

# JUDICIAL CONFLICT RESOLUTION IN PLEA BARGAINING AS THE GOLDEN MEAN BETWEEN THE ADVERSARIAL AND INQUISITORIAL LEGAL SYSTEMS

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## ABSTRACT

*This article seeks to develop a better understanding of plea bargaining as a mechanism of judicial conflict resolution in criminal law. Plea bargaining plays a significant role in both the adversarial and inquisitorial legal systems. The article examines how the plea bargaining model is designed in both legal systems by comparing two civil law countries (Italy and Germany) with two common law countries (England and Wales and the U.S.). I argue that two developments—a mechanism similar to plea bargaining in inquisitorial systems and judges' participation in the criminal plea bargaining negotiations in adversarial legal systems—are part of the same phenomenon seeking a golden mean in criminal conflict resolution.*

## I. INTRODUCTION

In an adversarial system, in which two advocates represent two parties' positions before an impartial passive judge attempting to determine the truth of the case, it seems reasonable for the parties to end the conflict by an agreement, such as a plea bargain. In an inquisitorial system, where the court is actively involved in investigating the facts of the case, a guilty plea or a plea bargain are not considered acceptable because the judge plays an active role in the search for the truth.

This distinction reflects a view of common law according to which the judge, as a neutral third party, rules based on legal rights, and a view of civil law according to which the judge is responsible for collecting evidence and interrogating suspects. In the reality of

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both legal systems, however, judges' activities are much more varied. Most of the time, their judicial activities involve decision making outside the legal domain, and promoting consent and settlement through diverse practices.<sup>1</sup> Judges have strong incentives not to adjudicate cases, and indeed, most cases are settled.<sup>2</sup> Several studies in the last decades have repeatedly confirmed that most cases are settled, a phenomenon that has been referred to as the "vanishing trial."<sup>3</sup> This is conspicuous in criminal trials, where plea bargains are the most common outcome in many common law countries,<sup>4</sup> and judges are involved in various activities promoting and approving plea bargains.

The main claim of this paper is that two developments—(a) a mechanism similar to plea bargaining in inquisitorial legal systems, and (b) judges' participation in the criminal plea bargaining negotiations in adversarial legal systems—are part of the same phenomenon seeking a golden mean in criminal conflict resolution.

In Part II of this article, I examine how the plea bargaining model is designed in both legal systems. First, I review the inquisitorial legal system, focusing on two examples of civil law countries: Italy and Germany (Section II.A); next, I review the adversarial legal system, focusing on two examples of common law countries: England and Wales and the U.S. (Section II.B). In Part III, I explain the phenomenon of judicial conflict resolution ("JCR") through plea bargaining, common to both legal systems. After reviewing the convergence theory (Section III.A) and the managerialism theory (Section III.B), I delineate golden mean theory (Section III.C).

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<sup>1</sup> See generally RICHARD A. POSNER, *HOW JUDGES THINK* (2010); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011).

<sup>2</sup> Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

<sup>3</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004).

<sup>4</sup> William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2d ed. 2009).

## II. THE PLEA BARGAIN MODEL

### A. *Plea Bargaining in the Inquisitorial Legal System*

In many inquisitorial systems, the common law instrument of the guilty plea is unknown; therefore, one cannot speak of plea bargaining *per se*. But informal negotiations, based on bartering concession for confession, play an increasing role in the criminal process in many inquisitorial systems. In civil-law or inquisitorial-system countries, the main purpose of a criminal trial is to find the concrete truth.<sup>5</sup> It is the court itself that has to expose the facts of the case. Finding the truth is the main goal, and not subject to the interests of the parties. Confession is only one type of evidence, and it is not enough to end a trial. Therefore, in inquisitorial systems, confession alone is not sufficient procedurally for conviction.

Nevertheless, many kinds of negotiation take place at all stages of the criminal process in inquisitorial systems, which are similar to plea bargaining in adversarial systems. To demonstrate the phenomenon, in this part I outline the current practice of plea bargaining procedures in Germany and Italy, and show that formal and informal plea bargaining agreements have become more common on a wider scale in these countries.

#### 1. Italy

The first Italian Code of Criminal Procedure was established in 1930, by adopting an inquisitorial system. In 1988, the Italian legislature renewed the Code of Criminal Procedure<sup>6</sup> by introducing special proceedings, which can be considered a form of plea bargaining<sup>7</sup>: sentencing by the parties' request and abbreviated trial. These procedures, however, needed to be made consistent with the constitutional framework that includes the principle of mandatory prosecution,<sup>8</sup> the presumption of innocence,<sup>9</sup> and the principle of legality, which states that no punishment shall be imposed except upon assessment of criminal responsibility within a criminal proceeding. To this end, the Italian legislature amended

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<sup>5</sup> NIGEL G. FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* (4th ed. 2010).

<sup>6</sup> The new Italian Code of Criminal Procedure of 1988 (It.).

