Fall 1997

An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System

Rachel A. Van Cleave
Golden Gate University School of Law, rvancleave@ggu.edu

Follow this and additional works at: http://digitalcommons.law.ggu.edu/pubs
Part of the Comparative and Foreign Law Commons, Criminal Law Commons, International Law Commons, and the Jurisprudence Commons

Recommended Citation
11 Emory Int'l L. Rev. 419 (1997)
AN OFFER YOU CAN'T REFUSE? PUNISHMENT WITHOUT TRIAL IN ITALY AND THE UNITED STATES: THE SEARCH FOR TRUTH AND AN EFFICIENT CRIMINAL JUSTICE SYSTEM

by

Rachel A. Van Cleave

INTRODUCTION

With the jury's verdict in the O.J. Simpson civil case, questions going to the heart of our criminal justice system have surfaced. Primarily, such questions ask whether the goal of our system is to discover the truth of a particular crime, or rather to achieve some form of justice, regardless of whether the truth necessarily emerges. Where O.J. Simpson was acquitted by a criminal jury, but then found civilly liable for the deaths of Nicole Brown Simpson and Ron Goldman, it appears to many that the civil trial was the real search for the truth. Many commentators question the fairness of a system which requires a criminal defendant who has been acquitted to stand trial again...
in a civil case or a federal civil rights case. Continental observers are particularly puzzled by these outcomes.

Another recent example of this tension between truth and fairness is the attempt to reopen the case against James Earl Ray who pled guilty to the murder of Martin Luther King, Jr. twenty-eight years ago. Significantly, the King family has supported Ray's request for a trial in an effort to determine the truth about King's assassination. Ray's request adds to the mix of tensions regarding the need for plea bargains to further efficiency goals, even though the ability to discover the truth may be compromised.

With such soul-searching occurring in the United States over the purposes of the criminal justice system, Italy's recent adoption of an overhauled code of criminal procedure provides a unique opportunity for evaluating the tensions within the United States system. The 1989 Italian Code of Criminal Procedure imported certain aspects of our criminal justice system into Italy's civil law tradition. This Article focuses on the trial-avoid-

---

4 Yale Kamisar, Call it Double Jeopardy, N.Y. TIMES, Feb. 14, 1997, at A37 (citing the O.J. Simpson cases as well as the examples of Lemrick Nelson Jr., who had been acquitted of state criminal charges but then later convicted in federal court for violating Yankel Rosenbaum's civil rights, and the Los Angeles police officers, Stacey Koons and Laurence Powell, who were also acquitted of state criminal charges, but were found guilty in federal court of violating Rodney King's civil rights).

5 Robert Siegel, All Things Considered (National Public Radio broadcast, Feb. 5, 1997, Transcript No. 97020504-212) ["NPR All Things Considered"] (interview with George Fletcher, Professor of Law, Columbia University) (noting that in civil law countries criminal and civil cases are joined and tried together, the standard of proof is lower (preponderance of the evidence), and the same for each. Also noting the prosecutor in a civil law jurisdiction may appeal a criminal verdict of not guilty).

6 On February 20, 1997, a Shelby County Circuit Judge in Tennessee determined that there was reason to grant a hearing on the ballistics test of the rifle. See Judge says Technology Warrants Testing of Rifle in King Murder, THE COM. APPEAL, Feb. 21, 1997, at A1.


8 CODICE DI PROCEDURA PENALE [C.P.P.] (Italy). Enacted on September 22, 1988, by Presidential Decree number 447, the code did not go into effect until October 25, 1989. Throughout this article it is referred to by 1989, the year it went into effect.
ance mechanisms which have been dubbed plea bargaining. Examining how a civil law country has "translated" trial-avoidance mechanisms, thought to be characteristic of the United States adversarial model, can further general understanding of our own system, and specific understanding of the practice of plea bargaining. Before considering these devices in detail, a general description of the new code is necessary.

Not long after the adoption of its post-World War II Constitution, Italy became aware of the conflicts between this document and the 1930 Code of Criminal Procedure (Codice Rocco). The Rocco Code was a product of fascism and reflective of a traditionally inquisitorial criminal justice system. In addition, the 1930 Code did not include methods for protecting the guarantees of individual rights set out in the new constitution. Efforts to reform the Rocco Code began as early as 1965, but were not successful until the adoption of the 1989 Code of Criminal Procedure. The principal goal of the 1989 Code was to bring Italy's criminal justice system in line with "liberal democratic political structures." In order to fulfill this goal, Italy sought to adopt aspects of an "accusatorial" criminal justice system found in common law countries such as the United States. Many of the changes focused on opening up the trial stage, thus eliminating elements of secrecy characteristic of inquisitorial systems. For

9 COSTITUZIONE [Constitution] [COST. (1948)] (Italy).
11 Mirjan Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506, 556 (1973) (describing secrecy and torture or coercion as characteristics of "criminal proceedings which prevailed in continental European countries from the thirteenth until the first half of the nineteenth century").
example, the new Italian Code adopted the principles of “orality”\(^{14}\) (live testimony) and “publicity”\(^{15}\) of criminal trials, judicial impartiality,\(^{16}\) and the techniques of direct and cross-examination of witnesses by the parties.\(^{17}\) In addition, the new code imposed greater restrictions on the admission of evidence from the prosecutor's dossier at trial.\(^{18}\) Each of these changes regarding the trial stage have made the trial itself more complicated and time-consuming, thus creating the risk of a tremendous backlog of criminal cases.

Along with changes in the trial, the new code effected the significant structural change of abolishing the giudice istruttore (investigative judge)\(^{19}\) who previously was responsible for investigating the crime, evaluating the evidence, and rendering a decision. The 1989 Code instead divides up these functions, allocating them to different players and to different phases of the criminal process,\(^{20}\) thus altering the roles of the prosecutors and defense attorneys. These structural changes also threatened to slow down the processing of cases. Recognizing these likely effects, the delegating legislation included alternative methods for disposing of cases, to streamline the system, unclog the courts, and ensure a speedy disposition of cases.\(^{21}\) However, the devices

---

\(^{14}\) Id., art. 2, directive 2 (adoption of the oral method).

\(^{15}\) C.P.P. art. 471 (providing that trials shall be public; if not, they are null).

\(^{16}\) C.P.P. arts. 37-44 (providing strict recusal rules to ensure the impartiality of the judge).

\(^{17}\) C.P.P. art. 498 (providing for direct examination of a witness by the party who called the witness, followed by cross-examination by the other party).

\(^{18}\) C.P.P. art. 431 (listing the evidence from the prosecutor's file which will accompanying the judge's decision to bind the case over for trial) & art. 433 (stating that any other evidence in the prosecutor's dossier is to be returned to the prosecutor).

\(^{19}\) C.P.P. arts. 347-357 (listing the investigative activities of the judicial police), and arts. 358-378 (listing the investigative activities of the prosecutor). There is no longer any mention of the investigative judge. However, the 1989 Code created the judge presiding over the preliminary investigations (giudice per le indagini preliminari) who supervises the investigations, decides the appropriateness of preventative detention of the defendant before trial, and conducts any preliminary hearings.


\(^{21}\) 81 LEGGE DELEGA, Feb. 16, 1987, art. 2, directives 43 & 44 (Italy) (providing for “direct trial” and “immediate trial,” respectively, skipping the preliminary hearing, pro-
adopted for disposing of criminal cases without trial have collided with the deeply rooted goal of ascertaining the truth in a criminal case.

This Article compares the steps taken by Italy and the United States to reconcile the need for an efficient criminal justice system on the one hand, and the desire to achieve justice or discover the truth on the other. Plea bargaining in the United States has a significant history and has generated a substantial amount of literature critical of the device as violative of a criminal defendant's constitutional rights, particularly the right to be tried by a jury of one's peers. In addition, scholars have criticized the distortive effect of plea bargaining on the roles of the prosecutor, judge, and defense counsel. Similarly, the tre-
al-avoidance mechanisms adopted in Italy only eight years ago already have raised a number of constitutional concerns over the powers, roles, and authorities of the players in the criminal justice system. More recently, in the United States, plea bargaining has raised diametric concerns that the criminal justice system is too soft on criminals by allowing those who admit guilt to serve a lighter sentence than what they might otherwise deserve. These concerns have resulted in efforts to limit the discretion of the prosecutor to engage in plea bargaining. In contrast, Italy is currently examining ways to broaden the application of trial-avoidance procedures. Analysis of these trial-avoidance measures in the United States and in Italy reveals a number of pendulum swings in both countries with respect to attitudes concerning the purposes of a criminal justice system, and the beliefs regarding the appropriate roles of the players involved. As each country begins to move away from its traditional perspective on criminal justice—Italy toward a greater use of alternatives to trial and more dispersion of powers among criminal justice play-

L.J. 1179 (1975).

