many of the cases that are disposed of before trial.

What do judges do, exactly, to promote settlements? In this Article we focus on judicial promotion of settlements in pretrial hearings. Our empirical study comprised courtroom observations of 217 case management and settlement hearings in civil trial courts of original jurisdiction in Israel (Hashalom Courts).³³ These hearings are the setting of the first in-person encounter between the judge, litigants, and lawyers. We explore the specific practices that judges use to promote the early resolution (disposition) of cases during these hearings. Even though these practices significantly affect litigated lawsuits, they are usually not documented in the formal case record.³⁴ Thus, our observations provide new evidence that unveils judicial behaviors and interactions. They enable us to present a critical description, thematic analysis, and conceptualization of the “courtroom in action.” We use these insights to inform and develop the emerging jurisprudence of JCR, and to reflect on the images of law and settlement, as well as courts and judges, that judges create and perpetuate in these hearings.

30. Marc Galanter, *World of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

31. Galanter & Cahill, *supra* note 26, at 1341–42.

32. Alberstein, *supra* note 6, at 881.

33. While “Hashalom Court” is commonly translated as “magistrate court,” it should be noted that these courts are not equivalent to American magistrate courts but rather to the trial court in the general civil court system.

34. See Courts Law § 68A(a).

B. *Context and Previous Research*

Studies of litigation-related settlements typically rely on court-registered data, samples of cases coded for relevant variables, or surveys and interviews of judges and lawyers. In this Section, we review some of the findings and limitations of these studies and explain how the observational methodology employed in the current research closes some of the remaining knowledge gaps.

Studies based on data gleaned from court dockets and case files provide necessary context for understanding the role of judges in settlement. However, the scope and accuracy of these studies' depictions of the judicial role in settlements are limited by the type and inherently low reliability of information on which they are based. First, electronic docket information regarding settlements (as reflected in case disposition codes) proves highly inaccurate. Many disposition codes are ambiguous, the reported error rates in the codes that are most relevant to settlement are as high as seventy percent,³⁵ and observable disparities exist in case outcome data.³⁶ Second, as we elaborate below, the available data and records do not always provide a coherent and comprehensive picture regarding the scope and nature of court action in each case, especially for cases that have terminated without trial.³⁷

In a recent study of trial courts of original jurisdiction in Israel, Sela & Gabay-Egozi sought to overcome these two challenges by analyzing a sample of over 1,000 cases in Hashalom trial courts, for which data were coded based on all case documents.³⁸ The study identifies the subset of cases in which judges are actively involved, and the likelihood of all possible modes of disposition given the type of judicial procedural involvement in a given case. According to the study, eight percent of the lawsuits in our study population were adjudicated on the merits, whereas forty-seven percent were settled by

35. See e.g., Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. LEG. STUD. 705 (2004). Similar error rates exist with respect to electronic docket data in Israel. See Keren Winshall Margal et al., *Reliability of Case Filing and Disposition data in Net-Hamishpat Electronic System* (2001), ISRAELI SUPREME COURT RESEARCH DIVISION, <http://elyon1.court.gov.il/heb/Research%20Division/doc/Research3.pdf> [in Hebrew].

36. See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1460–61 (2003).

37. See *infra* note 45 and accompanying text.

38. See Ayelet Sela & Limor Gabay-Egozi, *Vanishing Trials, Settlement Judges? What Data on Judicial Procedural Involvement Reveals about the Role of Judges in Civil Litigation* (May 2018) (unpublished manuscript) (on file with the authors).

the parties. An additional seven percent of cases were withdrawn.³⁹ It is possible that some withdrawn cases reflect settlements that were not reported to the court.

In their study, Sela & Gabay-Egozi describe the relationship between the type of judicial procedural involvement in the case and its mode of disposition. They find that litigants and lawyers interact with the judge in the courtroom in thirty percent of the cases: nineteen percent of them terminate during or after a pretrial hearing, and an additional eleven percent terminate during or after the trial.⁴⁰ It follows that the majority of cases (seventy percent) terminate during the pleading phases, without any in-person encounter between the judge, the litigants, and the lawyers.⁴¹ However, in twenty-one percent of those cases, at least two motions were filed, suggesting that judges affect case dispositions through their rulings on motions even in cases that are terminated during the pleading phase.⁴² According to the study, cases in which judges are procedurally involved usually end in settlement.⁴³ Most of the cases that terminate following either ruling on motions or pretrial hearings do so through settlements, and sixteen percent of the cases that reach trial settle.⁴⁴ Sela & Gabay-Egozi identify pretrial hearings as a particularly fertile ground for judicial settlement promotion work: sixty-six percent of the cases that terminate during the pretrial phase are settlements, and while the average number of hearings before settlement in such cases is 1.7, it may take up to six pretrial hearings for a case to settle.⁴⁵

What do judges do in pretrial hearings to help sixty-six percent of cases settle? Docket data and content analysis of case documents do not reveal much about the extent and nature of judicial case management and settlement activity because this activity occurs predominantly off the record. As Resnik notes, “[m]anagerial judges

39. *Id.* at 14–15.

40. *Id.* at 10–11.

41. See our discussion later in this Section, explaining that in Israel judges generally do not meet with litigants or lawyers in chambers to discuss the case or its settlement; rather, all litigation related in-person interaction with the judge occurs in the courtroom.

42. See Sela & Gabay-Egozi, *supra* note 38, at 18–20; see also Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J. L. ECON. & ORG. 898 (2012) (discussing the relationship between judges’ decisions in motions and settlements).

43. See Sela & Gabay-Egozi, *supra* note 38, at 23.

44. *Id.* at 22–23.

45. *Id.* at 18, 23.

frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.”⁴⁶ Thus, studies that rely on case documents or docket data are unable to fully capture the specific practices that judges employ to promote settlements and other modes of early disposition. The observational methodology employed in our study overcomes this challenge by capturing the in-person interaction between judges, lawyers, and parties.

Previous studies have relied on surveys of judges, lawyers, and litigants about their experiences in judicial settlement conferences and mediations. Peter Robinson made a notable contribution in a series of articles based on a survey of subordinate judicial officers in California trials. His findings are consistent with the findings of previous surveys of judges.⁴⁷ Robinson examined judges’ self-reports about their approach in settling cases during judicial conferences. In one of his studies, he examined whether judges perceived their role as “directive” (focusing primarily on the legal strengths and weaknesses of the case before them) or “problem-solving” (focusing primarily on the underlying issues giving rise to the conflict—the parties’ needs, goals, fears, and feelings).⁴⁸ Robinson’s findings point to significant variations in the extent of interactive and directive judicial settlement promotion activities in his study population.⁴⁹ Another study asked judges about the emphasis that they placed on costs and risks in the settlement process, the techniques they employed to encourage compromise, and the techniques they utilized to facilitate communication among those involved.⁵⁰ Robinson used the data to explore the effect of the judge’s persona on the settlement conference.⁵¹ In a third study, Robinson reported judges’ perceptions of the tension they experienced while facilitating settlements between the

46. Resnik, *supra* note 27, at 8.

47. See, e.g., JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 187–88, 190–91 (1980); James A. Wall, Jr., Lawrence F. Schiller & Ronald J. Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques*, 8 AM. J. TRIAL. ADVOC. 83, 94–99 (1984); Robel, *supra* note 18.

48. See generally Robinson, *supra* note 8.

49. *Id.* at 126–29, 132–42.

50. See generally Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 HARV. NEGOT. L. REV. 97 (2012).

51. *Id.* at 142–45.

requisite neutrality of the court and their desire to achieve fairness.⁵² Robinson's studies echo other studies relying on surveys or interviews of lawyers. Those studies found that lawyers generally approve of judicial interventions that promote settlement, although there are variations in the extent to which different types of lawyers *favor* active judicial involvement in settlements.⁵³ There are also variations in lawyers' reports of the *rate* of judicial involvement in settlements.⁵⁴ In a fairly recent survey, Roselle Wissler explored lawyers' experiences and views of several models of judicial settlement conferences and mediation in federal courts. Among her many findings, Wissler reports that "[s]ettlement conferences with judges not assigned to the case were rated higher than settlement conferences with judges assigned to the case on a majority of dimensions."⁵⁵ The surveyed lawyers thought that "judges assigned to the case were much more biased than judges not assigned to the case . . . [and] that parties were far less able to candidly discuss the case and fully explore settlement with judges assigned to the case, without there being possible negative consequences or prejudice to ongoing litigation."⁵⁶

The reviewed studies rely on the self-reported attitudes, perceptions, and experiences of judges and lawyers, as collected in surveys or interviews. Accordingly, their findings are shaped by the perceptions and experiences of these stakeholders, and they are potentially influenced by inherent biases caused by various psychological effects and issues of questionnaire design, such as its length, the items and scales used, and the location and grouping of questions.⁵⁷ Moreover,

52. See generally Peter Robinson, *Opening Pandora's Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques*, 27 OHIO ST. J. ON DISP. RESOL. 53 (2012).