<sup>7</sup> Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567 (2005).

<sup>8</sup> Art. 112 Costituzione [Cost.] (It.).

<sup>9</sup> Art. 27, para. 2 Costituzione [Cost.] (It.).

the constitution, ratifying the shift toward the adversarial system by legitimizing consensual justice.<sup>10</sup>

The Italian sentencing by parties' request is different from the common law plea bargaining. First, there is no guilty plea; only a request that a particular sentence be applied. Furthermore, because of mandatory prosecution, no charge bargaining is possible. This option is available only if the final negotiated sentence, already reduced by up to one-third, does not exceed five years of imprisonment; additionally, the Code imposes some restrictions with regard to the nature of crime. For example, organized crime and sex-related crimes are excluded.<sup>11</sup> Repeat offenders are also excluded.<sup>12</sup> According to the Italian Constitution, the judge is independent and subject only to the law.

Nevertheless, other relevant characteristics of sentencing by parties' request are similar to plea bargaining,<sup>13</sup> first and foremost, the reduction of the punishment. The Italian code provides for a reduction of up to one-third of the punishment in cases of sentencing by parties' request. This reduction may also result in a sentence below the minimum term of punishment prescribed by the law. Such a provision clashes with the traditional model of the determination of the punishment, which, according to the Constitution, must be proportional to the guilt.

In a decision from 1990, the Constitutional Court struck a balance between this particular model of determining the punishment and the traditional, constitutional model, by holding that the judge must make sure that the negotiated sentence, even if not the just punishment, is nevertheless appropriate to the crime committed.<sup>14</sup>

Additionally, the Italian legal safeguards are almost identical to those in the adversarial legal system. The judge is not bound to the parties' agreement, but is obligated to verify the voluntariness of the defendant's request or consent. The judge must review the legal qualification of the charges against the defendant and the applicability of aggravating or mitigating circumstances. If any of these prove to be problematic, the judge must reject the bargain agreement and revert to the ordinary proceeding instead.<sup>15</sup>

<sup>10</sup> The due process reform, or *riforma del giusto processo*. See Cost. Law n.2 of Nov. 23, 1999, amended Art. 111, para. 5 Costituzione [Cost.] (It.).

<sup>11</sup> Art. 105 Criminal Code (It.).

<sup>12</sup> Art. 444, para. 1 C.p.p. (It.); art. 445, para. 1 C.p.p. (It.).

<sup>13</sup> Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 227-59 (2000).

<sup>14</sup> Art. 27, para. 3 Costituzione [Cost.] (It.).

<sup>15</sup> Art. 444, para. 2 C.p.p. (It.).

Another procedure largely similar to plea bargaining is the abbreviated trial, available for all types of offences. To qualify for an abbreviated trial, the defendant may submit a simple request, in which he asks to be judged only on the basis of the investigative file records. The abbreviated trial finds a constitutional basis in the provision that allows the defendant to renounce his procedural right to challenge the evidence at the trial by cross-examination,<sup>16</sup> in return for a reduction of punishment.

The abbreviated trial is similar to plea bargaining because the defendant can have his sentence reduced by submitting a request asking to be judged on the basis of the investigative file records, without pleading guilty. In return for saving the state the expenses of a full trial, if he is found guilty, the sentence of the defendant is reduced by one-third. But similarly to many adversarial systems, judges are likely to determine the punishment by starting with a more severe sentence, so that although the punishment is reduced by one-third, the resulting sentence is still the one they consider proportional to the guilt.<sup>17</sup>

What is the popularity of sentencing by parties' request and of the abbreviated trial in Italian criminal law? In 2013, out of a little over 400,000 criminal proceedings, 21.4% were resolved by sentencing by parties' request and 11.5% by abbreviated trial. In sum, sentencing by parties' request and the abbreviated trial were used in approximately one-third of the cases. The statistical data shows that quasi-plea bargaining proceedings are quite widely used, contrary to the old perception that in the inquisitorial system, plea bargaining is not acceptable.

## 2. Germany

In Germany, informal settlements have been used regularly for a long time, and a practice similar to plea bargaining has been introduced into the German criminal procedure.<sup>18</sup> In the case of a misdemeanor, a certain penal order (§ 407 of the Code of Criminal Procedure (StPO)) gives the prosecutor the power to request that the judge impose a punishment if there is sufficient reason to suspect the accused of having committed a violation.<sup>19</sup> If the accused does not appeal it, the penal order replaces all further proceedings,

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<sup>16</sup> Art. 111, para. 4, 5 Costituzione [Cost.] (It.).

<sup>17</sup> FRANCO CORDERO, *PROCEDURA PENALE* 1045 (2012) (It.).

<sup>18</sup> Werner Schmidt-Hieber, *Vereinbarungen im Strafverfahren*, NEUE JURISTISCHE WOCHENSCHRIFT (Ger.), 1982, at 1017.