See, e.g., PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 491-92 (5th ed. 1995) (discussing the criticisms of unduly lenient sentences and of inaccurate conviction records where the prosecutor has engaged in “charge bargaining,” both of which “breed cynicism about the degree to which our legal system cares about truth”); Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 HASTINGS L.J. 957 (1989); Misner, supra note 25, at 752 (noting that plea bargaining “has now come under attack from those that believe it has resulted in insufficient punishment for offenders”).


See Disegno di legge, July 14, 1994, n. 440, art. 13 (Italy) (legislation proposed in 1994, but not enacted, which sought to eliminate the need for prosecutorial consent to resolve cases by one of the trial-avoidance procedures).
ers, and the United States toward greater consolidation of powers in the prosecutor—each must grapple with how to resolve the resulting tensions and conflicts among the respective roles of the participants in the system.

This Article first describes how accusatory and nonaccusatory systems define truth, and how the structures of their systems reflect these different definitions of truth. Part II traces trial-avoidance mechanisms in Italy, both under the 1989 Code, as well as a limited first step adopted in 1981. This part discusses the tensions these changes created between judges and prosecutors in Italy, and provides an in-depth examination of the tortuous path by which the Italian Constitutional Court has attempted to resolve these conflicts. Part III discusses the extent to which Italy's trial-avoidance devices mirror the practice of plea bargaining in the United States, the extent to which plea bargaining is actually characteristic of an accusatorial system, and similar types of tensions between judges and prosecutors that exist in the United States. In addition, this part examines how recent trends in the United States, such as so-called "Three Strikes" laws and the Federal Sentencing Guidelines, have affected plea bargaining in the United States, and how these developments counsel that Italy proceed with caution when considering proposals to broaden their trial-avoidance mechanisms.

I. THE SEARCH FOR TRUTH

A comparison of the search for truth in accusatory and inquisitorial criminal justice systems initially requires a distinction between two types of "truths"—material truth and formal truth. "Truth" in an inquisitorial jurisdiction assumes the existence of a "material and absolute" truth, "external to and independent of the trial." This goal of ascertaining "material or substantive truth...

truth" is in contrast to the “procedural or formal truth” pursued in accusatory systems. Procedural truth is the result achieved by following formal rules designed to ensure that the process is fair, and that individual rights have been protected. Accusatory systems tend to eschew the feasibility of ascertaining the material truth of a case and instead settle for the perhaps more realistic goal of achieving “procedural or formal truth.” The structural differences between accusatory and inquisitorial systems reflect this distinction in their philosophies regarding criminal justice systems.32

An accusatorial system places central importance on the trial as the means by which the parties present and debate the evidence which they have each discovered. The factfinder, usually a jury, has the responsibility of evaluating the evidence and reaching a verdict. Correspondingly, the ideal role of the trial judge is non-active and impartial. Along with entrusting such a high degree of control over the trial to the parties, accusatorial systems include complex rules governing procedural and evidentiary aspects of the trial, such as placing a high burden on the prosecutor to prove guilt beyond a reasonable doubt,33 and the intricate web of rules surrounding the exclusionary rule.34 Participants and critics alike acknowledge that these technical rules actually may impede the factfinder’s ability to ascertain substantive truth in any given case.35 However, this division of responsibility and the formal rules reflect the democratic characteristic of establishing checks on the actions of the participants. One explanation or justification for this system is that where the parties are equally armed and have the opportunity to present

34 Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to the states by incorporating it through the due process clause of the Fourteenth Amendment); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994).
35 Damaska, supra note 11, at 506, 579-80; see also Rudolf B. Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, 26 Buff. L. Rev. 361, 378 (1976) (arguing that the rules in the United States encourage defendants to remain silent, thus depriving the factfinder of evidence from the accused).
evidence and arguments, the substantive truth will emerge as a result of this dialectic.36 A more realistic explanation may be that the complex rules governing trials reflect a recognition of the near impossibility of determining the substantive truth. Therefore, accusatorial systems place their faith in the adherence by the parties and judges to technical rules to protect the fairness of the process and the guarantees of the constitution, thus achieving justice, though perhaps not substantive truth.37

The deference accorded by appellate courts to findings at the trial level is consistent with the search for formal or procedural truth in an accusatorial system. In part, such deference reflects the notion that factual findings include aspects which an appellate court is not equipped to evaluate based on the “cold record.”38 For example, the factfinders are in the best position to evaluate the live presentation of evidence, particularly witnesses, and consider demeanor and other characteristics not present in the transcript of the trial. However, this appellate deference also reflects the accusatory goal of ensuring formal or procedural truth. As long as the reviewing court can find that the rules were adhered to, it usually will not upset the trial verdict.39

The different definition of truth in inquisitorial systems likewise is reflected in the different structure of the criminal justice system. Inquisitorial systems marginalize the importance of the trial and the dialectical debate between the parties while exalting the role of the investigative judge in researching, analyzing, and evaluating the evidence to come to a logical decision dictated by such evidence.40 Assigning such an active role to the trial judge, and collapsing most of the responsibilities into this

---

37 Damaška, supra note 11, at 580.
38 Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Prosecutorial Discretion, 64 N.C. L. REV. 993 (1986).
39 Id.
40 Damaška, supra note 11, at 582; see also Di Chiara, supra note 31, at 4.
single player, reflects the philosophy that a trained individual, the judge, can perform the mental and logical gymnastics required to discover the substantive truth. Correspondingly, the defense attorney and prosecutor have passive roles at both the trial and the investigative stages, since they are considered extraneous to the judge’s task of logical deduction.

The existence of very few evidentiary or procedural rules also reflects the inquisitorial goal of determining substantive truth. The investigative judge is required to investigate and consider all evidence necessary and relevant to determining the truth, and very few evidentiary barriers exist to impede the judge’s investigation. Moreover, the judge’s determination of guilt or innocence is not bound by a specific standard or burden of proof.

The structure and powers of appellate courts also reflect the inquisitorial goal of determining the substantive or material truth. Appellate courts are not limited to considering solely “legal” questions, but have the power to reevaluate the evidence and even consider additional evidence that was not considered by, or available to, the trial judge. Such superior review, “as a matter of course,” substantially sacrifices the independence and autonomy of the trial judge, thus furthering the goal of ascertaining the substantive truth.

Despite the differences in definitions of truth, and the structures and methods used to determine truth, accusatory and non-accusatory systems alike must confront the problems of overburdened criminal justice systems, and institute mechanisms for handling these practical problems. Both the United States and

---

41 Di Chiara, supra note 31, at 4.
42 Id. at 3; see also Eraldo Stefani, La Difesa Attiva nel Giudizio Abbreviato e nel Patteggiamento [The Active Defense Attorney in the Abbreviated Trial and in Plea Bargaining] 7 (1994).
43 Damaška, supra note 11, at 564.
44 See Fassler, supra note 12, at 268; see also NPR All Things Considered, supra note 5.
45 Mirjan Damaška, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J. 480, 525 (1974).
Italy recognize the impossibility of trying every criminal case according to the complex and time-consuming procedures which, by providing greater assurance that the criminal justice system will protect individual rights, appear to define a liberal democratic society. Thus, each country has developed mechanisms for screening out, or otherwise disposing of, cases without employing the centerpiece of the system. In the United States, nearly 90% of all criminal cases are disposed of by plea bargains, whereby the defendant admits guilt in exchange for some concession by the prosecutor such as dropping some of the counts against the defendant, reducing the charge to a less severe crime, or making a sentencing recommendation to the judge based on the defendant's acceptance of responsibility. The practice of plea bargaining runs counter to the accusatorial method of determining truth because, to a large degree, the responsibilities of investigating, charging, and sentencing are collapsed into one player, the prosecutor, reducing the checks on his or her exercise of authority. In addition, plea bargaining sacrifices rights fundamental to assuring the fairness of the accusatorial process. The devices adopted in Italy's 1989 Code of Criminal Procedure, which this article will discuss in detail, are much more limited and grant prosecutors less discretion than that conceded to prosecutors in the United States.

In developing mechanisms for making their criminal justice systems more efficient, both the United States and Italy have had to grapple with the conflicts and tensions between the search for truth or justice and the goal of efficiency.