53. See e.g., WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* 1-2, 111-18 (1985) (finding differences between plaintiff and defense attorneys or between legal aid and in-house counsels and other types of lawyers).

54. Wissler, *supra* note 8, at 299.

55. *Id.*

56. *Id.* at 302-03.

57. See Philip M. Podsakoff et al., *Common Method Biases in Behavioral Research: A Critical Review of the Literature and Recommended Remedies*, 88(5) J. APPL. PSYCHOL. 879, 882 (2003) (noting that examples for psychological causes of bias include the Consistency Effect: "the propensity for respondents to try to maintain consistency in their responses to questions"; the Social Desirability Bias: "the tendency of some people to respond to items more as a result of their social acceptability than their true feelings"; and Mood States Bias: "the propensity of respondents to view themselves and the world around them in generally negative terms (negative affectivity) or the propensity of respondents to view themselves and the world around them in generally positive terms").

studies of judges often represent unrealistic conceptions about them based on the ways in which judges discuss their roles. Posner argues that “most judges are cagy, even coy, in discussing what they do They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.”⁵⁸

Our methodology of courtroom observations adds a different perspective to this literature and overcomes some of the disadvantages of self-reporting and the absence of formal documentation of judicial settlement promotion techniques.⁵⁹ Section II.C details our study population and methodology and discusses some of its limitations.

C. *Courtroom Observations of Judicial Pre-Trial Settlement Promoting Practices: Methodology and Analysis Scheme*

Our study is based on a series of semi-structured courtroom observations in 217 pretrial case management and settlement hearings at the Tel-Aviv Magistrate Court—the busiest Israeli trial court of original jurisdiction.

The observations focused on pretrial hearings, which are a fertile procedural site of settlement.⁶⁰ Similar to Rule 16 of the Federal Rules of Civil Procedure, Rule 140 of the Israeli Rules of Civil Procedure prescribes that the goal of pretrial hearings is to simplify, shorten, accelerate, and increase the efficiency of the procedure, as well as examine settlement options with the parties. To achieve these goals, judges are authorized to take various actions, as we detail in the next Section.

Israeli civil trial courts are a particularly suitable setting for studying judges’ role in settlement. First, under Israeli law, judges have authority over all procedural and dispositive decisions; there are no jury trials.⁶¹ Moreover, the same judge who conducts pretrial case management and settlement hearings usually continues to preside over the case if it goes to trial.⁶² As a result, the pre-trial judge’s

58. POSNER, *supra* note 10, at 2. Posner further notes that “[t]his reticence makes the scholarly study of judicial behavior at once challenging and indispensable.” *Id.* at 6.

59. *See infra* Section II.C.

60. *See* Sela & Gabay-Egozi, *supra* notes 38, 42.

61. Certain procedural decisions and dispositive decisions can be rendered by court registrars, who are not necessarily judges. *See* Courts Law § 84-96.

62. *See* RCA 288/89 Ushiyot Insurance Company v. Cohen PD 43(4) 427, 432 (Isr.) (noting that under Israeli law the pretrial and trial phases are considered separate procedural units, such that the presiding pretrial judge will not necessarily preside over the trial); *see also* Israeli Rules of Civil Procedure-1984, §40; CSA 1168/02

settlement-promoting practices provide particularly significant information signals for the parties' bargaining process as they project a highly relevant and immediate "shadow of the law" should the case proceed to trial. As an example, a pre-trial judge's prediction of the likely outcome or use of court procedure offers litigants direct insight about their probable future determination, since that judge is likely to be the presiding judge in the trial if settlement is not reached. As a comparison, in the United States, this relationship is not always as pronounced because it is common for different judges to preside over pretrial settlement conferences and the subsequent trial.⁶³ Finally, unlike other legal systems, in which settlement discussions can (and do) occur in the judges' chambers, in Israeli civil courts, all in-person interaction with the judge, including settlement promotion, takes place at a public hearing in open court. This allows researchers to enter the courtroom freely to document judicial settlement promotion practices, which are typically not transcribed in full in the formal record.⁶⁴ Thus, our observations provide a unique account of otherwise undocumented judicial practices, as they occur in the field.

In order to understand the activities and the challenges associated with an observational study of pretrial hearings, the authors conducted multiple preliminary observations. These exploratory observations were inspired by previous studies that involved courtroom observations,⁶⁵ literature on managerial judging and litigotiation, and conceptualization of JCR practices. These initial undertakings

Falah vs. Civil Service Authority PD 56(6) 197, 202 (Isr.) (noting that the general rule is that "all hearings should be held before the same judicial panel, as much as possible"); OMBUDSMAN OF THE ISRAELI JUDICIARY OPINION 04/06 CHANGE OF JUDGES 3 (2006) [Hebrew], <https://www.justice.gov.il/Units/NezivutShoftim/MainDocs/406.pdf>.

63. See Wissler, *supra* note 8, at 272–73 (noting that in the United States, "[t]he primary distinguishing feature among the two main models of judicial settlement conferences is the role that the judge who conducts the conference plays in other aspects of the case. In one model, the assigned trial judge conducts the settlement conference. In the other model, a judge other than the trial judge conducts the settlement conference.") (citations omitted).

64. See Courts Law § 68A(a) (noting that while as a general rule a full transcription of hearings should be kept in the case record, the judge, with the consent of the litigants, can authorize the recorder to document only a *summary* of the pretrial hearing in the formal record).

65. See, e.g., SIMON ROBERTS, A COURT IN THE CITY: COMMERCIAL LITIGATION IN LONDON AT THE BEGINNING OF THE 21ST CENTURY (2014); Nicholas H. Woolf & Jennifer MJ Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission*, 47 COURT REV. 84 (2011) (report on an evaluation program for which citizens were trained to conduct courtroom observations aimed at capturing the performance of judges with relation to procedural justice); Maureen Mileski, *Courtroom Encounters: An Observational Study of a Lower Criminal Court*, 5 L. & SOC'Y REV. 473 (1971) (studying prominent patterns in the lower court's day-to-day

subsequently informed the design of a semi-structured observation protocol. Eventually the observations on which the current study is based were conducted by law students from Bar Ilan University and Ono Academic College, who conducted the observations for credit, as part of courses and a clinic on JCR. The observers were trained by the authors and conducted pilot observations and reports, which were then debriefed by the authors for feedback to achieve consistency and reliability.

According to the semi-structured observation protocol, observers were asked to provide as rich as possible a description of any conduct that related to judges' conflict resolution and settlement activity. Specifically, they were instructed to pay attention to the judges' behavior and actions, and to all interactions between stakeholders present in the courtroom (including litigation-related interactions that did not involve the judge). Observers were further asked to describe the legal aspects of the dispute and conflict resolution interactions in the hearing, indicate the duration of each hearing, and note whether each activity happened on or off the record. The observers were instructed to take notes during the hearing, and to process them into a report that they submitted shortly thereafter. Once the observations were complete, the authors analyzed them thematically with the goal of capturing, categorizing, and conceptualizing the various JCR practices that the observers had documented in the courtroom.

The analysis in this Article is based on 217 pretrial case management and settlement hearings conducted between July 2016 and January 2018. Observers chose the hearing dates based on their availability, and specific courtrooms they observed were selected at random from the court calendar of any given day. While this case selection method does not constitute a random sample, it yields a valid source of conducting a qualitative thematic analysis of JCR practices.

III. JUDICIAL SETTLEMENT PROMOTION PRACTICES

As noted in previous Sections of this Article, Rule 140 of the Israeli Rules of Civil Procedure prescribes case management and settlement promotion as the two main goals of the pretrial phase. To achieve these goals, during this phase the Rules of Civil Procedure grant judges inquisitorial capacities, including the ability to invite witnesses and interrogate them, sort out and set the agenda for the

operations that bases its findings on direct observations in a criminal court of the first instance).

relevant issues that need to be determined, appoint experts, and use other case management methods to promote case resolution.

In our observations at the Tel-Aviv Magistrate Court (“Hashalom”), we found that judges’ interactions with the parties during pre-trial hearings are geared primarily toward settlement promotion. We found that judges and parties engaged in settlement discussions in nearly all hearings we observed. They did so through a wide variety of JCR practices. In aggregate, the findings resonate the unique position of the judge as an “unavoidable authority figure” in pretrial settlement discussions, who greatly influences the willingness of parties to settle and the terms of settlement.⁶⁶ While it is true that “[j]udicial methods of encouraging settlement vary widely,”⁶⁷ as do JCR practices,⁶⁸ it is helpful and important to identify common themes and concepts that can serve as organizing categories for discussion and evaluation. Below, we report our findings, organized into thematic categories, and provide examples for each practice or theme.