<sup>19</sup> STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 407 (Ger.).

and the offender is immediately punished with a fine or a suspended sentence. In informal settlements, the defense counsel and prosecutor may agree that the prosecution will not bring further charges, and request only a penal order, if the accused is willing to accept the punishment suggested by the order.<sup>20</sup> In practice, the defense and the prosecutor negotiate the extent of the sanction, and the judge usually agrees to the order suggested by the prosecution.<sup>21</sup> This procedure avoids a trial and comes very close to the guilty plea in common law systems. At present, some 35% of cases are handled through a penal order, and the majority of those are based on informal settlements.<sup>22</sup>

Another procedure is that of the dismissal (§ 153a of the Code of Criminal Procedure (StPO)). According to this section, a case of misdemeanor can be dismissed for insignificance by the prosecution, with agreement of the court, if there is only minor culpability and no public interest in prosecution. If there is an indictment, the court can make the decision to dismiss with the consent of the defendant and the prosecutor. This provision enables the prosecutor not to press some or all charges, even if there is an interest in prosecuting, if such interest can be overridden because the defendant meets certain conditions. Dismissal has become the common pattern for reaching informal agreements in Germany.

At present, § 153a is frequently used as a basis for informal negotiation and settlement. Especially during the preliminary investigation, it is common for the courtroom actors to agree that the investigation will cease if the accused pays a fine.<sup>23</sup> As in adversarial systems, the German practice of exchanging a dismissal for a confession or waiver of appeal can result in the prosecutor charging the defendant with a more serious offence to have more substance for increased leverage during bargaining.<sup>24</sup>

The German version of plea bargaining was subsequently accepted by the Federal Court of Justice and written into § 257c of the Code of Criminal Procedure (StPO) in 2009.<sup>25</sup> The legislation

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<sup>20</sup> Joachim Herrmann, *Absprachen im Deutschen Strafverfahren*, in 31–32 ARCHIVUM JURIDICUM CRACOVIANSE 56 (Krakow Polska Akademia Nauk 2000) (Pol.).

<sup>21</sup> *Id.*

<sup>22</sup> Regina E. Rauxloh, *Formalization of Plea Bargaining in Germany: Will the New Legislation be Able to Square the Circle?*, 34 FORDHAM INT'L L.J. 296 (2011).

<sup>23</sup> *Id.* at 306.

<sup>24</sup> *Id.*

<sup>25</sup> DEUTSCHER BUNDESTAG, DRUCKSACHEN [BT] 16/12310, available at <http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf> (explaining the Federal government's official reasons for the new legislation) (Ger.).

expressly authorizes “discussions” about a case “with a view toward expediting the proceedings.” In its central new provision, the law allows judges to reach an “understanding” with the parties about the outcome of the case. Finally, in 2013, the German Constitutional Court upheld the constitutionality of § 257c, authorizing the negotiation of criminal judgments between the court and the parties.<sup>26</sup> In 2011, about 18% of criminal proceedings in local courts and 23% of proceedings in district courts were resolved through a negotiated judgment.<sup>27</sup>

Note that § 257c assigns a central role in plea bargaining to the court. The statute allows judges not only to initiate negotiations, but also to indicate the maximum and minimum sentence they would impose as part of the bargain. In a survey, 59% of judges admitted that they concluded more than half of their negotiations “informally” (i.e., without recording the negotiations in the trial protocol).<sup>28</sup> A large portion of participating judges also stated that they provide defendants not only with a possible sentencing range, as required by law, but with the actual sentence they would receive if they confessed, and at times also the sentence they could expect to receive after a contested trial.<sup>29</sup>

### B. *Plea Bargaining in Adversarial Legal System*

There is no argument that in the last two decades plea bargaining has quickly grown to become the dominant institution of criminal procedure in adversarial systems.<sup>30</sup> Additionally, there is a common perception in adversarial systems that judges do not or should not play a role in criminal plea bargaining between prosecution and defence counsel. In many common law countries, however, judicial participation is allowed and even encouraged by statute or by case law. To illustrate this phenomenon, in this part I outline the current plea bargaining practices in England and Wales

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<sup>26</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 28, 1997, Case No. 4 StR 240/97, 43 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 195, para. 8, <http://www.hrrstrafrecht.de/hrr/4/97/4-240-97.php?referer=db> (Ger.).

<sup>27</sup> Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 93 (2014).

<sup>28</sup> Weigend & Turner, *supra* note 30, at 92.

<sup>29</sup> Weigend & Turner, *supra* note 30, at 93.

<sup>30</sup> Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147 (2015).

and the U.S., describing the involvement of judges in promoting and approving plea bargaining agreements.