---

46 U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAM, BUREAU OF JUSTICE STATISTICS, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 550 (1993) (stating that in 1993, 88.5% of federal convictions were a result of guilty pleas); see also Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1022 (1974) (explaining that "more than 90% of criminal cases are never tried; they are concluded by pleas of guilty ... "). These statistics do not distinguish between cases resolved solely due to defendant's admission of guilt and those resolved by such an admission in exchange for some sort of governmental concession.
II. \textit{Patteggiamento in Italy}^{47}

Prior to the statutory reforms in 1981 and 1989, the method of dealing with judicial backlog of criminal cases was for Parliament occasionally to grant amnesty to entire groups of defendants.\footnote{\textit{Patteggiamento} is the Italian word for plea bargain. 2 \textit{FRANCESCO DE FRANCHIS, DIZIONARIO GIURIDICO-ITALIANO-INGLESE} [LAW DICTIONARY-ITALIAN-ENGLISH] 1058 (1996).} The 1981 law was a first and tentative step toward a formal, statutorily governed trial-avoidance device in Italy. It added the word \textit{patteggiamento} to the vocabulary of Italian criminal attorneys, judges, and legal scholars.\footnote{William T. Pizzi & Luca Marafioti, \textit{The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation}, 17 \textit{YALE J. INT'L L.} 1, 4 (1992).}

A. A Tentative First Step in 1981

Article 77 of the 1981 law provided\footnote{Modifiche al sistema penale, Le Leggi, Nov. 24, 1981, n.689.} that, upon request of the defendant and consent of the prosecutor, the judge could decide that elements exist for applying a \textit{sanzione sostitutiva} (substituted sanction)—a form of punishment other than imprisonment—such as controlled liberty\footnote{Articles 77-80 were expressly abrogated by article 234 of the legislative decree number 271 of July 28, 1989. This legislative decree includes rules for the enactment of the new Code of Criminal Procedure, which include rules regarding the coordination of the new code with other laws and the transition from the old code to the new one. Legislative Decree, July 28, 1989, No. 271, art. 234.} or a monetary fine.\footnote{Le Leggi, Nov. 24, 1981, n.689, art. 56. Controlled liberty might be best analogized to the use of probation in the United States. The convicted person may not leave his or her \textit{comune} (community or town) of residence without authorization, and must present himself or herself at least once a day to the local public safety official.} Such alternative sentences, however, were not available for all types of crimes.\footnote{\textit{Id.}} This modification was designed to unclog the criminal courts, which were heavily burdened with petty or less serious
The defendant had until the opening of trial to request an alternative sanction, allowing the judge to dispose of such cases without a trial. In exchange for requesting a *sanzione sostitutiva* defendants received certain benefits. The defendant received a sentence less severe than incarceration. Moreover, the 1981 law provided that the court could even expunge the crime itself.

Where the judge granted the defendant’s request for *sanzione sostitutiva*, the defendant waived both a trial and the ability to appeal other than to the *Corte di Cassazione* (Court of Cassation). This very limited form of rewarding a defendant who agreed to waive his constitutional right to be tried in exchange for a less severe punishment was dubbed *patteggiamento*. Use of the term *patteggiamento* in describing these provisions of the 1981 law indicates the drafters specifically had in mind the U.S. device of plea bargaining. However, unlike plea bargaining in the United States, the 1981 law involved neither a “plea” nor a “bargain.” The 1981 law did not require the defendant to admit guilt or responsibility, nor could there be even an implicit admission of guilt where the defendant requested the alternative sanctions set out in article 77. Otherwise, the defendant’s position under the ensuing ordinary procedures might be prejudiced. Specifically, under the pre-1989 Code of Criminal Procedure, the judge was required to enter a judgment of acquittal at any stage of the proceedings where the judge believed that the defendant did not commit the crime or that the defendant was otherwise

---

55 Le Leggi, Nov. 24, 1981, n. 689, art. 77. However, if the defendant had already benefitted from this law or had prior sentences for which imprisonment was imposed, the defendant was ineligible to request *sanzione sostitutiva*. Id., art. 80.
56 Id. art. 77(3).
57 *C.L. art. 25, § 1.
59 Musso, supra note 54, at 115-16.
60 See id. at 120, 135.
61 Id. at 120.
not punishable. Were the defendant’s request for a substituted sanction to constitute a confession or an admission of guilt, the defendant would be deprived of the possibility of a subsequent judicial order of acquittal in cases where the judge had previously denied the request for a substituted sanction.

In addition, the provisions of the 1981 law involved very little actual “bargaining,” and no bargaining between the parties. Rather, the law set out the circumstances in which a criminal defendant might be rewarded for waiving the right to be presumed innocent, to present a defense, and to be tried by a judge. While the 1981 law required the prosecutor’s consent, there was no requirement that the defendant and the prosecutor come to an agreement as to the alternative sanction. Rather, use of the procedure depended entirely upon the initiative of the defendant.

Other than that stemming from the prospect of ultimately being convicted and sentenced to imprisonment, there was little pressure on the defendant to request the statutorily provided alternative sanctions. Under the terms of the statute, the prosecutor was involved only to grant or withhold consent to the defendant’s request. In addition, given the narrow confines of prosecutorial discretion in charging, a prosecutor could do little to encourage the defendant to invoke the statute. Despite the slight resemblance to plea bargaining in the United States, the 1981 law is important because it required the Italian judiciary, primarily the Constitutional Court, to begin to grapple with profound issues in reconciling the traditional philosophy of discovering truth with the goal of promoting judicial efficiency.

---

62 CODICE ROCCO art. 152, para. 2 (currently C.P.P. art. 129).
63 COST. art. 27, § 2 (stating that a defendant is not considered guilty until a judgment of conviction is final).
64 COST. art. 24, § 2 (stating that the right of defense is inviolable at every phase and stage of the proceedings).
65 COST. art. 25, § 1 (stating that no one may be denied the right to be tried by a natural and lawfully appointed judge).
In a 1984 judgment, the Italian Constitutional Court considered challenges to the 1981 law which primarily questioned the effect of the law on the roles of the judge and prosecutor. One such argument focused on the fact that article 77 of the 1981 law provided that the judge might impose alternative sanctions at the request of the defendant and with the consent of the prosecutor. Where the prosecutor refused to agree to the defendant's request, the prosecutor effectively had veto power over the judge's ability to grant the defendant's request, thus exorbitantly elevating the role of the prosecutor. This, argued the lower courts, implicated three provisions of the Italian Constitution. First, article three requires equal treatment of, or parity between, the public prosecutor and the defendant. The law's provision that the prosecutor's lack of consent required the judge to deny the request resulted in an unjustifiable disparity of treatment between the prosecutor and the defendant. Second, article 101 of the constitution provides that "[j]udges are subject only to the laws." The binding nature of the prosecutor's refusal to consent to the defendant's request for substituted sanctions made the judge subject to the prosecutor's decision, rather than to the law. This discretionary decision by the prosecutor intruded on the trial judge's autonomy. In addition, the veto power which the prosecutor had under the law arguably violated article 102 of the constitution which states that "[t]he judicial function will be exercised by regular judges . . ." because the lack of consent by the prosecutor amounts to a judicial decision. This aspect of the 1981 law required a closer look at the roles of the prosecutor

---

66 Corte costituzionale [Corte cost.], Apr. 30, 1984, n.120, 1984 Foro Italiano [Foro It.] I 1171.
67 In Italy, the jurisdiction of the Constitutional Court includes review of laws for legality. COST. art. 134, § 2. However, only lower court judges may raise constitutional questions before the Constitutional Court. While parties might suggest constitutional questions, they may not invoke the jurisdiction of the Constitutional Court on their own. See MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM 77-79 (1967).
68 “All citizens have equal social standing and are equal before the law, without distinction of sex, race, language, religion, political opinion, or social and personal conditions.” CAPPELLETTI ET AL., supra note 67, at 281 (quoting COST. art 3, § 1).
69 COST. art. 101, § 2.
70 COST. art. 102, § 1.
and the judge, a task further complicated by the fact that both prosecutors and judges are considered *magistrati* (magistrates), and thus have the same education and career paths, as well as overlapping functions.\(^{71}\)

Italy's *Corte Costituzionale* (Constitutional Court) rejected each of the arguments set out above.\(^{72}\) In upholding the challenged provisions of the 1981 law, the Constitutional Court examined the role of the prosecutor and the effect of the prosecutor's decision not to concur in the defendant's request. The court concluded that the prosecutor's decision in response to the defendant's request is not equivalent to a sentence disposing of the case.\(^{73}\) That is, the prosecutor does not usurp the judicial function of deciding the case by withholding consent. Rather, the action of the prosecutor represents a mere choice as to the procedural mechanism used to dispose of the case. Where the prosecutor consents, the prosecutor has opted to dispose of the case without a trial and subject the defendant to one of the alternative sanctions rather than imprisonment. If the prosecutor withholds consent, the case proceeds under ordinary procedures in which the defendant will have the opportunity to present arguments in his or her favor, and the judge will then reach a decision on the charges and the punishment, which could, despite the prosecutor's dissent, consist of an alternative sanction.\(^{74}\) Thus,

---

\(^{71}\) The term *magistrati* includes both judges and prosecutors. DIZIONARIO GIURIDICO-ITALIANO-INGLESE, supra note 47, at 953-954. See also COST. arts. 104-107 (regarding the formation of the Consiglio superiore della magistratura (Superior Council of Magistrates), which is responsible for the discipline of both judges and prosecutors); Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PROF. 59, 83-84 (1994).