A. *Judicial Opening Statement: An Expectation or Invitation to Settle?*

The manner in which a judge opens the pretrial hearing is crucial. It frames the discussion and sets the tone for what comes next.

Judges commonly opened the hearings by referring to settlement. Usually, their statements conveyed the position that the primary goal of the pretrial hearing is to help the parties reach a settlement. Much like the opening statements of mediators, judges’ expositions varied in content, style, and length. Generally, judges’ opening statements took either a directive or an eliciting stance. Eliciting judicial opening statements construe an invitation to settle, while directive statements encapsulate an expectation to settle. Such an expectation carries a substantial weight given the judge’s inherent authority. In the Israeli context, this position is further exacerbated by the fact that pretrial judges will typically continue to preside over the case should it proceed to trial. Examples of directive questions or statements reflecting the judge’s position that a case should settle include unequivocal questions, such as “Why has this case not settled?” or unequivocal statements, such as “I don’t see a reason this case should not settle.” These openings require the parties either to comply and settle or to indicate what stands in the way of settlement.

66. Robinson, *supra* note 8, at 131.

67. Robel, *supra* note 18, at 16.

68. See Alberstein, *supra* note 6.

In other instances, judges used more eliciting or suggestive questions, such as, “Have you discussed settlement?” or statements, such as, “Settlement would be a good path in this case.” Some judges create a platform for attorneys to bring up the idea of settlement, using open-ended questions, such as “How would you like to proceed from here?” Another type of opening statement alludes to the desirability of settlements by generally pointing to the uncertain prospects of pursuing judicial determination on the merits. Examples include questions such as “How is this case different from the ruling in the case of [. . .]?” or statements such as “It is unclear whether rule [. . .] would apply here.” Judges’ opening statements are often followed by more definitive JCR techniques such as prediction,⁶⁹ or direct facilitation.⁷⁰

B. *In the Courtroom, Off the Record*

Confidentiality and informality are important aspects of settlement discussions. In litigation-related settlements, these attributes are challenged by the public nature of court proceedings. In the United States, judges can overcome this discrepancy by conducting settlement conferences privately in chambers. In Israel, where private judicial settlement conferences are not allowed, a different solution is used to allow some degree of confidentiality and informality in judicial settlement discussions. The general requirement to keep full transcripts of court hearings is relaxed in pretrial hearings. According to the Israeli Courts Law, in pretrial hearings, judges are allowed to obtain the parties’ consent to record only the main points discussed at the pretrial hearings, and only with the parties’ consent.⁷¹ Under this regime, courtroom observations enabled us to capture the importance of judges’ off-the-record activities to the achievement of settlements.

We found that JCR activities occur almost invariably off the record. For some judges, the default in pretrial hearings is that discussions are off the record unless otherwise instructed (for example, by directing the court recorder to record the discussion or by formally announcing that the discussion will be recorded). Other judges explicitly asked lawyers for permission to engage in off-the-record discussions. In yet other cases, it became evident only after the fact, when the judge dictated to the record a lean summary of a previous off-the-

69. See *infra* Section III.F.

70. See *infra* Section III.E.

71. See Courts Law § 84–96.

record discussion. At all times, it was clear that the lawyers were well aware when a discussion occurred on or off the record. In fact, we observed when lawyers asked the judge to add a certain exchange or statement on the record or have it removed.

The following exchange provides an example of the way in which judges record their JCR activities. In this case, an insurance company that had previously settled a plaintiff's principal tort claim pursued a subrogation claim against another insurer. The judge opened the hearing by telling the lawyers: "*You are at home. I think the risk is greater than the probable gain for both of you, and an agreement can be reached.*" The attorney for the third-party defendant objected to a settlement, and the judge responded, "*I will not force you [to settle] but I will schedule the evidentiary hearing before the Summer Recess [in three weeks].*" While checking for an available date for the hearing on her electronic calendar, the judge said, "*I thought you would have a constructive discussion, and reach understandings about a risk-gain trade-off. It's a waste of time and money but I will not force you.*" Following additional exchanges with the lawyers, the judge alluded to her potential future ruling on legal costs, which according to Israeli law are awarded at the discretion of the judge;⁷² "*You should take into account . . . that pursuing a case unnecessarily—and this is not a threat—involves more than just court fees.*" The judge then split a piece of paper, handed each lawyer one half, and asked them to make a confidential settlement offer. After discovering that the two proposals were far apart, the judge noted, "Were the parties themselves present at the hearing, it would have been possible to settle the case." Despite their being led by a judge in a public hearing in open court, these intricate and persistent settlement-promoting attempts have no formal record outside a short statement dictated by the judge, noting that there was a failed attempt by the court to settle the case, and that the parties insisted on proceeding to an evidentiary hearing at trial.

C. *The Lawyer-Client-Judge Interactional Triangle*

During pretrial hearings, judges may speak directly with the parties if they are present in the courtroom. The direct interaction

72. Civil Procedure Regulations, 5744–1985, KT 5744 [hereinafter Civ. Pro. Regs.], § 511 (Isr.) (stating that at the end of a civil proceeding, the judge shall decide whether to grant costs, as well as the amount of the costs). §§ 512–514 further detail various issues that judges may consider when determining the costs and how to allocate them, including the value of the claim, the value of the granted relief, and the behavior of the parties throughout the litigation.

between the judge and the litigants can take different forms and serve various purposes. The Courts Law authorizes judges to interrogate the parties in a pretrial proceeding, thereby revealing strengths and weaknesses in a given lawsuit. Judges may also ask the parties about their wishes, expectations, needs, and interests in the litigation and point to additional considerations that impact the parties' preferences and positions regarding settlement. In this way, judges may help increase litigants' sense of participation and involvement in the settlement process. We also observed instances in which judges interacted with parties on a personal level to understand their expressed emotional reaction or to enable them to vent their feelings.

In some instances, we observed judges implicitly referring to the attorneys' interests in settlement. For example, we observed judges noting the advantages of an attorney's expected compensation as part of a proposed settlement. In other instances, we observed judges praise the lawyer while addressing the client, in what appeared to be an attempt to increase the client's trust in the attorney or to lend support to a certain settlement proposal that the lawyer tended to support. More rarely, judges insinuated that an attorney was objecting to settlement against the best interests of the client. In one tort case, the judge remarked, "*If the parties were present we could have bridged the differences [in evaluation of the damages],*" to which one of the lawyers quietly murmured back, "*And how would we collect attorney fees?*" Notably, when lawyers refuse a settlement offer without explicitly consulting their client, judges tend to scorn them and demand that they step outside to consult with the client in person or by telephone and report back to the Court. At times, we observed judges require the parties to appear in person in the next hearing to discuss a settlement.

D. *Court Procedure and Legal Costs*

This JCR category refers to judicial attempts to persuade the parties to settle by relying on judges' authority to determine procedural arrangements and to rule on legal costs. Examples include affirmatively setting another pretrial hearing or refusing to advance the case to trial in order to allow the parties another opportunity to settle. Relatedly, some judges reference the busy court schedule and set a distant trial date, and then invoke again the appeal of a timely settlement. The exact strategy depends on the circumstances of the case. Thus, in other cases, we observed judges do the opposite: set a very

near trial date, which would put the lawyers under pressure to prepare the case in the short time left, and then point out that settlement was still an option. We observed judges use this JCR practice in particular in cases involving strong insurance companies, presumably as a means to mitigate their alleged strategic tendency to prolong the proceedings. In addition, judges may use a procedural “event” as an anchor for promoting settlement. For example, we observed judges use events such as a third party joining the proceeding, approval of a temporary injunction, or a decision to join cases together as a springboard for settlement discussions.

Another frequently observed JCR practice in this category is judges’ references to their expected ruling on costs should a settlement not be reached. Under Israeli Law, judges have full discretion to decide to assign legal costs at the end of civil proceedings, including the amount and allocation between litigants.⁷³ According to the rules of civil procedure, the judge may take into account the behavior of the parties during the litigation.⁷⁴ Thus, judicial disapproval of parties’ refusal to settle and references to their expected ruling on costs can be seen as a means for persuading the parties to settle. When reference to costs is combined with the related JCR practice of predicting the legal outcome, opting for an immediate settlement becomes a more reasonable choice for the parties.