### 1. England & Wales

In England and Wales according to the Criminal Procedure Rules, the Magistrate's court may convict a defendant based on his guilty plea if the court is persuaded that the defendant recognizes his guilt.<sup>31</sup> The Crown Court, by contrast, may convict a defendant based on his guilty plea if the defendant pleads guilty. A guilty plea based on an agreement between the prosecution and the defense is a *de facto* plea bargain. Discussions with the defense are conducted by the Crown Prosecution Service ("CPS")<sup>32</sup> or a barrister representing it.<sup>33</sup> But any agreement to accept a plea for a lesser charge cannot provide certainty regarding the sentence that is likely to be imposed.<sup>34</sup> Furthermore, judges have the power to disallow a plea of guilt that is not compatible with the alleged facts.<sup>35</sup>

In serious fraud cases, to encourage plea negotiations to take place earlier, the Attorney General issued guidelines for a formal framework that facilitates such negotiations.<sup>36</sup> After agreement has been reached about the plea, discussion about the sentence follows and a joint submission is presented to the court.<sup>37</sup> The court has absolute discretion whether or not to sentence in accordance with the joint submission.<sup>38</sup>

The procedure allowing judges to promote plea bargaining agreements is the Goodyear Hearing, under which the Crown court judge may indicate the sentence the defendant can expect if

<sup>31</sup> Criminal Procedure Rules 2010, part 37, § 37.7 (Eng.).

<sup>32</sup> *The Code for Crown Prosecutors*, CPS (Oct. 26, 2018), <http://www.cps.gov.uk/publications/docs/code2010english.pdf>.

<sup>33</sup> EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Marty & John R. Spencer eds., Cambridge Univ. Press 2002).

<sup>34</sup> John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 L. & SOC'Y REV. 287, 288 (1978).

<sup>35</sup> GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM: 2012–2013* 422 (13th ed. 2012).

<sup>36</sup> OFFICE OF FAIR TRADING, FRAUD REVIEW, FINAL REPORT 242–43 (2006), <http://north.eastfraudforum.co.uk/wp-content/uploads/2013/10/fraudreview.pdf> [<https://perma.cc/26KZ-Z4EF>].

<sup>37</sup> See ATTORNEY GEN.'S OFFICE, ATTORNEY GENERAL'S GUIDELINES ON PLEA DISCUSSIONS IN CASES OF SERIOUS OR COMPLEX FRAUD ¶ D9 (2009), <https://www.gov.uk/guidance/pleadiscussions-in-cases-of-serious-or-complex-fraud-8> [<https://perma.cc/S455-JKBJ>].

<sup>38</sup> See *id.* ¶ D10.



he pleads guilty.<sup>39</sup> The request, which can be made at any stage of the criminal proceeding, must come from the defense, and the basis of the plea must be accepted by both the prosecution and the defense before the judge provides an indication about the maximum expected sentence if a guilty plea is entered.<sup>40</sup> The court has the discretion to refuse or to delay giving such an indication.<sup>41</sup> Once it is given, however, it is binding on any judge who tries the case.<sup>42</sup> In *McKinnon v. United States*, the judgment handed down by the House of Lords suggests that involvement of the judge is acceptable practice, and that “Goodyear goes further than would be permitted in the United States by allowing the judge in certain circumstances to indicate what sentence he would pass.”<sup>43</sup>

Reports indicate that the vast majority of criminal cases in at least some of the courts in England and Wales are resolved by plea bargaining,<sup>44</sup> and it has been estimated that in recent years 70% of all Crown cases are resolved by plea bargaining.<sup>45</sup> Although there is no empirical evidence to prove it, recent developments in plea bargaining practices in England and Wales appear to cause judges to intervene proactively in the management of criminal cases, before and during trial, to encourage agreement where possible and to promote plea bargaining.<sup>46</sup>

## 2. U.S.

In the U.S., plea bargaining practices differ from state to state, depending on state law, the number and type of the charges, etc. Therefore, I begin by focusing on the practices and rules governing federal plea bargaining. Over the years, the Supreme Court has affirmed the constitutionality of plea bargaining.<sup>47</sup> Since 1974, the

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<sup>39</sup> *R v. Goodyear* [2005] EWCA (Crim) 888 [56]–[57] (Eng.).

<sup>40</sup> *See id.* at 51.

<sup>41</sup> *See id.* at 54.

<sup>42</sup> *See id.* at 61.

<sup>43</sup> *McKinnon v. United States and Another* [2008] UKHL 59, [2008] 1 WLR 1739, [2008] 4 All ER 1012, [2008] UKHRR 1103 (Eng.).

<sup>44</sup> MINISTRY OF JUSTICE, CRIMINAL JUSTICE STATISTICS 2013: ENGLAND AND WALES 13 (2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/312021/criminal-justice-statistics2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312021/criminal-justice-statistics2013.pdf) [<https://perma.cc/6MP7-KQ8Y>].

<sup>45</sup> MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2011, at 9 (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217494/judicial-court-stats2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats2011.pdf) [<https://perma.cc/2N45-T6A5>].