\(^{72}\) *Corte cost.*, Apr. 30, 1984, n.120, 1984 Foro. It. I 1171.

\(^{73}\) *Id.*

\(^{74}\) The specific statutory interpretation employed by the Constitutional Court centered on article 79 of the 1981 law which stated that the judge could proceed according to the elements under article 77 at any point in the trial where the defendant has requested an alternative sanction as outlined in article 77. Article 77 speaks of a defendant's request before the opening of the trial and requires the consent of the prosecutor. In determining that this requirement of prosecutorial consent did not violate the constitution, the court looked to article 79, and concluded that the initial lack of consent by the prosecutor ultimately would not preclude the judge from imposing an alternative sentence where the defendant had made the request before trial. Furthermore, the lack of prosecutorial consent did not constitute a prosecutorial "veto" depriving the defendant of the benefits of
the prosecutor's decision to withhold consent would not deprive the defendant of the opportunity to obtain an alternative sentence upon conclusion of the ordinary proceedings. The prosecutor's lack of consent only precludes use of the procedure set out under the 1981 law of disposing of certain cases without a trial. The Constitutional Court also indicated an unwillingness to force a prosecutor to proceed with a case in a certain way by speaking of the prosecutor's prerogative as to the procedure used to dispose of the case. Certainly, this hesitation to force a procedure on a prosecutor contributed to the law's relative ineffectiveness in achieving its goal of unclogging the criminal justice system. When a judge disagrees with the prosecutor, the judge might impose the alternative sentence after the ordinary procedure had been followed, but neither the statute nor the Constitutional Court's decision permitted a judge to disregard the prosecutor's wishes and simply dispose of the case without the ordinary procedure. Nor did the law provide for trial court or appellate review of the prosecutor's refusal to consent. A convincing explanation for this reluctance to force a procedure on the prosecutor is that both prosecutors and judges are part of the judicial organ in Italy. There is no hierarchy of judges and public prosecutors. Therefore, if the prosecutor has decided that a criminal case should proceed under the ordinary procedures, this decision is to be respected as one made by an impartial and autonomous member of the judiciary. This is especially true since before the 1989 Code the functions of the prose-

75 See Musso, supra note 54, at 136.

76 No single constitutional article expressly states that judges and prosecutors are part of the judiciary. Nonetheless, Chapter IV of the constitution, entitled "The Judiciary," includes provisions regarding public prosecutors. Cost. Ch. IV. For example, article 107 outlines the disciplinary function of the Superior Council of Magistrature, and discusses both judges and prosecutors. Cost. art. 107. The chapter covering the judiciary also includes article 112 which states that "[t]he duty of prosecution in criminal proceedings pertains to the Public Prosecutor." Cost. art. 112.

77 "Magistrates shall be differentiated only by the diversity of their functions." Cost. art. 107, §4. See also Musso, supra note 54, at 143.

78 See Cappelletti et al., supra note 67, at 107; see also Musso, supra note 54, at 144.
The Constitutional Court also rejected the argument of inequality between the parties as a result of the prosecutor’s refusal to consent. Relying on its conclusion that the action of the prosecutor did not amount to a judicial function, the court further concluded that at trial the judge would objectively evaluate the prosecutor’s reasons for withholding consent, just as the judge would evaluate the defendant’s reasons for making the request. This analysis thus preserved parity between the parties. As to the roles of the prosecutor and judge, the opinion seems to tread carefully in an effort to maintain the autonomous spheres of each while at the same time avoiding a hierarchical ordering of the two roles; neither can act to bind the other. That is, the prosecutor’s refusal to consent to the defendant’s request cannot prohibit the judge from imposing alternative sanctions after the ordinary procedures, and the judge’s disagreement with the prosecutor cannot force the prosecutor into a procedure which prematurely terminates the case. The court’s delineation of the functions of judges and prosecutors, while convincing, unduly insulates the prosecutor’s refusal to agree to the alternative method of disposing of cases at the cost of limiting the efficacy of the 1981 law.

Aside from the tensions between the prosecutor and judge, the 1981 law raised other, more practical concerns. Significant is the issue of exactly what the law accomplished in terms of streamlining the criminal justice system and unclogging the courts. On the face of the law, it appears that the ordinary procedure of disposing of cases is not necessary where the prosecutor agrees to the defendant’s request for a substituted sanction and the judge grants the application. To evaluate the quantity of judicial resources saved under this early form of trial avoidance, one must examine what constituted the ordinary procedure. As discussed earlier, the Rocco Code of 1930 provided for a public trial.

Nonetheless, given the concentration of investigative and dispositive powers in the figure of the *giudice istruttore*, investigative judge, the trial became a mere formality during which, at most, the defendant made a statement and the court heard arguments by the defense attorney and prosecutor. The judge relied almost exclusively on the evidence collected during the investigative stages. Therefore, the 1981 law’s mechanism to avoid the ordinary procedure or trial did not save a significant amount of judicial resources since the trial was a mere formality to confirm the results of the prior investigation. The 1981 law does not provide for the application of the alternative sanctions automatically upon the defendant’s request and the prosecutor’s consent. Rather, the judge must determine the appropriateness of such sanctions. Article 77 states that where the judge believes, based on an examination of the record that elements exist for applying one of the substituted sanctions, the judge may order such a sentence upon the request of the defendant and the consent of the prosecutor. The vagueness of this language raises additional questions concerning the conflict between the goal of uncovering the truth and the goal of achieving efficiency through trial-avoidance measures. This language does not clearly state what role the judge has when the defendant and the prosecutor agree to the imposition of an alternative sanction. On the one hand, the judge might be in the position of merely ratifying the request of the parties, a rubber-stamping role, as long as the type of crime involved is not one listed in article 60 as one to which no substituted sanction applies. On the other hand, the law might require the judge to assess and evaluate the facts involved. The first interpretation amounts to a substantial abdication of the judge’s role of dominating the procedure. However, such an abdication of judicial power in this narrow setting may be what is necessary to achieve greater efficiency in the processing of criminal cases. If, instead, the correct interpretation of this vague language is that the judge must conduct some degree

---

80 See Pizzi & Marafioti, supra note 48, at 4.
81 Le Leggi, Nov. 24, 1981, n.689, art. 77.
of assessment of the joint request, the next question is what level of assessment or evaluation is necessary?

The 1981 law does not expressly require that the judge make a determination of the defendant's responsibility or guilt. Arguably, however, the Italian Constitution requires a determination of guilt before imposing punishment. Arguably, however, the Italian Constitution requires a determination of guilt before imposing punishment. The response to this argument is that the constitutional provision requires a determination of guilt only before imposing the punishment of imprisonment. Application of the alternative sanctions does not require such a judgment because imprisonment is never imposed. Implicitly, this appears to be how the Italian legislature resolved this potential constitutional problem.

Under another article of the 1981 law, after a defendant is convicted, the judge may decide that an alternative, non-incarceration sentence is appropriate. The judge may also impose a punishment called "semi-detention." This form of punishment is permitted only where the defendant has been found guilty of criminal activity, and the punishment is not listed as an alternative punishment where the defendant requests a substituted sanction before the opening of the trial. It thus appears that the legislature recognized the potential problem of depriving a person of liberty, even if only ten hours a day, where there has been no finding of guilt.