In our observations, we witnessed multiple instances in which judges referred to cost shifting in relation to the parties’ positions about settlement. In one case that involved two expert opinions, the lawyers opposed the judge’s offer to issue a “judgment by way of compromise,”⁷⁵ resulting in the judge’s response: “*The honorable Judge . . . once told me, ‘If we can solve it with costs, we will solve it with*

73. *Id.* § 512(a).

74. *Id.* § 512(b). For further discussion of the Israeli cost regime and its application, see Keren Weinshall-Margel, Assoc. Professor, The Hebrew Univ. of Jerusalem, *Equal in the Eyes of the Law? Pro-Plaintiff Cost Shifting in Civil Procedures*, Lecture before the Conference of Empirical Legal Studies in Asia (2017).

75. § 79A of the Courts Law stipulates that “[a] court presiding over a civil matter is allowed, by consent of the parties, to rule in the matter before it, partly or fully, by way of compromise.” Courts Law § 79A. The law does not define this form of adjudication, but it appears that § 79A is used to provide a bottom-line outcome without a reasoned decision, to rule an outcome that does not result from strict application of the law, or to simulate a fair settlement between the parties. *Id.* See generally Jacob Turkel, *Strict Law or Compromise*, 3(1) SHAAREY MISHPAT 13 (2002) [Hebrew] (discussing the tension between justice and compromise); Menachem Klein, *A Proposal for the use of a Scientific Formula for the Arithmetic Calculation of a Judgment under Section 79A(a) of the Law*, PSAKDIN (2008), http://www.pskadin.co.il/fileprint.asp?FileName=/sada/public/art_cceh.htm [Hebrew] (pointing to the open-ended nature of this form of judgment).

costs.” In another case, following extensive yet unsuccessful attempts by the judge to promote a settlement, the judge moved the case to trial, adding that “*the parties should take into account that the court will rule on costs in this case, although it is still not clear which party will have to pay the costs.*” In another case, an unrepresented plaintiff refused the court’s settlement offer. Subsequently, the judge noted that the chances that the plaintiff’s claim would be fully awarded were low, and that if the plaintiff accepted the settlement offer, the judge would consider not granting the request to rule on costs in favor of the defendant. Finally, in one pretrial hearing, the plaintiff’s lawyers opposed the judge’s settlement offer, explaining that they wanted to wait for the Supreme Court’s decision in a pending case on a related taxation question. The judges noted that it could take more than two years for the Supreme Court to rule on the matter, in which case she would have to “impose on the parties significant *costs.*” In this case, however, after the plaintiff’s lawyers elaborated on the significant legal questions the case raised, the judge decided that the case should go to trial. Notably, out of 300 observed hearings, this was the only case in which the judge explicitly stated it was appropriate to move the case to trial rather than settle.

E. *Direct Facilitation of Litigotiation*

This category refers to explicit and direct judicial facilitation of the litigotiation between the parties, intended to help them reach an agreement on their own. The settlement agreement may be reached during the hearing in the courtroom or immediately outside the courtroom and then reported back to the judge. It may also be reached at a later time, in which case it is reported to the judge before or during the next scheduled hearing.

Judicial practices in this category include offering to facilitate settlement talks between the parties (“*You should reach a settlement in this case. If you need assistance, please tell me . . . I know what you need to do.*”); eliciting a settlement offer from one of the parties; questioning the parties about out-of-court settlement negotiations and tackling specific reported barriers to agreement; scheduling a deadline in the court calendar before the next hearing by which the parties must notify the judge about the progress of their settlement negotiations; suggesting that the parties go to mediation or referring them to a specific mediator; asking the parties to step outside the courtroom to negotiate and report back to the court (possibly multiple times if their negotiation fails at first); and designating and ordering

the submission of a missing document or evidence that is presumed to promote the prospects of reaching a settlement.

F. *Prediction*

The hearings we observed demonstrated that many judges go beyond facilitating settlement to providing the parties with an indication or assessment of the expected legal outcome. In a regime in which the same judge typically presides over both pretrial and trial hearings, this glimpse into the judge's preliminary take on the lawsuit provides valuable information to the parties: a highly relevant prediction of the outcome of adjudication (albeit based on the limited information that is available in the early stages of the proceedings). In other words, the judge's prediction materializes "the shadow of the law" in the context of the specific case, providing a concrete approximation of what the judge would decide should she be required "to step from the shadows and resolve the dispute by coercion if the parties cannot agree."⁷⁶ Accordingly, this JCR practice represents a strong form of judicial intervention in pretrial settlement negotiations. By its nature, it is less facilitative, eliciting, and open-ended, and more akin to narrow, directive, and evaluative mediation, conducted by a strong judicial authority figure.⁷⁷

Accordingly, this category refers to a judge's indication regarding the expected legal outcome of the case. In some cases, judges provide an explicit prediction of the outcome. In others, they assert their view about the strengths and weaknesses of the parties' claims. Sometimes the judicial prediction is accompanied by reservation, given the early stage of the proceedings. After providing the litigants with this valuable information—a powerful anchor or reference point in their litigation—judges often suggest, or even direct, the parties to step outside the courtroom to discuss the possibility of settling the case.⁷⁸

76. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982).

77. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23–24 (1996) (describing mediation intervention styles as varying between broad and facilitating problem solving and narrow evaluative directive); see also Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG. 22, 24 (2003) (following a heated debate on whether directive narrow mediation should be named as such at all, revising the grid by referring to elicitive and directive styles).

78. See Henrik Kristensen & Tommy Gärling, *The Effects of Anchor Points and Reference Points on Negotiation Process and Outcome*, 71 ORG. BEHAV. & HUM. DECISION PROCESSES 85, 87 (1997) (noting that "[t]he distinction between anchor and reference point . . . [is that w]hile an anchor point affects the counteroffers negotiators make, a reference point determines how an offer is perceived. However, a reference

An example of an implicit judicial prediction followed by an invitation to negotiate is evident in the following statement that we observed a judge make to the parties in one case: “*If you think that this case will end without paying damages to the claimant, you are wrong I suggest you go outside and finish this saga between you, without letting me make a ruling in this case.*” Following the judge’s statement, the parties stepped outside, and returned forty minutes later to report they had reached a settlement.

Judges’ preliminary prediction of the outcome can take many forms, such as comparing the case at hand to other similar cases, discussing the applicability of certain laws and precedents to the specific case, pointing to the strengths and weaknesses of the case, underscoring elements of uncertainty in the case (“*Some things are not clear here, and this goes for both sides in this case.*”), pointing to the inadmissibility of certain evidence that is referred to in the pleadings, or discussing the difficulty in overcoming certain legal presumptions. The following exchange, which was observed in a pretrial hearing in relation to a dispute about realtor fees, is an example of direct, hands-on judicial settlement facilitation using an explicit prediction:

Defendant’s Lawyer (DL): We are willing to settle the case, but they are asking for an unreasonable amount.

Judge (J): How much? Let’s talk about the money!

DL: We will pay one percent plus taxes.

Plaintiff’s Lawyer (PL): We are asking for 1.5 percent plus tax.

J: Will the case be over for 60,000 shekels [approximately 16,500 USD]?

PL: I want to consult with my client.

J: He will not get more than that.

[PL goes outside to call her client, and then reports he is willing to settle the case for 65,000 shekels [approximately 18,000 USD].]

J: I am not negotiating with you or with your client. This is not horse-trading. Please deliver the message to your client, he will not get more than that [which I proposed]. He should take the money now.

Following some additional exchanges, the parties agreed to the judge’s proposed settlement amount of 60,000 shekels and the judge dictated a decision that rolled the settlement into judgment.

It is debatable whether stating or implying the judge’s expected final decision at such an early stage of the proceedings is practically

point may also affect counteroffers since it determines whether an anchor point is perceived as a gain or loss, which in turn affects the adjustment process”).

or normatively desirable. Research suggests that judges are subject to overconfidence and other vulnerabilities in making judgments early in the litigation process that “can lead judges to believe that they have more ability to predict the course of a lawsuit than is actually the case.”⁷⁹ As a matter of fact, given the judge’s unique position in the proceeding, her prediction is extremely powerful and provides valuable information to the parties, improving the prospect of a settlement.⁸⁰ In one observed case, the judge suggested that the defendants pay the plaintiff a sum of 35,000 shekels (about 9,500 USD). The defendant’s lawyer said that the client authorized her to pay only 2,000 shekels (about 550 USD), to which the judge responded: “*You need to understand that if this case will go to trial, you will pay at least twice what I have offered.*” This type of judicial statement indicates that judges’ settlement offers during the pretrial stage do not necessarily reflect their idea of a “just” or “correct” legal outcome sanctioned by the law, but rather a different, perhaps more practical, standard that may take into account other considerations. As such, it raises questions about the normative appropriateness of such predictions.