<sup>46</sup> Jenny McEwan, *From Adversarialism to Managerialism: Criminal Justice in Transition*, 31 LEGAL STUD. 519, 519–46 (2011).

<sup>47</sup> *United States v. Jackson*, 390 U.S. 570 (1968); *Brady v. United States*, 397 U.S. 742 (1970); *Santobello v. New York*, 404 U.S. 260 (1971).

rules of plea bargaining have been prescribed by the Federal Rules of Criminal Procedure.<sup>48</sup> In 1987, new provisions for plea bargaining have been issued by the United States Sentencing Commission (“USSC”) in the Federal Sentencing Guidelines Manual.<sup>49</sup>

Plea bargaining can take place any time before the beginning of a trial. It can involve negotiations on any aspect of the case, including what charges will be brought, what facts will be included in the agreement, and what sentence will be requested. All negotiations take place directly between the parties, without any mediator, because there is an absolute prohibition against all forms of judicial participation or interference with the negotiation process.<sup>50</sup> Rule 11 of the Federal Rules of Criminal Procedure, which governs all federal plea proceedings, prohibits the involvement of judges in plea proceedings.<sup>51</sup>

Indeed, the judge’s role in the federal court process is limited. But the judge may decide how much time to give the parties to negotiate, and whether to accept or reject the plea agreement. The decision as to how much time to give the parties to negotiate almost always makes a significant difference in the outcome. A guilty plea should be made only after sufficient knowledge has accumulated to make an informed decision. Such knowledge can be obtained only through a defense investigation, a review of the discovery material disclosed by the prosecution, or through information obtained by court order. All three require time.<sup>52</sup>

An overwhelming number of criminal prosecutions in the U.S. are resolved by guilty pleas. Plea bargaining takes place in the vast majority of those cases, not only in federal courts (97%) but in state courts as well (94%).<sup>53</sup>

Similarly to federal courts, state courts also hold that judges should not play a role in the criminal plea bargaining discussions between prosecutors and defense counsel. But in many state jurisdictions, judicial participation is allowed and even encouraged by statute or by case law.<sup>54</sup>

<sup>48</sup> FED. R. CRIM. P. 11.

<sup>49</sup> U.S. SENTENCING COMMISSION, 2009 FEDERAL SENTENCING GUIDELINES MANUAL (2009), <https://www.ussc.gov/guidelines/archive/2009-federal-sentencing-guidelines-manual>.

<sup>50</sup> *United States v. Hemphill*, 748 F.3d 666, 672 (5th Cir. 2014); *United States v. Pena*, 720 F.3d 561, 570 (5th Cir. 2013); *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993).

<sup>51</sup> FED. R. CRIM. P. 11.

<sup>52</sup> FED. R. CRIM. P. 11(b)(1)–(3).

<sup>53</sup> Brook et al., *supra* note 33, at 1169.

<sup>54</sup> Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015).

For example, in New York, the practice is flexible and leaves the procedure to the discretion of the individual judge, who may follow a preferred uniform practice or change it in accordance with the particular circumstances of the case.<sup>55</sup> In Idaho, the court may participate in any such discussion.<sup>56</sup> In North Carolina, the trial judge may participate in the discussions.<sup>57</sup> In Massachusetts, the court may require the conference to be held in court, under the supervision of a judge or clerk-magistrate.<sup>58</sup> In Oregon, at the request of both the prosecution and the defense, or at the direction of the presiding judge, a judge may participate in plea negotiations.<sup>59</sup> In Vermont, the judge has the discretion to decide whether or not to participate in the discussions, based on the circumstances of the case.<sup>60</sup>

Although the U.S. legal system is adversarial, and according to common law the court should not participate in plea bargaining negotiations, it is clear that in many states the judge can choose to participate in the discussion if in his opinion the circumstances of the case warrant it. In many states, the practice is that in difficult criminal cases, when the parties are deadlocked, the judge may forge a compromise.

### III. JCR THROUGH PLEA BARGAINING

#### A. *Convergence Theory*

The above review shows that there is movement of the criminal justice system in common law countries away from the adversarial tradition, and in civil law countries there is movement away from the inquisitorial tradition. This development, which to some degree has been recognized in the academic literature, has several implications.<sup>61</sup> Some writers believe that adversarialism or inquisitorialism are empty labels. They argue that the dichotomy between adversarial and inquisitorial procedures is inaccurate, primarily because no individual jurisdiction displays precisely all

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<sup>55</sup> N.Y. CRIM. PROC. LAW § 220.50 prac. Cmt.

<sup>56</sup> IDAHO CRIM. R. 11(f)(1).

<sup>57</sup> N.C. GEN. STAT. ANN. § 15A-1021(a) (West 2013).

<sup>58</sup> MASS. R. CRIM. P. 11(a).

<sup>59</sup> OR. REV. STAT. ANN. § 135.432(1)(b).

<sup>60</sup> VT. R. CRIM. P. 11(e)(1).