Nonetheless, some standard must apply to the judge's decision whether to accept the request of the parties, even if the constitution does not require a finding of guilt for imposition of one of the substituted sanctions. The penultimate paragraph of article 77 states that the provisions of the first section of the 1981 law

---

82 COST. art. 13 ("There shall be no form of detention... nor any other restriction whatsoever of personal liberty except by a decision, wherein the reasons are stated...").
83 Le Leggi, Nov. 24, 1981, n.689, art. 53.
84 Id. A sentence of semi-detention requires the defendant to spend at least ten hours each day confined in a type of institute as defined by another law. In addition, semi-detention includes other provisions that prohibit the convict from possessing weapons, suspend his driver's license, and confiscate his passport. Le Leggi, Nov. 24, 1981, n.689, art. 55. The closest U.S. analogue to Italy's semi-detention would probably be the work-release programs in some states.
are to be followed in the determination and application of a substi-
tuted sanction. The first section referred to in article 77 in-
cludes articles 53-76 and concerns the application of substitut-
ed sanctions where a defendant has been convicted, thus assum-
ing a finding of guilt. Reference to articles 53-76 may provide a
judge operating under article 77 with some guidelines as to
whether an alternative sanction is appropriate. However, it
will not help a judge determine the extent to which a finding of
guilt is necessary. Therefore, the incorporation of these earlier
articles still leaves a gap between the defendant's request, along
with the prosecutor's consent, and the judge's final decision to
grant the defendant's request. One commentator has surmised
that the problems arising out of the 1981 law are due to a lack of
clarity in distinguishing between decriminalizing certain offenses
and creating alternative procedures for disposing of some off-
fenses.

Eliminating the punishment of imprisonment is a form of
decriminalization, and the arguably nonpenal sanctions which
the judge may impose do not require a determination of the
defendant's guilt. If instead, article 77 merely creates a different
procedure as to some crimes, while still remaining within the
criminal realm, then the procedure must end with a judgment as
to the crimes charged, thus requiring the judge to evaluate the
evidence.

Although this is a significant, albeit tentative, step toward
disposing of some cases without trial, very few defendants re-
quested to proceed under the provisions of article 77. One expla-
nation for this may be that defendants preferred to proceed un-
der the ordinary mechanisms and hope that if convicted their
sentence would be suspended. A suspended sentence was not
listed as a substitute sanction available under the 1981 law. Rather,
a suspended sentence was available only upon conviction, and since a disposition of the crime under the 1981 law did

---

85 Le Leggi, Nov. 24, 1981, n.689, art. 77(2).
86 See Musso, supra note 54, at 127.
87 Id. at 134.
88 Sergio Sottani, Osservazioni Critiche sul Nuovo Patteggiamento, in QUESTIONI
not involve a conviction, the judge was unable to grant a suspended sentence. Thus, by its own terms, the 1981 law limited the extent to which cases might be disposed of without trial, and by its ambiguities further limited the possibility of effectively unclogging the Italian criminal justice system. Nevertheless, the 1981 law and the Constitutional Court's analysis of it provided a starting point for the drafters of the 1989 Code.

B. Broader Mechanisms Under the 1989 Code

Unlike the tinkering and ambiguity exemplified in the 1981 law, the 1989 revision of the Code of Criminal Procedure represents an overhaul of the system and contains a clearer statement of the goals. The legislation delegating to the Italian Government the task of drafting a new code of criminal procedure proclaims that the new code must put into effect the characteristics of an accusatory system, in addition to carrying out the principles of the Italian Constitution and conforming to international conventions ratified by Italy. This delegating legislation lists 105 principles and criteria which the government was to use in carrying out these directives. Among these principles is a limited form of plea bargaining, set out in directive number forty-five of the delegating legislation. Directive number fifty-three sketches a second mechanism to dispose of criminal proceedings without a trial. Pursuant to the delegating legislation, Book VI of
the new Italian Code of Criminal Procedure sets out five procedimenti speciali (special procedures), two of which permit a sentence of imprisonment without a trial as outlined by directives forty-five and fifty-three, respectively—applicazione della pena su richiesta delle parti (application of punishment upon the request of the parties, or agreed punishment) and giudizio abbreviato (abbreviated or summary trial).93

The new code does not use language of bargaining to describe the devices of agreed punishment and summary trial. However, the report of the preliminary project on the new code distinguishes the two mechanisms in terms of the subject of the parties’ bargaining.94 In the preparatory works on the new code members of the Camera dei Deputati referred to la pena su richiesta as bargaining of punishment, and to giudizio abbreviato as bargaining of procedure, using the Italian word for bargain, patteggiamento.95 These labels emphasize the fact that la pena su richiesta involves an agreement between the parties as to the punishment they would request the judge to impose. Giudizio abbreviato, on the other hand, involves the agreement of the parties to dispose of the case by a procedure different from a full trial. Both mechanisms reward the defendant with a reduction in the sentence finally imposed. Nonetheless, despite the fact that

81 LEGGE DELEGA, Feb. 16, 1987, art. 2, directive 53.
91 Giudizio abbreviato is governed by articles 438-443 of the Code of Criminal Procedure, and the provisions on applicazione della pena su richiesta delle parti are articles 444-448. Another procedure which avoids the necessity of a trial is procedimento per decreto (a proceeding by penal decree). C.P.P. arts. 459-464. This device permits prosecutors to request the imposition of a monetary fine reduced by one-half. Where the judge grants the request, the case is disposed of without either a preliminary hearing or a trial. Within fifteen days of the notification of the decree, the defendant may oppose the decree by requesting one of the two other trial avoidance procedures, or a procedure called giudizio immediato (immediate trial), pursuant to which the case proceeds immediately to trial without a preliminary hearing. C.P.P. arts. 453-458.
95 Id.
the legislature, judges, and attorneys use the Italian term for plea bargaining, the mechanisms under the new code, similar to the 1981 law, do not require a defendant to admit guilt and provide little opportunity for bargaining.

The main purpose of each of these provisions is to streamline criminal justice and unclog the courts by providing methods by which some cases might be resolved without the necessity of a trial. However, each of these devices also raises conflicts with the traditional search for substantive truth, as manifested by the tensions created among the roles of the participants involved.

1. *Party-Agreed Sentence*[^96]

Application of punishment upon request of the parties is the literal translation of the title of this section of the 1989 Code of Criminal Procedure. However, Italian scholars, attorneys, prosecutors, and judges use the short-hand term *patteggiamento* (plea bargain). In considering how to carry out directive forty-five of the delegating legislation, the government looked to the device set out in the 1981 law and sought to clarify vague aspects as well as to broaden the scope of this form of plea bargaining.[^97] Where the 1981 law limited the application of punishment without trial only to a form of probation or the payment of a monetary fine,[^98] the 198 Code provides that either the defendant or the prosecutor may request the imposition of a substituted sanction, if otherwise permissible, or a sentence of imprisonment, reduced by one-third, or a combination of substituted sanctions and imprisonment.[^99]

Moreover, article 445 of the 1989 Code provides that the sentence imposed upon request of the parties is equivalent to a conviction,[^100] thus allowing the judge to suspend the sentence.

[^96]: C.P.P. arts. 444-448.
[^97]: Report of the Preliminary Project, supra note 57, at 106-08.
[^98]: C.P.P. art. 444.
[^99]: Id.
[^100]: C.P.P. art. 445.
In fact, the defendant might condition the request to the judge upon the granting of a suspended sentence, such that where the judge denies the condition of suspension, the judge must deny the entire request of the parties.

While the 1981 law listed the types of crimes for which a substituted sentence could not be imposed, the 1989 Code limits the application of the section based on the length of the sentence finally imposed. The code provides that the defendant and the prosecutor may request the application of a sentence of imprisonment where, considering all of the circumstances and the one-third reduction provided by article 444, the final punishment would not exceed two years.\textsuperscript{101} By so limiting the use of the device, the new code adds flexibility to this trial-avoidance measure. The 1989 code also gives the defendant and the prosecutor the ability to play with the sentence where the crime involved specifies a minimum and maximum sentence, rather than a fixed sentence.\textsuperscript{102} In addition, it permits the parties to agree on the existence of extenuating circumstances under the penal code,\textsuperscript{103} resulting in a further reduction of the ultimate sentence, even before the statutorily prescribed one-third reduction is applied under article 444 of the Code of Criminal Procedure.\textsuperscript{104}