G. *Procedural Contracts and Quasi-Arbitration*

Judges may use the pretrial phase to create “procedural contracts” with the parties, limiting their judicial power and granting increased control to the parties in the interest of advancing an early resolution of the lawsuit.⁸¹ For example, we observed judges proposing that the parties set an acceptable range for a settlement amount and authorize the judge to decide on a specific sum of money within that range, or alternatively, that the judge set the range within which the parties should settle. Another procedural design is to seek

79. Jeffrey J. Rachlinski, *Processing Pleadings and The Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 428 (2011). One may view the judicial predictions that are provided in pretrial hearings as intuitive judgments. In other words, they are the result of judges’ cognitive processes that produce rapid, confident judgments, based on heuristics and automatic reasoning (“System 1” thinking), in contrast to the more elaborate, deliberate judgment that characterizes judges’ legal determination after a full trial process, which can be viewed as more careful, logical, and fully reasoned (“System 2” thinking). *Id.* at 415.

80. See *supra* note 62 and accompanying text.

81. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEXAS L. REV. 1329, 1339 (2012) (noting that to a certain, albeit limited, extent, parties to litigation can choose to agree on general procedural rules for their lawsuits by agreement); see also Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEXAS L. REV. 1475, 1478 (2013).

the parties' agreement to the appointment of an expert whose determination of the appropriate settlement amount would constitute the final terms of the settlement. The judge then grants the settlement a status of a judgment that is enforceable like any other court order.

The idea of such procedural arrangements in court raises normative questions about the contours of parties' autonomy within adjudication, as well as the diminishing opportunities of judges to exercise their public role in providing principled reasoning for their decisions.⁸² Arguably, these concerns carry a somewhat different weight when the judge initiates (or even designs) the private procedural arrangement. In some jurisdictions, such procedures are defined as arbitration (such as Delaware's state-sponsored arbitration).⁸³ In Israel, § 79A of the Israeli Courts Law enables litigants to authorize the judge to rule on a matter partly or fully "by way of compromise."⁸⁴ The law provides no definition for this form of ruling, nor does it specify the role of the judge in ruling as such.⁸⁵ However, the article appears to be used to provide a bottom-line final outcome without a reasoned decision, to render a judgment that does not necessarily result from direct application of the law, or to simulate a fair settlement between the parties. This interpretation of the article results in a unique form of judicial arbitration, through which judges can create procedural arrangements.⁸⁶ In one observation, the judge referred to a ruling according to § 79A in contractual terms, as "*a tri-party agreement between the defendant, the plaintiff, and the court.*" Nearly all judges emphasize that a judgment by way of compromise is final, does not pronounce the reasoning behind the decision, and can rarely be appealed.

82. See Bone, *supra* note 81, at 1390; see also Kapeliuk, *supra* note 81, at 1475.

83. See 10 DEL. CODE ANN. TIT. 10, § 349 (2009); DEL. CH. R. 96–97 (noting that "Delaware state sponsored legislation" is a binding arbitration before a judge that takes place in a courtroom, which is an alternative to trial for resolving certain kinds of (business) disputes, and that this type of arbitration is governed both by statute and by the Rules of the Delaware Court of Chancery). For discussion of this hybrid model together with the equivalent Israeli instrument of § 79A of the Israeli Courts Law, see Yuval Sinai & Michal Alberstein, *Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 739, 740–43, 753 (2015).

84. Courts Law § 79A.

85. The wording of § 79A "to rule . . . by way of compromise," is taken from Jewish law (Maimonides, Book of Judges 22:4), where it is usually presented as an attempt to avoid the strict commitment to Divine law, while empowering the rabbinical decision-maker with broader discretion, including the possibility of referring to social justice and peace considerations as part of the imposed solution. See Maimonides, *Book of Judges 22:4*; see also Courts Law § 79.

86. See Sinai & Alberstein, *supra* note 83.

The vague language of § 79A sets unclear boundaries regarding the scope and nature of its judicial application. Judges use this procedural framework extensively and flexibly, and our observations suggest that they view it as a procedural agreement between the judge and the parties that can serve different purposes. They may use the article to apply the law and determine that “the winner takes all,”⁸⁷ to define the terms of a compromise,⁸⁸ or to initiate an arbitration in which the parties minimize risk by setting a specific range for the sum of money the judge may rule, bound by upper and lower boundaries to which the parties mutually agree. Judges can also use the article to insert extra-legal considerations.⁸⁹ For example, in one case, the judge proposed to issue a judgment by way of compromise, pointing out that it is suitable for the case at hand because it “*presents a difficult conflict that would be difficult to adjudicate.*” In other cases, judges attempt to persuade the parties to agree to a judgment by way of compromise when the parties’ independent settlement discussions fail. In one hearing we observed, the judge attempted to persuade the parties to opt for a judgment according to § 79A by saying, “*I promise you will both be satisfied,*” and “*If you cannot reach a settlement on your own, I could set the range through [a decision based on] §79A. Would you like me to set minimum and maximum values?*”

H. *Negative Aspects of the Legal Process or Outcome*

This category of JCR practices emphasizes the potential negative aspects and costs of proceeding with the lawsuit to trial and adjudication on the merits. This category includes references to uncertainty with respect to the final outcome, negative “externalities” of the litigation process (such as emotional distress associated with testimonies), reputational damage due to information recorded in a publicly available formal case record, the extended wait for a final determination (compared to an early settlement), and other associated costs.

The judges we observed commonly underscored the potential negative implications stemming from factual or legal uncertainties they identified in the case. As one judge commented in a hearing, “*In trial, you only know how you are getting in, but you never know how*

87. CA 1639/97 *Agiapolis v. El Castodia Internationale De Tera Santa* 53(1) 793 (1999) (Isr.) [Hebrew] (ruling that § 79A may be used both to provide compromise outcomes and to rule in favor of only one party).

88. *Id.*

89. See Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV. NEGOT. L. REV. 221, 241–47 (2016).

you will get out.” Judges present the inherent uncertainty of the litigation process as an undesirable aspect of pursuing a trial (as a separate consideration from the predicted legal outcome described in Section III.F).

Furthermore, judges discuss a range of potential direct and indirect costs that litigants may incur during litigation. We observed judges emphasizing the value of ending litigation and receiving timely compensation. Some judges refer to exogenous litigation-related risks, such as the reputational damage that may result from a publicly available record of testimonies (“*I imagine you do not want this claim to be published in a judgment.*”). In an era of searchable online court records, this reputational risk is heightened due to increased ease and immediacy with which such information can be accessed and publicized.⁹⁰ Judges also point to the emotional distress associated with having a pending court case or being required to testify, and in some instances they allude to the importance of protecting an ongoing relationship (personal, professional, commercial, or other) of the litigants or with related stakeholders.

For example, in a case involving two Haredi Jews, the judge offered to refer the parties to mediation within the Haredi community, repeatedly stating that from both a religious and a legal perspective, “*any agreement would be better than a judgment.*” Another example was observed in a case that involved the death of a young school boy, whose body was found by his sister. The judge proposed to make a settlement offer based on the medical evidence the parties submitted in order to avoid having the deceased boy’s family hear the testimonies in such a sensitive case. And in a slander lawsuit between neighbors, the judge turned to the parties and said, “*Try and do anything you can to reach an agreement. This will help both sides to get on with their lives, work, and earn money. The compensation that is usually awarded in such cases is low, and so you need to have realistic expectations, and do something that will help everyone to continue with their lives I am here to help you reach an agreement.*” The parties went outside and returned with an agreement according to which the defendants would publish an apology and the judge would determine the rate of compensation within a range the parties agreed upon. The judge then said to the litigants, “*You should most certainly thank*

90. See Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 773–74 (2011).

your lawyers, who helped you solve the case through settlement. Continuing with the litigation process would not have done any good to either of you."