<sup>61</sup> McEwan, *supra* note 46, at 520.

the features associated with one or the other system,<sup>62</sup> but incorporates various elements from both. In this sense, all systems are hybrids.

In inquisitorial systems, however, there is an ideological objection to the notion that the outcome of a criminal trial is a matter for the parties to decide, to their own satisfaction. Similarly, in adversarial systems, there is an ideological objection to the notion that the outcome of a criminal trial is achieved by a plea bargain with considerable interference from the court. The inquisitorial-adversarial dichotomy seems to reflect certain deeply rooted views about the proper function of criminal proceedings.

According to the convergence theory, the merger between the two systems represents a movement toward civilian-style proceedings, which coincides with increased state activism.<sup>63</sup> The notion of convergence emerged in light of attempts by several traditionally inquisitorial jurisdictions in Europe to incorporate traditionally adversarial elements into their criminal justice systems.<sup>64</sup>

Damaška argued that the more activist governments are, ideologically driven to intervene in the lives of their citizens, the more likely the state is to play a key role in the criminal justice process. In contrast, re-activist governments, which favor self-management, prefer disconnected agencies, such as prosecutors and courts, to be largely autonomous. The shift from one system to the other reflects a changing perception of the proper role of government.<sup>65</sup>

In adversarial systems, proceedings involve a dispute between two sides. At least in theory, they should be in a position of equality before a judge, whose role is passive and neutral. Fairness and equity are achieved by granting the parties control of their own case. Because the process is one of conflict resolution, the parties may strike deals without much interference from the court. In contrast, inquisitorial systems, where facts are adduced exclusively by agents of the state, seek to ensure fairness and equality through involvement designed to provide supervision and review of each layer of the system by the one above it.<sup>66</sup>

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<sup>62</sup> INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW VOLUME X (Mauro Cappelletti & B. Kaplan eds., 1995).

<sup>63</sup> John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737 (2005).

<sup>64</sup> See generally SARAH J. SUMMERS, *FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS* (2007).

<sup>65</sup> See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

<sup>66</sup> MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 11 (1997).

According to the convergence theory, the phenomenon can be explained as follows. Many countries dislike court trials because results are relatively unpredictable. They prefer that the parties do the work, and also encourage them to do so. The result is a conflict-solving model of criminal justice, promoted by representatives of the system. In such a climate, both adversarial and inquisitorial values are challenged, because criminal and civil litigation may be perceived as a local dispute rather than the essential protection of the rights and freedoms of every member of society. In both legal systems, state activism appears to have created a new role for the judge as a conflict resolution manager.

### B. *Managerialist Theory*

Civil law and common law countries share a common problem, irrespective of their procedural and political structures. Many countries lack the resources to deal with the number of cases reaching their criminal justice systems. Although these countries are reforming their criminal justice systems in fundamental ways, the direction is not toward either the adversarial or inquisitorial system, but toward efficiency.

The managerialist system of criminal justice has evolved through the combined effects of a series of independent *ad hoc* measures that have fundamentally changed the pre-trial processes and trial procedures.<sup>67</sup> One of them is the emergence of the new interventionist judge, a move toward a managerial model in which the court intervenes actively to promote efficiency, but is not responsible for seeking out the truth. The phenomenon of the judge's involvement in various activities aimed at promoting plea bargaining is not a move toward a middle ground between the two types of systems, but rather toward a new model that shares elements of both.

In the managerial model, efficiency and agility have become particularly important goals. With the power shifting from the parties to the judges, the latter may force collaboration to ensure that cases are processed as quickly as possible.<sup>68</sup> It is less problematic to switch from adversarial or inquisitorial to managerial proce-

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<sup>67</sup> Stewart Field & Philip A. Thomas, *Justice and Efficiency? The Royal Commission on Criminal Justice*, 21 J.L. & Soc'y 1 (1994).

<sup>68</sup> Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005).

dures than it is to introduce inquisitorial arrangements in an adversarial system or *vice versa*.

Many countries are reconsidering the features of their adversarial or inquisitorial legacy with a view toward efficiency and reduced cost.<sup>69</sup> Conflict resolution is a feature of adversarialism. The plea bargain does not reflect the defendant's right to a fair trial but the parties' control over the procedure. Managerialism differs from adversarialism in that it dislikes such control by the parties over the criminal process. In the transition from adversarialism to managerialism, power is transferred to the court. Nevertheless, the result is incompatible with inquisitorialism because the contest between two competing parties remains.<sup>70</sup>

For example, in England and Wales, the early plea is widely regarded as the salvation of a system under pressure. It is becoming clear that the earlier pleas are entered, the more courts reward defendants. The criminal justice system must do all it can to encourage those who are guilty to plead at the earliest opportunity, so much so that in the Goodyear Hearing power is transferred to the court, allowing judges to promote plea bargaining agreements even by applying pressure on the defendants.