For example, take the crime of receipt of stolen goods, set out in article 648 of the Penal Code.\textsuperscript{105} The first paragraph of article 648 imposes a sentence of imprisonment from two to eight years, and a monetary fine of one to twenty million lire.\textsuperscript{106} However, the next paragraph provides that for cases involving

\begin{footnotes}
\item[101] C.P.P. art. 444.
\item[102] For example, the crime of producing or trafficking illicit drugs is punishable by eight to twenty years imprisonment. Le Leggi, Dec. 22, 1975, n.685, art. 71(1).
\item[103] C.P. arts. 62-70.
\item[104] One commentator has argued that the one-third reduction granted under \textit{giudizio abbreviato} effectively permits a modification of articles 63 \textit{et seq.} of the Penal Code. Ernesto Lupo, \textit{Il Giudizio Abbreviato e L'applicazione della Pena Negoziata}, in \textit{QUESTIONI NUOVE DI PROCEDURA PENALE: I GIUDIZI SEMPLIFICATI} 61, 70 (A. Gaito ed., 1989). The same critique applies to \textit{applicazione della pena su richiesta delle parti}.
\item[105] C.P. art. 648.
\item[106] Assuming an exchange rate of 1500 lire to the dollar, this is about \$666.00 to \$13,333.00.
\end{footnotes}
less serious facts, the punishment shall only be imprisonment up
to six years, and a fine of up to one million lire. This para-
graph does not indicate what factors make a case of stolen goods
less serious, nor does the provision state a minimum sentence.
Thus, upon agreeing that the particular case is less serious, the
prosecutor and the defense attorney could begin with a base sen-
tence of one year. The parties could then agree that the defen-
dant is entitled to a reduction of one-third, based on “generic” ex-
tenuating circumstances under the penal code. Finally, given
the decision of the defendant to opt for this procedure, the sen-
tence would be reduced by another one-third. In this exam-
ple, the defendant could end up with a final sentence of six
months. Thus, depending on the type of sentence statutorily
assigned to a particular crime, the applicazione della pena su
richiesta delle parti provides the parties with a great deal of
flexibility in reaching a final sentence of less than two years
which they will request of the judge.

This example also illustrates another difference between the
1981 law and article 444 of the 1989 code. Under the 1981 law,
initiation of the procedure depended upon the defendant’s re-
quest, which did not include any discussion with the prosecutor.
In contrast, the applicazione della pena su richiesta delle parti
involves a joint request based on an agreement of the parties as
to the nature of the crime as well as the length and type of pun-
ishment. When the parties put the request to the judge, they
have already agreed upon how to characterize the crime in-

\[107\] C.P. art. 648(2).
\[108\] C.P. art. 65(3).
\[109\] C.P.P. art. 444.
\[110\] This example is based on a case which the author observed in the Pretura of Rome
on September 18, 1996. In this case the amount involved was eighteen million lire. Typi-
cally, amounts over ten million lire are not considered to be less serious cases entitled to
the sentence set out in paragraph two of article 648 of the Penal Code (according to a
conversation with defense attorney Maurizio Bellacosa, Sept. 18, 1996). However, in this
case, the prosecutor agreed to treat the case under the second paragraph, thus avoiding
the minimum two-year sentence, but told the defense attorney that the final agreed-upon
sentence would have to be six months. The two then worked to reach the result indicated
in the text accompanying this footnote. The judge approved the sentence requested by the
parties.
volved—as in the above example where the parties agreed that
the case of receipt of stolen property was of a less severe na­
ture—in addition to having agreed upon the final sentence. Com­
mentators have noted that this marked increase in the parties’
control over criminal proceedings is consistent with the delegat­
ing legislation’s directive of adopting accusatorial characteristics
in the new Code of Criminal Procedure. However, it is pre­
cisely this increase in the powers of the defendant and the prose­
cutore that has conflicted with several constitutional norms defin­
ing the roles of the participants in the criminal justice system.

In contrast to the 1981 law, article 444 of the new code in­
cludes some express standards by which the judge is to evaluate
the request of the parties. However, the absence of certain stan­
dards has led to constitutional challenges. Article 444 states that
the judge is to determine whether the parties have proposed the
correct legal qualification or definition of the crime and whether
they have accurately applied and balanced the circumstances in­
volved to reach an appropriate punishment. Thus, in the
above example of receipt of stolen goods, the judge must initially
evaluate whether the parties correctly qualified the crime as less
serious under paragraph two of article 648 of the penal code,
thus avoiding the mandatory minimum sentence. Further, the
judge must assess whether the parties correctly applied the re­
duction for generic extenuating circumstances, under article
65(3) of the penal code. However, articles 444-448 are silent as to
the judge’s power to evaluate a sentence in an individual case for
proportionality, a discretionary power expressly given to the

111 See, e.g., MARIO CHIAVARIO, PROCEDURA PENALE: UN CODICE TRA “STORIA” E
CRONACA 119-20 (1996); Lupo, supra note 104, at 81; GIOVANNI PAOLOZZI, IL GIUDIZIO
ABBREVIATO 17 (1991); STEFANI, supra note 42, at 5-6. But see ANIELLO NAPPI, GUIDA AL
NUOVO CODICE DI PROCEDURA PENALE 343-44 (3rd ed. 1992) (characterizing both giudizio
abbreviato and la pena su richiesta delle parti as examples of the inquisitorial method);
Giuliano Vassalli, LA GIUSTIZIA PENALE STATUNITENSE E LA RIFORMA DEL PROCESSO PENALE
ITALIANO, in PROCESSO PENALE NEGLI STATI UNITI 251, 259 (E. Amodio et al. eds., 1988)
(arguing that plea bargaining in Italy is needed as a practical matter to relieve the other­
wise impossible burden on the justice system, not because it is a grand procedural prin­
ciple representative of an accusatorial system).

112 C.P.P. art. 444(2).
judge under articles 132 and 133 of the penal code. The argument is that since this is a power allocated to the judge, the procedure set out in article 444, which allocates the selection of the sentence to the agreement of the parties, violates the constitutional provision which states that "[j]udges are subject only to the law."

In one of two orders considered jointly by the Constitutional Court in 1990, the defendant had been charged with the production and trafficking of illicit drugs. The prosecutor and the defendant presented the judge with an agreed-upon sentence of one year and six months imprisonment and a fine of two million lire, with the sentence to be suspended. The tribunale argued the unconstitutionality of article 444 to the extent that the judge could not consider the adequacy of the sentence when compared to the gravity of the offense, even though the parties had correctly defined the offense and correctly found the existence of extenuating circumstances. The Constitutional Court rejected this argument, holding that the constitution says nothing about proportionate sentences. However, the court did find that the tribunale implicitly raised a constitutional question to the extent that article 444 does not expressly permit the judge to consider whether the agreed sentence promoted the constitutional goal of rehabilitation of the defendant. In this regard, the court found a constitutional violation, thus essentially amending the statute to permit such an evaluation by the judge.

---

113 C.P. art. 133. This provision requires the judge to consider the gravity of the crime, as well as the criminal nature of the individual defendant.
114 COST. art. 101.
117 This is a trial court whose criminal jurisdiction covers crimes punishable by up to eight years imprisonment. Campanella, supra note 71, at 68 n.91.
118 See supra note 66.
119 The Italian Constitution states that "[p]unishments cannot involve inhumane treatment and shall promote the rehabilitation of the convicted person." COST. art. 27, para. 3.
120 This author's description of the unconstitutionality found by the Constitutional Court differs from that of other commentators who mistakenly characterized the finding as a violation of the constitutional presumption of innocence. See, e.g., Pizzi & Marafioti,
The tribunale also raised the argument that article 444 violated two other articles of the constitution which set out the judge's role and authority.\textsuperscript{121} The court rejected these arguments, however, that article 444 relegates the judge's role and power to that of a mere notary.\textsuperscript{122} Although article 102(1) provides that "[t]he judicial function will be exercised by regular judges," the tribunale argued that article 444 attributes to the judge a role of merely reviewing the parties' agreement for legal legitimacy. The court explained that the judge's evaluation of the agreement between the parties is not simply an exercise in legal logic where the judge assesses whether the agreement is covered by the law. Rather, article 444 requires the judge to examine and evaluate the evidence when drawing his conclusion on the appropriateness of the charge and the punishment. The judge is not bound by the agreement of the parties, and a judge who disagrees with the parties' determination will simply reject the agreement. Additionally, article 444 states that the judge may grant the parties' request unless an order of acquittal must be issued under article 129,\textsuperscript{123} thus requiring the judge to evaluate the merits of the case.

The argument based on article 102(1) of the Italian Constitution is closely related to the trial court's challenge based on article 111. Article 111 provides, in part, that "[i]n all dispositive judicial actions the reasons must be stated."\textsuperscript{124} The tribunale supra note 48, at 34. The provision regarding the presumption of innocence is found in article 27 of the Italian Constitution, as is the provision declaring the goal of rehabilitation. However, the Constitutional Court expressly rejected the argument that article 444 violated the constitutional presumption of innocence. Firstly, upon receipt of the request of the parties, the judge must determine whether an acquittal is required under article 129 of the Code of Criminal Procedure. Secondly, where a defendant requests the application of an agreed-upon sentence, he waives his right to dispute the charges. This does not violate the presumption of innocence which continues to exist until the sentence becomes final. Corte cost., July 2, 1990, n.313, 1990 Foro It. I 2385.