In a tort case between neighbors, the judge remarked, *"This lawsuit has been motivated, and is being run, by a lot of emotions, and not necessarily according to the facts and actual damages. Emotions are running this case, and I will carefully add this has almost gotten to the lawyers as well."* When the parties remained entrenched in their refusal to negotiate a settlement, the judge added, *"The cost of managing this case will only increase with time. What you have spent until now has come out of your pocket . . . I am saying this because I understand that this is your money, and this is nothing compared with what it is going to cost you in the future. You will have to pay for the witnesses, you will have to pay court fees, your time, your health—and this is nothing we cannot put a price tag on . . . You know how you enter the door here, you do not know how you will come out."* In another tort case, the judge took out four large files that contained documents related to the case and said, *"Do you think all this paper is worth the value of the case? I do not think so. It is a pity for the forest used to make this paper. Is this not worth getting done with? You can manage the lawsuit, by the book all the way through, even when the chances are zero. But is it worth it?"*

Moreover, in some instances, judges criticized parties' decisions to refuse settlement and proceed to trial, proclaiming them irrational, unjust, or even immoral. For instance, in a pretrial hearing of a lawsuit against an insurance company that denied coverage for individuals injured in a car accident, the insurer opposed a settlement and insisted on litigating the case. In response, the judge said to the attorney of the insurer: *"You are the bad guy here, and at the end it will cost the insurance company. This makes me mad . . . This type of case is somewhat infuriating."*

When judges use JCR practices, they encourage settlement by emphasizing the downsides of the legal process and adjudicatory outcomes, and by presenting trial altogether as an unfavorable option compared to settlement. In Section IV.B, we discuss how these dynamics lead to the creation of a public image of "legal aversion" where it would be least expected—at the heart of the justice system, in open court, by the presiding judge, during litigation. In fact, in many respects, the dynamics of pretrial hearings lead judges to construe trial and judgment as the worst alternative to a negotiated (settlement)

agreement (WATNA). It is a peculiar position for a judge to pronounce, sitting at the bench in open court while presiding over the given case. In Section IV, we elaborate on this point.

I. *ADR Techniques*

Dispute resolution scholars often argue that alternative dispute resolution (ADR) practices, and especially mediation techniques, should—or already do—affect the way judges handle disputes in courts.⁹¹ Following this prescription as a judge would entail discussing extra-legal interests of the parties, expressing empathy, referring to emotions and relationships, recognizing the different narratives the opposing parties might have with respect to the dispute, encouraging apologies, promoting transformative justice, empowering the parties in the process, and instilling a forward-looking atmosphere. Such practices would entail the use of warm or attentive body language, personal tone, informal language, positive framing, creativity, and joint brainstorming of settlement options.

In reality, we observed only a few instances in which judges employed techniques from the mediator's toolbox, and the examples we encountered were limited in scope. For example, we observed a judge who told litigants who reached a settlement, "*I have no doubt that you have reached the right decision. The case before me does not fall into the lines of a legal dispute.*" In another case, the judge explained to the parties that it is not advisable to stick to one's own opinion and see oneself as the only one who is right: "*Each coin has two sides, and we cannot accept the perception of either party that it is the only one who is hurt and has a just cause.*"

Another example occurred in a lawsuit that a tenant filed against the owner of her apartment. The tenant had invested a large sum of money in renovating the apartment, and sought to recover it from the owner, despite not having obtained his consent prior to the renovation. The tenant rejected the judge's settlement offer for a sum considerably lower than what she had claimed. The judge turned to the claimant and her lawyer, explaining that although the claimant

91. See, e.g., Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & Soc. 1, 10–12 (1985) (describing settlement techniques of judges while exploring their advantages); Alberstein, *supra* note 6, at 887–92 (offering to conceptualize judicial work of settlement according to the organizing principles of conflict resolution, and especially perceiving them as mediators who can expand the horizons of their activities); *id.* at 900–01; Robinson, *supra* note 8, at 124–29 (discussing self-reported problem solving activities of settlement judges in California).

was morally right in renovating the apartment, given its poor state, which was unsuitable for living, her legal case was very weak. Subsequently, the judge told the tenant:

I want to help you because you have a legal problem, not a moral one. What you did was not morally wrong, but now you are facing a legal problem. I do think you should receive some money back, which is why I think you should accept the court's settlement offer.

This excerpt demonstrates how judges promote, through settlements, non-binary solutions to legal claims, which result in outcomes that would not have been feasible through direct application of the law.

In some instances, judges helped the parties search for creative solutions or suggested that it would be helpful to “*think outside the box.*” This happened, for instance, in a second pretrial hearing of a lawsuit filed by two investors in a start-up company that the defendant founded. The investors sought to receive their investment back, claiming that the founder engaged in misrepresentations when he raised the money from them. After discussing some procedural matters and noting that the investors resided outside Israel, the judge proposed that the parties conduct a mediation via Skype. After the defendant refused the offer, the judge remarked, “*You don't have to hug and you don't have to touch each other in a mediation that deals with start-up companies.*” Subsequently, the judge spoke directly with the founder, patiently inquiring about his invention and professional experience. The opposing attorneys then briefly presented their arguments. At the end of the hearing, the parties accepted the judge's suggestion to devise a creative solution that accounted for two possible scenarios: the company succeeding or the company failing. They agreed to conduct another pretrial hearing to discuss specific settlement options, in which the claimants would participate via Skype. This hearing, which entailed a rare judicial exercise of a constructive, creative, conflict resolution process, lasted forty-five minutes—one of the longest pretrial hearings we observed.

Another example of an ADR-like judicial practice was observed in a hearing of a lawsuit filed by a divorced woman against the bank in which she used to have a joint account with her (now former) husband. During the hearing, the judge shared with the claimant his prediction that if the case were pursued, no damages would be awarded. Subsequently, the judge explored with the claimant her goals in litigation, noting that even if she were interested in “getting back” at the bank, it was advisable to check whether the parties could

reach an agreement before trial. It appeared that given the weakness of the legal claims, the judge viewed the settlement option as a more viable way to advance the non-legal interest of the claimant—her emotional motivation for filing the lawsuit.

J. Carryover Effect in Proximate Hearings

Pretrial hearings are typically held consecutively, such that each judge holds several hearings in a single courtroom sitting, usually in the morning. However, there are considerable variations in the number and frequency of hearings. We have seen judges schedule between one and ten pretrial hearings in a single one-hour timeslot. Accordingly, the duration of hearings in our sample ranges from a few minutes to a full hour.⁹² Litigants and their lawyers usually wait for their hearing inside the courtroom, seated on the public benches at the back of the courtroom, and advance to the plaintiff and defendant seats when called upon by the judge. In such a setting, the judge's behavior and pronounced attitude regarding settlement in any given case or series of cases can impact not only the litigants and lawyers involved, but also those who wait in the courtroom for their case to be heard. As a result, judicial practices in one hearing or series of hearings may set the tone for settlement discussions in subsequent hearings.

The fact that judges hear multiple hearings consecutively shapes the courtroom as a busy setting, sometimes appearing hive-like, with a continuous busy movement of lawyers and litigants in and out of the courtroom. Often, hearings overlap and stakeholders from different cases interact inside or outside the courtroom. Such interaction occurs, for example, when the judge requires attorneys to step outside and seek their clients' approval of a settlement offer, when parties are instructed to negotiate outside the courtroom and return to report on the result, or when attorneys linger in the courtroom after the next hearing starts, waiting for the official record (transcript of the hearing) to be reproduced by the court recorder. These busy, overlapping hearing schedules are characterized by informal courtroom dynamics that affect settlement bargaining.

92. As an example, in one of our observations, four pretrial hearings took place during a one-hour sitting. The first lasted twenty minutes and ended with the judge's instruction to the parties to attempt to negotiate an out-of-court settlement and report back within sixty days. The second hearing lasted ten minutes and resulted in a decision to appoint an expert. The third hearing lasted eight minutes and ended in the parties' acceptance of the court-proposed settlement. The fourth hearing lasted twenty-two minutes and ended with the judge's instruction to the parties to submit additional documentation and schedule an additional pretrial hearing.

For example, in one observation comprising eight pretrial hearings that were scheduled at nine o'clock in the morning, the judge opened the first hearing by directing a question to the claimant, undermining the legal merits of her claim and suggesting that the parties mediate the case out of court. The judge opened the second hearing by asking, "*Why isn't this case moving forward?*" The judge then told the self-represented claimant, "*You will pay the costs for wasting the court's time.*" The judge opened the third hearing with another settlement-oriented question to the parties: "*Did you read the expert's opinion? Why isn't this case over yet? Finish this case! For God's Sake!*" The judge opened the fourth hearing by pleading to the lawyers: "*Well, try and finish this one way or another.*" These opening statements, which were delivered by the judge consecutively in a single court sitting, may have had a cumulative impact on the litigants and lawyers who were present in the courtroom, extending beyond each single case. This cumulative effect is relevant for other JCR techniques, such as direct facilitation of settlement, prediction, and law aversion.

In some instances, we observed judges interacting with lawyers in the courtroom apart from the hearing of their cases, most commonly between scheduled hearings. This interaction often fostered a positive atmosphere in the courtroom. Lawyers and litigants who observe the judge's behavior in previous cases gain familiarity with the judge's style, mood, or attitude, and are able to adapt their behavior and plan regarding how to handle their own case when it is heard.