Similarly, although the plea bargain is an adversarial expression of the parties' control over the procedure, some inquisitorial systems that embrace expediency at the expense of some of their traditional characteristics have adopted the procedure. In these countries, control through management is primarily a response to economic pressures. For example, the German version of plea bargaining allows discussions between the parties to expedite the proceedings. Whether because of its inquisitorial tradition or because of the transition to managerialism, the law in Germany assigns the court a key role in plea bargaining by allowing judges not only to initiate negotiations, but also to indicate the maximum and minimum sentence they would impose as part of the bargain.<sup>71</sup>

Either way, the result is quite the same. In common law countries, such as England and Wales, and in civil law countries, such as Germany, the dominant criminal law procedure is plea bargaining, in which negotiations are conducted between the parties. Contrary to the rules in several legal systems in which judges are generally

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<sup>69</sup> McEwan, *supra* note 46, at 520.

<sup>70</sup> Langer, *supra* note 68, at 836.

<sup>71</sup> Maike Frommann, *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?*, 5 HANSE L. REV. 197 (2009).

prohibited from participating in plea negotiations, in both countries, judges are allowed to intervene in the negotiations. As a result, in many plea bargain proceedings, the role of a judge is not adversarial or inquisitorial, but rather that of a criminal conflict resolution manager.

### C. *The Golden Mean Theory*

Managerial judging is a recent innovation in criminal law. Judicial participation in plea negotiations includes a wide array of new procedures that routinely involve judges in the settlement of criminal cases. What used to be informal interactions have gradually transformed into highly structured best practices for docket management in both adversarial and inquisitorial systems.<sup>72</sup> What used to be informal interactions have gradually transformed into highly structured best practices for docket management in both adversarial and inquisitorial systems.

I suggest that this development is not merely the result of economic and political considerations, but it is rather the product of trial and error, as both legal systems search for the golden mean. In criminal law, the golden mean is the desirable middle between two extremes: justice without efficiency and efficiency without justice. A frequent justification for plea bargaining is procedural justice that can be achieved in meaningful ways without undermining the basic goal of efficient case processing.<sup>73</sup>

The prevailing perception of the classical plea bargaining model is that the parties forecast the expected sentence following a trial, determine the probability of acquittal, and based on the two propose a proportional discount.<sup>74</sup> This perception, however, ignores structural distortions that affect bargaining decisions, including attorney competence, compensation, workloads, resources, and psychological biases such as overconfidence, denial, and risk preferences.<sup>75</sup>

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<sup>72</sup> Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

<sup>73</sup> Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).

<sup>74</sup> Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial"*, 52 CRIMINOLOGY 723, 726–31 (2014).

<sup>75</sup> Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

Furthermore, plea bargaining revolutionized criminal law by eliminating courtroom trials and making the prosecutor a dominant figure in the criminal justice process.<sup>76</sup> Many studies have pointed out the problematic nature of the prosecutor's extensive power, showing that prosecutorial passion reflects subjective determinations, exceeding the strength of evidence and disregarding the likely post-conviction sentence.<sup>77</sup> Prosecutors cannot entirely separate guilty defendants from innocent ones through the plea bargaining process.<sup>78</sup> They rely on prior arrest as a default factor when making plea offer determinations,<sup>79</sup> and use detention to encourage or coerce guilty pleas by the accused (defendants who are not held in pre-trial custody are much more likely to have all charges withdrawn by the prosecution).<sup>80</sup> Therefore, one of the main criticisms against plea bargaining is that despite its effectiveness, prosecutors can dictate the terms, so that litigants in criminal cases end up bargaining not in the shadow of the law but in the shadow of prosecutors' preferences, budget constraints, and political inclinations.<sup>81</sup>

In adversarial systems, prosecutors' discretion and their overwhelming dominance in plea bargaining have long been shown to be inconsistent with the principles of fairness, equity, and accountability on which the system of justice is based. Scholars have suggested the possibility of reforming the adversarial system based on the experience of civil law countries, especially the principle of compulsory prosecution and the rigorous control that civil law countries exercise over prosecutorial discretion.<sup>82</sup> To prevent factual, moral, and legal inaccuracies in plea bargaining, some have proposed a combination of quasi-inquisitorial safeguards, a more

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<sup>76</sup> Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 *STAN. L. REV.* 1399 (2003).

<sup>77</sup> Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 *MARQ. L. REV.* 183 (2007).

<sup>78</sup> Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 *J.L. ECON. & ORG.* 149 (2001).

<sup>79</sup> Besiki Luka Kutateladze & Victoria Z. Lawson, *How Bad Arrests Lead to Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining*, 37 *CARDOZO L. REV.* 973 (2016).

<sup>80</sup> Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 *BRITISH J. CRIMINOLOGY* 186 (2002).

<sup>81</sup> Stuntz, *supra* note 4, at 2549.