\textsuperscript{121} COST. arts. 102(1) and 111(1).
\textsuperscript{122} Id. In Italy, the notaio is a category of practicing lawyers, unlike the American notary public. Campanella, supra note 71, at 71-72.
\textsuperscript{123} C.P.P. art. 129.
\textsuperscript{124} COST. art. 111(1). In addition, the constitution states that "[t]here shall be no form of detention, . . . except by a [written] decision, wherein the reasons are stated, of the
argued that article 444 permits a judge who approves the parties' agreement to state that the sentence is imposed based on the accord of the parties and a comparison of the circumstances, and thus to simply ratify the parties' will. That is, this section of the criminal procedure code does not require the judge to explain his reason for finding that the sentence is legally justified, apart from the agreement of the parties; therefore, article 444 violates the constitutional requirement of a written justification. The Constitutional Court held that in the opinion disposing of the case based on the agreement of the parties, a judge must include an assessment of the correctness of the juridical definition of the case, as well as a comparison of the aggravating and extenuating circumstances involved. Thus, the Constitutional Court confirmed the requirement that the judge issue written reasons for the sentence even when the trial court imposes the sentence agreed upon by the parties. However, the court's holding is difficult to reconcile with the principle of "libero convincimento del giudice", or, the independent and autonomous decision of the judge, which has signified the authority of the judge to determine both the responsibility and the sentence of a criminal defendant, almost from scratch. In contrast, the Constitutional Court's decision indicates that the judge's determination begins with and works off of the parties' agreement, either accepting or rejecting their assessment of the type of crime involved, the balancing of extenuating and aggravating circumstances, and the permissibility of suspending the sentence.

This challenge, regarding the reasoning of the judge, is a poignant example of the tension created by application of an accusatorial system, based on the control of the parties, to a system constitutionally defined by the dominion of the judge at trial. The decision of the Constitutional Court attempts to adhere to judicial authorities." COST. art. 13(2).


Article 426 provides, inter alia, that a sentence must contain "a summary statement of the factual and legal reasons upon which the decision is based." C.P.P. art. 426(1)(d).
the constitutional powers of the judge even though article 444 provides that the judge's assessment works from the agreement of the parties as to both the facts and the punishment. In this author's opinion, the strong language of the Constitutional Court in support of the judicial role at trial masks the extent to which the agreed upon sentence strips the judge of substantial power. For instance, the opinion of the Constitutional Court does not expressly state the all-or-nothing position of the judge. The judge must either accept the agreement of the parties in its entirety, or reject it; the judge has no power to modify the request. This further confirms the role of the judge, emphatically denied by the Constitutional Court, as an entity simply to check the agreement of the prosecutor and defendant.

Another aspect of the patteggiamento device is the requirement of consent by the prosecutor, which the 1981 law also mandated. Despite the title of the device—"application of the punishment agreed upon by the parties"—the articles governing this device provide for the possibility that either party may invoke the procedure. The Constitutional Court determined that such a challenge to article 448 was without basis. Corte cost., Mar. 29, 1993, n.127 (order of the court).

127 Article 444 refers to the "party who did not formulate the request." C.P.P. art. 444(2). "If the request is presented by one party [during the preliminary investigations], the judge sets by decree a date by which the other part must express agreement or not." C.P.P. art. 447(3).
128 C.P.P. art. 448(1).
129 Using a similar analysis, the Constitutional Court determined that such a challenge to article 448 was without basis. Corte cost., Mar. 29, 1993, n.127 (order of the court).
Thus, it appears that the drafters of the 1989 code were guided by the 1984 Constitutional Court decision in providing for judicial review of a prosecutor’s dissent and in permitting the defendant to gain the advantage of the sentence reduction upon conviction even when the prosecutor withheld consent. The drafters, however, did not provide for similar review of a prosecutor’s withholding of consent to the other trial-avoidance mechanism adopted by the 1989 Code of Criminal Procedure, giudizio abbreviato (abbreviated or summary trial).

2. Abbreviated Trial

Patteggiamento has been dubbed bargaining as to the punishment, in contrast to giudizio abbreviato (abbreviated or summary trial), which is called bargaining as to the procedure. While little bargaining occurs under the device of application of the agreed upon sentence, no bargaining is involved in giudizio abbreviato. Rather, invocation of the procedure depends entirely on the initiative of the defendant, and requires no discussion with the prosecutor, even though the prosecutor’s consent is necessary. Upon the defendant’s request and the prosecutor’s consent, the judge must determine whether it is possible to dispose of the case allo stato degli atti (based upon the evidence thus far accumulated). If the judge determines that it is possible to proceed under this mechanism, the case is disposed of at the preliminary hearing, with the judge issuing the appropriate sentence. Where the judge issues a sentence of conviction, the punishment which would otherwise result is reduced by one-third. Similar to the application of an agreed sentence, the incentive for a defendant to invoke this summary procedure is a reduction of the sentence if the defendant is ultimately convicted.

130 C.P.P. art. 438.
131 C.P.P. art. 440(1).
132 This means that the judge is to evaluate the case using the evidence in the prosecutor’s dossier, and neither party is to present additional evidence. However, a defendant might make a statement.
133 C.P.P. art. 442.
134 C.P.P. 442(2).
However, unlike application of the agreed upon sentence, which is limited to situations where the final sentence does not exceed two years, *giudizio abbreviato* may be requested without regard to the final sentence imposed or to the type of crime charged, at least as originally enacted.\textsuperscript{135}

The "typical" use of *giudizio abbreviato* occurs where, either before or during the preliminary hearing, the defendant requests the judge to dispose of the case this way by deciding the merits of the case based on the evidence contained in the prosecutor's dossier. Use of this procedure will result in a judicial decision on the merits of the case in anticipation of trial, in contrast to the agreed-upon sentence procedure where the judge simply decides whether to accept the agreement of the prosecutor and defendant as to the merits of the case and the ultimate sentence to be imposed. Thus, the nature of *giudizio abbreviato* requires active participation by the judge on the merits of the case and not simply an evaluation of the parties' agreement.

*Giudizio abbreviato* may be invoked in other situations as well. For example, the prosecutor may request that the case proceed by one of the mechanisms which bypasses the preliminary hearing—*giudizio direttissimo*\textsuperscript{136} (direct trial), or *giudizio immediato*\textsuperscript{137} (immediate trial). Where the judge has granted such a request, the defendant may oppose this by requesting *giudizio abbreviato*.\textsuperscript{138} Pursuant to both of these procedures, a case proceeds to trial on an accelerated basis by avoiding the preliminary hearing. A prosecutor may invoke the direct trial device where the defendant was arrested *in flagrante*, or where

\textsuperscript{135} The Constitutional Court determined that the drafters of the 1989 code had exceeded their legislative mandate by providing that crimes punishable by life imprisonment could be disposed of by *giudizio abbreviato*, resulting in a reduced sentence of 30 years. Corte cost., Apr. 23, 1991, n.176, 1991 Foro It. I 2318.

\textsuperscript{136} C.P.P. arts. 449-452.

\textsuperscript{137} C.P.P. arts. 453-458.

\textsuperscript{138} See C.P.P. art. 452(2) (providing for the transformation of direct trial into abbreviated trial upon consent of the prosecutor and judge's decision that he or she may decide the case based on the evidence in the prosecutor's dossier). See also C.P.P. art. 458 (providing that the defendant may request an abbreviated trial in opposition to the prosecutor's request of immediate trial).
the defendant confessed. Immediate trial applies to situations where the evidence against the defendant is strong and the judge for the preliminary investigations determines that the case may be bound over for trial without the need for a preliminary hearing. Consistent with the purposes of the trial-avoidance devices, giudizio abbreviato and application of an agreed-upon sentence, these mechanisms for getting a case to trial faster are intended to help unclog the criminal justice system by quickly disposing of cases where the proof is relatively straightforward. Permitting the defendant to request giudizio abbreviato would resolve the cases even more efficiently than these other procedures by disposing of them in the preliminary hearing and avoiding a trial. The incentive for the defendant to make such a request is the prospect of a one-third sentence reduction in a situation where proof of guilt would be difficult to counter. Analogously, in the United States, these types of cases, where the defendant has been caught in the act or where there is otherwise strong evidence of guilt, would likely result in a plea bargain between the prosecutor and the defendant.

The above uses of giudizio abbreviato have been dubbed the “atypical” version of the procedure since the defendant does not make the request at the preliminary hearing, but rather in opposition to one of the procedures that skip the preliminary hearing and move the case straight to trial.