K. *Style and Tone of Judicial Interventions*

The mode of delivery of each JCR practice greatly impacts the nature and outcome of the judicial intervention. Specifically, the judge's tone and style significantly influence participants' reactions to the judge's intervention. The words used in a judge's opening statement can take on different meanings when delivered softly, accompanied by friendly non-verbal cues such as a smile, or when delivered authoritatively in a scolding tone. In the next Section, we explain that these attributes contribute to shaping the perceived position of the judge with respect to settlement promotion as eliciting or directive (using authority either to invite the parties to explore settlement options, or to create an expectation or pressure that steers the parties toward settlement). It follows that judges' interactional style influences parties' willingness to settle and their view of proposed settlements. Some judges raise their voice, express anger, and even appear to threaten the parties with negative ramifications of refusing to

settle. Other judges use question marks, a suggestive voice, and a subtler, persuasive tone. These variations in judges' modes of expressions are particularly manifest when they engage in prediction, emphasize uncertainty, or use "soft" conflict resolution techniques.

IV. JUDGES AS GATEKEEPERS AND THE DISMAYING SHADOW OF THE LAW

A. *Structural, Technical, and Stylistic Attributes of Judicial Settlement Promotion*

The findings of our thematic analysis of pretrial courtroom observations in Israel reveal an intricate web of structural features, judicial behaviors, and intervention styles that influence settlements in the courtroom. Structural features are attributes of the courtroom litigation setting; judicial behaviors are specific techniques that judges use to persuade litigants to settle; and intervention styles relate to the interactional position and style that judges exhibit.

The structural dimension has to do with the judge's opening statement,⁹³ the off-the-record nature of settlement discussions,⁹⁴ the interaction between the judge, lawyers, and litigants,⁹⁵ and the carryover effect between proximate hearings.⁹⁶ In the court setting, the hearing almost invariably opens with some statement or question by the judge. This structural feature allows the judge to frame the discussion and define the goal of the hearing as pursuit of settlement. Similarly, the procedural exception that allows judges to conduct off-the-record discussions in pretrial hearings fosters informal negotiation, non-binding brainstorming of solutions, and significant involvement of the judge in the settlement bargaining process and in persuading the parties to avoid trial. The presence of clients and lawyers in the courtroom enables judges to mobilize the principal-agent relationship by conveying persuasive messages to each of them, thereby overcoming settlement barriers.⁹⁷ Finally, the structural proximity of multiple pretrial hearings tightly scheduled one after another creates carryover effects of judicial influence between hearings.

93. See *infra* Section III.A.

94. See *infra* Section III.B.

95. See *infra* Section III.C.

96. See *infra* Section III.J.

97. See Civ. Pro. Regs. § 474 (stating that a judge is authorized to mandate the presence of litigants).

Concrete judicial settlement promotion behaviors include leveraging court procedure and legal costs,⁹⁸ direct facilitation of settlement discussions,⁹⁹ prediction,¹⁰⁰ procedural contracts and quasi-arbitration,¹⁰¹ emphasis of negative aspects of the legal process,¹⁰² and use of ADR techniques.¹⁰³ Through these practices, judges attempt to facilitate settlements.

We found that judges' settlement practices vary in the degree of influence they appear to exert on defining the bargaining zone or the expected outcome.¹⁰⁴ Judges engage in what can be described as a continuum of interventions. On one end, judicial practices encourage parties to settle by themselves within the litigation process. Next on the continuum are judges who evaluate strengths and weaknesses of each party's position without suggesting a concrete prediction of the legal outcome. In a more interventionist mode, judges provide a vague prediction of the legal outcome. And then some judges take the most interventionist stance, providing parties with explicit signals about the expected outcome of the litigation. This latter type of prediction, which we frequently observed, can help litigants assess the best alternative to a negotiated agreement (BATNA) and the WATNA of settlement. In the purest form of this practice, judges provide a specific settlement proposal. This practice sets the stage, in some cases, for judicial portrayal of the persistence of parties to proceed to trial as irrational. Under these circumstances, the parties presumably "know" the probable outcome of the litigation, and any remaining gaps or vagueness can be factored into their calculations and estimations. Judges in these circumstances appear to expect the parties to self-impose the expected outcome through mutual agreement.

Contrary to our expectation, we observed only a few instances of judges who engaged in broad conflict resolution practices that are akin to ADR methods. JCR approaches aiming to resolve the specific individual case by improving communication between the parties, overcoming information gaps, encouraging dialogue and collaboration, highlighting the interests underlying the parties' legal claims, and recognizing the multidimensional complexity of disputes beyond their legal framing were rare exceptions.

98. See *infra* Section III.D.

99. See *infra* Section III.E.

100. See *infra* Section III.F.

101. See *infra* Section III.G.

102. See *infra* Section III.H.

103. See *infra* Section III.I.

104. Cf. Robinson, *supra* note 8 (comparing "directive" and "problem-solving" approaches to judicial settlement promotion).

Instead, we found only minimal use of conflict resolution practices on the ground. Principally, they were used to elucidate the negative attributes of the legal process in order to persuade parties to settle. For example, judges pointed out the possible incompatibility of the legal proceeding for resolving the issues and interests at hand, empowered parties' self-efficacy and autonomy, and raised awareness of affected relationships and stakeholders. In summary, the judges we observed focused primarily on the legal framing of the dispute, aiming to facilitate settlement by issuing predictions that affect the bargaining zone and not by transforming the dispute resolution process altogether.

Judicial style of interaction and use of authority refer to the tone and style judges use in their interaction with the parties,¹⁰⁵ and to the framing of their position regarding settlement as either an option or an expectation.¹⁰⁶ We found that these two attributes greatly shape their settlement-promoting role and the courtroom atmosphere as a whole, as well as the execution of any of the eleven themes we identified.

This dimension of judges' settlement work is characterized by a unique quality that is markedly different from the settlement work of third-party neutrals in other contexts. It stems from judges' authority.¹⁰⁷ Judges operate in a unique mode in which they use their inherent authority to broker settlement agreements. Some judges take an eliciting stance, using their position in the process to extend an invitation to the litigants to settle, while others take a directive stance, relying on their authority, status, and inherent power to pressure parties into agreement. The eliciting mode is suggestive, and relies on authority to motivate the parties to settle. The directive mode is coercive and relies on authority to pressure the parties to settle.¹⁰⁸ Among judges, one finds significant difference in the type of settlement activity and the style through which it is delivered. Judges can use the same technique in a suggestive or directive manner, resulting in a different impact on litigants and on the emerging public image of law in the courtroom. This significant difference in judicial stance is

105. See *infra* Section III.K.

106. See *infra* Section III.A.

107. See generally JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979) (discussing sources of authority in law); see also Robinson, *supra* note 50, at 131 (discussing judges' unavoidable position of authority in litigation). For a discussion of the effect of judicial authority on settlement discussions, see Section III.B.

108. Cf. Robinson, *supra* note 50 (discussing "directive" and "problem-solving" approaches to judicial settlement promotion).

not always evident in the wording judges use, but rather in the manner in which it is delivered as reflected in their tone and interactional style.

B. *Judicial Gatekeeping and the Dismaying Shadow of the Law*

On principle, litigants have the right to the determination of their dispute by trial and judgment. The litigants stand “before the law,”¹⁰⁹ and while judges are not in a position to deny their access altogether, they can influence litigants’ decisions whether to cross the threshold into trial. Judges’ control over the litigation process and its prospective outcome, as well as their inherent institutional authority, positions them as a powerful party in this negotiation, one that can strongly impact litigants’ behavior. In this capacity, judges act as gatekeepers of trial, and judicial settlement promotion takes the form of a bargaining process. The judge seeks to obtain the parties’ consent to forfeit their right to trial and judgment by pursuing a settlement instead. Indeed, in most of the pretrial hearings we observed, judges attempted to persuade litigants to settle.

The motivation that drives this strong judicial tendency is beyond the scope of this study, but it likely has to do, at least in part, with institutional and structural incentives, such as large caseloads and the individual monitoring of judges’ clearance rates. However, we identify two archetypes of arguments that judges invoke in order to persuade parties to settle, broadly defined as arguments “for settlement” and arguments “against trial.”

Arguments “for settlement” emphasize the desirability of settlement as a good in and of itself. This type of argument is manifest when judges draw the parties’ attention to their underlying interests, including extra-legal interests (such as their goals and motivations, the emotional well-being of related stakeholders, or other relational and social considerations). It is also evident when judges suggest that a settlement will facilitate a fair and just solution in the specific circumstances of the case. In contrast, arguments “against trial” advocate for a settlement by *presenting trial and judgment as an undesirable option*. They are exemplified when judges suggest that a trial would be redundant given the ability to predict the legal outcome with considerable certainty already at the pretrial phase. Alternatively, these types of arguments can take the form of pointing to

109. See Franz Kafka, *Before the Law*, in THE COMPLETE STORIES OF FRANZ KAFKA 3 (1971) (noting that “[b]efore the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment”).

the high risk that is embedded in seeking a judicial determination, due to an identified ambiguity of a legal or factual question in the case. They are also evident when judges discuss negative externalities of the litigation process, such as legal costs, reputational damages, and the prolonged (and undefined) time it will take to come to a determination, compared to an immediate, certain, and possibly confidential settlement agreement. To summarize, these types of arguments present settlement as a better option compared to trial and judgment.