<sup>82</sup> Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 *INT'L CRIM. JUST. REV.* 22 (2002).



vigorous criminal defense, and a better normative evaluation of charges, pleas, and sentences.<sup>83</sup>

At the same time, inquisitorial systems have undergone significant changes in the past 30 years. Plea bargaining procedures in Germany, Italy, Argentina, and France have become so common that, according to several commentators, a substantial number of legal systems may gradually come to resemble or mimic the American legal system and become adversarial.<sup>84</sup> Moreover, plea bargaining adopted some of the practices of inquisitorial *ad hoc* tribunals, including a model for guilty pleas that closely mirrors common law systems. This has led to significant gains in the efficiency of tribunals, but in some ways it has also undermined their truth-seeking function and their efforts to provide justice for victims.<sup>85</sup>

In the search for the perfect model, common problems arise in both systems. First, no society can allow due process rights to be diminished or lost, and fair trial rights must be respected, whether or not countries depart from their legal tradition. Second, adherence to due process may be expensive and slow down the system. Finally, neither the adversarial nor the inquisitorial system is well equipped to take into account the interests of non-parties, such as victims and potential future victims.

To solve these problems, both legal systems have spawned judicial conflict resolution by plea bargaining. In the inquisitorial process, which is less efficient because it requires a trial in every case and permits a large number of appeals, plea bargaining can prevent collapse. Consequently, the inquisitorial system no longer prohibits plea bargaining and has adopted the adversarial practice of giving dispositive effect to whatever the parties decided concerning guilt and disposition, in agreements reached in the prosecutor's offices rather than in open court.<sup>86</sup> For the inquisitorial system, therefore, the golden mean amounts to a transfer of power to the parties, balanced by the judge, who has broad discretion to determine the sentence.

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<sup>83</sup> Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 *Wm. & Mary L. Rev.* 1055 (2016).

<sup>84</sup> Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT'L L.J.* 1 (2004).

<sup>85</sup> Kyle McCleery, *Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals: Lessons from Civil Law Systems*, 14 *J. INT'L CRIM. JUST.* 1099 (2016).

<sup>86</sup> Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism*, 57 *Wm. & Mary L. Rev.* 1505 (2015).

By contrast, the adversarial process allows judicial participation and even encourages criminal plea bargaining discussions between prosecutors and the defense counsel. Studies have shown that the potential benefits of a regulated involvement on the part of the judge include more informed sentencing as well as less coercion and uncertainty for defendants facing early plea offers.<sup>87</sup> The judges' involvement in the plea process also allows them to correct errors by the parties and to produce better outcomes than the parties would have on their own.<sup>88</sup> For the adversarial system, therefore, the golden mean amounts to a transfer of power to the court, in a move toward the case management model that preserves due process.

In both systems, under the golden mean, judges continue to wield substantial power. But from a general perspective, the role of judges in processing criminal legal conflicts has changed dramatically. In the present-day plea-bargaining reality, judges have not only the authority to approve plea-bargain offers but also to become involved in plea negotiations as conflict resolution managers.

#### IV. CONCLUSION

System-wide best practices have produced a range of approaches to cope with docket pressure, improve efficiency, and increase certainty in outcomes, all the while protecting the right to due process. In the last decade, these approaches have driven many countries to abandoning their traditionally passive approach to judicial participation in plea bargaining. As a result, new procedures have emerged, including problem-solving sessions, complete with risk assessment and real-time information on treatment options; settlement courts located in the jailhouse; settlement dockets employing retired judges; felony mediation involving both the defendant and the victims; felony court judges serving as lower court judges; and many more.<sup>89</sup>

Plea bargaining is a mechanism of judicial conflict resolution in criminal law. If the adversarial and inquisitorial systems were blended through judicial monitoring, it would improve the chances of the two evolving into a procedurally coherent mechanism for

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<sup>87</sup> King & Wright, *supra* note 72, at 397.

<sup>88</sup> Darryl K. Brown, *What's the Matter with Kansas—And Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 *TEX. L. REV.* 47 (2017).

<sup>89</sup> King & Wright, *supra* note 72, at 397.

achieving substantively accurate results.<sup>90</sup> But the transfer of power to the court represents a move toward a conflict management model that preserves due process only for as long as judges remain informed and objective.<sup>91</sup> In both inquisitorial and adversarial systems, this requires judges to apply unique skills and methods, borrowed from the field of conflict resolution,<sup>92</sup> to create a golden mean for criminal conflict resolution.

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<sup>90</sup> Slobogin, *supra* note 86, at 1505.

<sup>91</sup> Andrew Hall, *Where Do the Advocates Stand When the Goal Posts are Moved?*, 14 INT'L J. EVIDENCE & PROOF 107, 107–18 (2010).

<sup>92</sup> Michal Alberstein & Nourit Zimmerman, *Constructive Plea Bargaining: Towards Judicial Conflict Resolution*, 32 OHIO ST. J. ON DISP. RESOL. 279 (2017).