There is a striking by-product to the judicial dynamics we describe: in the process of advocating for settlement and against trial, judges inadvertently contribute to a jurisprudence of litigation avoidance. Moreover, they publicly portray the legal process and outcome as a worse alternative compared to settlement, presenting trial as the WATNA. Their JCR practices cast a dismaying shadow of the law as an undesirable, lengthy, slow, costly, uncertain, unsatisfying, and—at times—even unfair path to justice. In its stead, in day-to-day pre-trial practice, judges tend to promote a jurisprudence centered on redress, compromise, finality, and cost-effectiveness. It is a jurisprudence of a “negotiated justice” rather than justice by application of law.

Thus, judges—the flagbearers of the legal system—find themselves in a peculiar position: convincing parties that the paradigmatic path of the law—trial and judgment—is not as good as the alternative path of settlement. This apparent judicial aversion from the legal process is a central component of judges’ settlement promotion practice in the Israeli courts we observed. It is manifest in many forms, ranging from depicting the complex, ambiguous, or uncertain nature of the future legal solution, pointing to the limits, inapplicability, or incompatibility of legal solutions, or emphasizing the negative aspects of litigation procedures.

One may argue that this reality is the result of a structural conflict of interest in which judges find themselves. Faced with large caseloads, judges are left with no other practical option but to dispose of the majority of their cases early on. As others have noted, “[t]he concern here is that the need to manage their dockets could create situations in which judges push too hard for settlements.”¹¹⁰ Under these circumstances, the pursuit of settlement serves, at least in part, the individual and institutional interests of judges in minimizing their standing docket and improving their clearance rates. This

110. See Robinson, *supra* note 8, at 30.

conflict of interest is particularly evident when it is personal—that is, when a pretrial judge continues to preside on the case should it proceed to trial. However, due to institutional incentives, it may also be relevant when judges presiding over pretrial hearings do not continue to preside over the same cases in trial.

Judges who facilitate settlements may face ethical concerns akin to those faced by third-party neutrals in med-arb processes.¹¹¹ One such concern is that “the self-determination principle [of the parties] is severely compromised in med-arb by the elimination of voluntary participation and the absence of a withdrawal option.”¹¹² This concern is especially relevant in judicial pretrial settlement facilitation, as all parties involved know that should the settlement facilitation fail, the case would proceed to be determined by the same judge in trial. Parties in med-arb may be reluctant to fully use the advantages of mediation knowing that their facilitator may later become their arbitrator. Complementarily, mediators may be affected in the process by their desire or reluctance to arbitrate the dispute. These concerns naturally also affect the behavior of litigants and judges in pretrial settlement discussions.

Notwithstanding these concerns, as we argue in this paper, these tensions create a fertile ground for the creative development of hybrids of law and conflict resolution, and some of the JCR activities that we observed reflect such hybrids. Clearly, judges do not act as mediators in pretrial hearings.¹¹³ Their institutional capacity and position as authority figures shape their unique mode of settlement promotion and drive their evaluative style. Within these confines, there is ample room for exercising adapted JCR practices. In the face of those practices, it is necessary to develop relevant judicial training as well as ethical and procedural governance.

111. In a classic med-arb process, parties attempt to resolve the dispute in mediation, and if they fail to reach an agreement, the same third-party neutral becomes an arbitrator and issues a final binding decision. See STEPHEN P. GOLDBERG, FRANK A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 226–27 (1992).

112. Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, *DISP. RESOL. J.* 53, 57 (2010).

113. In fact, in Israel, judges are forbidden from acting as mediators in court cases. See RULING 154/15, 2015 OMBUDSMAN OF THE ISRAELI JUDICIARY ANN. REP. 45 (2016), <https://www.justice.gov.il/Units/NezivutShoftim/CommissionPublications/Accountability/Documents/reports2015.pdf>.

C. *Governing Judicial Settlement Practices and the New Form of JCR Law*

Our observational study captured an important aspect of judges' settlement-promoting work that is qualitatively different from settlement work of third-party neutrals in other contexts: judges' status of authority. In order to retain the legitimacy of judicial settlement promotion under the influence of their authority, it is necessary to develop clear regulatory rules that would ensure its ethicality and appropriateness. It is important to utilize the inherent tension we found in JCR practices by turning it into a fertile ground for expanding our notions of the nature and goal of litigation and of the legal system as a whole. The selection and training of trial judges must consider the significant settlement promotion activity that is bound to characterize their daily work. Judges should be equipped with a rich toolbox that does not necessarily rely on their authoritative position, knowledge of the law, or ability to make determinations. In other words, judges need to master not only legal analysis, writing, and decision-making skills, but also problem-solving, interactional, communication, empathetic, and other dispute resolution skills.

The combination of increasing caseloads, judicial authority, and dispute resolution activity helps explain the effectiveness of judicial settlement promotion and the continued demand for it. Despite the rarity of trials, litigants continue to bring their disputes to court. Moreover, direct interaction with a judge seems to be a significant component of the legal process and of what consumers of the justice system seek, even if the judge does not adjudicate the case. For some litigants, encounters with the judge are prerequisites for accepting a settlement offer. While it is true that in some instances, judges use their authoritative position to pressure the parties to settle, it is also true that in other instances, by merely interacting with a judge under the auspices of a court proceeding, parties' willingness to accept a settlement offer increases. When the judge is the one to define the terms of the settlement, this relationship becomes even more pronounced. Today, many litigants' "day in court" is a "settlement day in court." Judicial settlement promotion is part and parcel of the current public sphere in courts and a key component of legal systems in an era of vanishing trials.

Finally, our findings in pretrial hearings portray contemporary adjudication as a process that favors persuasion and negotiation over legal determination. More often than not, judicial settlement work

does not amount to a wholesome conflict resolution practice. Nonetheless, this special form of persuasive activity in the shadow of judicial authority deserves a theory of its own. The development of such a theory should inform the two alternative conceptual frameworks that dominate this field: settlement as conflict resolution and settlement as efficiency-maximizing privatization. Our findings suggest that trial judges manifest a surprisingly grim view of law and litigation. They also draw the contours of a unique form of settlement that is molded by direct and indirect influences of judicial authority and represent new manifestations of “law in action.” These settlement promoting judicial interventions embody neither a perception of privatization of legal dispute resolution nor a commitment to broad conflict resolution considerations. Still, and although we rarely observed judges’ use conflict resolution strategies or skills, we did find that judges seemed interested in more than just efficient case management. Their work appears to represent a jurisprudence that is less coercive than adjudication, and may be described as “negotiated justice in the shadow of authority and law.” Judges’ broad set of procedural tools and their power of judicial authority and discretion generate a creative space for new modes of normative enforcement and rulemaking.

With time, settlements may substantiate a new variant of the public function of courts, not through the declaration of norms, but through the ad hoc enforcement of desirable social values and outcomes in settlements.¹¹⁴ Moreover, settlements open a viable path for acknowledging and implementing compromise solutions and non-binary notions of justice. While we did not observe much explicit alternative judicial rhetoric in the courtroom, the jurisprudential gap created by judges’ presentation of a dismaying image of the legal process and a fairly pragmatic and outcome-oriented image of settlement suggest that this can be a transitional moment. Thus, the time has come to develop a coherent, public values-oriented theory of the role

114. See, e.g., Isabel Kershner, *Israeli Woman Who Sued El-Al for Sexism Wins Landmark Ruling*, N.Y. TIMES (June 27 2017), <https://www.nytimes.com/2017/06/21/world/middleeast/israeli-woman-who-sued-el-al-for-sexism-wins-landmark-ruling.html> (highlighting a case in which an eighty-three-year-old woman sued El Al Airline for being asked to change her seat during a flight following an ultra-orthodox man’s request not to sit near the woman). In the settlement conference in the El Al case, the judge persuaded El Al representatives to commit to reinforce the policy that Israeli airline employees cannot ask women to change seats to spare men from having to sit next to them. *Id.* The agreement included commitment for training programs for employees and compensation for the plaintiff. *Id.* *The New York Times* presented this settlement as “a groundbreaking decision,” even though it was a solution agreed upon by both parties and a result of the dialogue the judge promoted in court. *Id.*

of courts and judges, and an accompanying regulatory framework that would be compatible with and relevant to the actual role that judges play in civil litigation.