Despite the description of bargaining as to the procedure, use of giudizio abbreviato, in either its typical or atypical version, relies exclusively upon the initiative of the defendant; the prosecutor may not invoke the procedure. However, the consent of the prosecutor is necessary under the law as originally enacted. The articles setting out this summary procedure do not expressly indicate the effect of a prosecutor’s decision to withhold consent.

---

129 See C.P.P. 449(1) and (5). See also SERGIO RAMAJOLI, I PROCEDIMENTI SPECIALI NEL CODICE DI PROCEDURA PENALE 104-05 (2d ed. 1996).
130 Id. at 140.
131 See id. at 130. See also CARMINE COVINE, “PATTEGGIAMENTO” E GIUDIZIO ABBREVIATO 125 (1995).
132 C.P.P. arts. 438-443.
to the defendant's request. The report of the drafters of the code acknowledges this omission, but explains that this trial avoidance device is one which does not involve the merits of the charges. In contrast to application of the agreed-upon sentence, where the defendant's request concerns not only the procedure used but also the type of crime involved and the sentence to be imposed, giudizio abbreviato involves only a procedural choice. The report also points to the fact that the procedural choice by the prosecutor is likely to involve a complex consideration of various factors, making it difficult to set out in the abstract how such a choice could be examined on review. Finally, the report again emphasizes the mere procedural aspect of giudizio abbreviato and its usefulness in unclogging the criminal justice system to justify the "reward" of the one-third sentence reduction for the defendant who requests the procedure. Absent this incentive, the device would be completely useless. Despite the reasoning of the drafting committee, the prosecutor's veto power in giudizio abbreviato triggered constitutional challenges, similar to the challenges made to the 1981 law and to the device of the agreed-upon sentence.

In a series of sentences, the Constitutional Court examined the effect of the prosecutor's refusal to consent to the defendant's request of giudizio abbreviato. In each of the three sentences, the Constitutional Court determined that the discipline of giudizio abbreviato, as enacted, was unconstitutional to the extent that it did not require the prosecutor to articulate reasons for withholding consent to the defendant's request for the summary procedure. In addition, the court held that if the subsequent trial resulted in a conviction, and the judge determined that the prosecutor's reasons for withholding consent were unfounded, the judge could grant the defendant the one-third sentence reduction. The result of these decisions was to add judicial review of the prosecutor's withholding of consent to the procedure of summary trial. Also added was the possibility of a one-

---

third sentence reduction where, upon completion of the trial, the judge determined that the prosecutor improperly withheld consent to the defendant's request for the abbreviated procedure. In addition, the court extended this sentence involving the "typical" application of giudizio abbreviato to the "atypical" instances. That is, where the defendant requests giudizio abbreviato in opposition to one of the procedures by which the case would proceed directly to trial, the prosecutor's refusal to consent is subject to the same form of judicial review, and the defendant is entitled to a one-third sentence reduction upon a judicial determination that the prosecutor improperly withheld consent.144

In the three sentences, the Constitutional Court relied on article three of the Italian Constitution, which guarantees equality.145 In the first of the three sentences,146 the court compared giudizio abbreviato with application of agreed-upon punishment, and could find no justification for requiring the prosecutor to state reasons for his or her dissent to the latter, but not the former. The court rejected the distinction made in the preliminary project report, stating that while giudizio abbreviato involves a choice of procedures, and no request or agreement as to the nature of the facts or the appropriate punishment, the choice has an effect on the sanction imposed, specifically, the one-third sentence reduction upon conviction. The court emphasized its reasoning in the subsequent sentences, still relying on the equality provision of the constitution, by delineating two aspects of equality violated by the lack of judicial review of the prosecutor's refusal to consent to the procedure.

The first aspect of equality is similar to the challenge made to the 1981 law regarding substituted sanctions, requiring parity between the defendant and the prosecutor at each stage of crimi-

144 Corte cost., Apr. 18, 1990, n.183 (regarding the transformation from giudizio direttissimo to giudizio abbreviato).
145 "All citizens have equal social standing and are equal before the law without distinction of sex, race, language, religion, political opinion, or social or personal conditions." COST. art. 3(1).
nal proceedings.\textsuperscript{147} While the Constitutional Court rejected this challenge to the 1981 law, the court found a constitutional violation as to \textit{giudizio abbreviato}. Under the 1981 law, the prosecutor's withholding of consent could only preclude employment of the trial-avoidance device. Upon issuing a sentence of conviction at the conclusion of the trial, the court could nonetheless decide that an alternative sanction was appropriate and impose such a punishment. In contrast, the statutory scheme for \textit{giudizio abbreviato} provided for no such recoupment of the reduced sentence, thus putting the prosecutor in a position of superiority over that of the defendant, not due to the procedural choice, but rather to the ultimate effect this would have on the defendant's punishment if convicted. The court rejected arguments by the \textit{Avvocatura della Stato}\textsuperscript{148} in defense of the code provisions that permitting judicial review of the prosecutor's decision not to dispose of the case by the summary procedure would amount to attributing powers to the judge which the drafters of the new code intended to deny. This argument is based on the idea that a salient aspect of the 1989 Code of Criminal Procedure is the shift in control over the proceedings from the judge to the parties, as an integral characteristic of an accusatory system. The argument continues that the provisions for review of the prosecutor's choice concerning application of the agreed-upon sentence is necessary because the prosecutor's failure to consent affects the \textit{merits} of the case, that is, the qualification of the crime involved as well as an evaluation of the aggravating and extenuating circumstances. In contrast, the prosecutor's choice not to proceed by \textit{giudizio abbreviato} has nothing to do with the merits of the case, but simply indicates the procedural strategy of the prosecutor. Again, for the Constitutional Court, the effect of the choice on the ultimate sentence was sufficient to require

\textsuperscript{147} Corte cost., Apr. 18, 1990, n.183.

\textsuperscript{148} Essentially, this person is the equivalent of the Attorney General in the United States.
judicial review and the possibility of recouping the sentence reduction.

The second aspect of equality the court relied on was the fact that similarly-situated defendants could receive markedly different sentences depending solely upon the unreviewable decision of the prosecutor to agree to giudizio abbreviato in one case and not the other. Although not discussed by the court, this holding is consistent with Italian distrust of broad prosecutorial discretion that could have arbitrary, inconsistent, and unpredictable results. The mere possibility that similarly-situated defendants could receive different sentences probably would not have been sufficient to trigger a constitutional violation, but where this possibility is attributable to an unreviewable decision by the prosecutor, the equality provision is a greater concern.

While the court found the above constitutional violation, the court rejected other challenges to giudizio abbreviato which relied on other provisions of the constitution in the same vein as the article three equality challenge. By reading into the statutory provisions the form of review discussed above, the court rejected other challenges based on the roles of the judge and prosecutor, similar to challenges made to both the 1981 substituted sanction law and the device of application of the agreed-upon sentence of the parties.

The Constitutional Court's analysis of these trial-avoidance techniques illustrates the tensions and conflicts which these devices generate between Italy's fundamental value of ascertaining the substantive truth in criminal matters and the practical concern of relieving the clogged system. More specifically, these procedures have required a greater definition of the roles of the judges and prosecutors, and a refinement of the notion of equality between the defendant and the prosecutor.

C. Comparison to Plea Bargaining in the United States

As previously discussed, before the 1981 and 1989 legislation, Italy relieved its overburdened criminal justice system by granting occasional amnesties. The practice of plea bargaining in the
United States similarly began without a foundation in a legislative choice after deliberation on its advantages and disadvantages. In fact, commentators have described plea bargaining as the result of "backroom deals" and as part of an "invisible justice system." By the time any branch of the government was called upon to regulate it, the practice had become routine and heavily relied upon by both prosecutors and defense attorneys. Scholars disagree as to how long plea bargaining has been around, with some claiming that the practice has always been a part of criminal justice and others tracing its beginnings as recent as the middle of the nineteenth century. Regardless of when and how plea bargaining originated, no one disputes that it is the method by which the vast majority of criminal cases are disposed of and that it is here to stay. This part of this Article will not describe all or even most aspects of plea bargaining in the United States, but will focus instead on issues raised by the practice that are similar to the problems faced by the Italian system. Comparison should lead to a better understanding of the nature of plea bargaining and provide some direction to current trends and reform movements in both countries. Of course, any discussion of plea bargaining in the United States cannot assume only one system, insofar as each state, as well as the federal system, has its own method, perhaps codified, perhaps not, of evaluating plea bargains. Therefore, when comparing the Italian mechanisms to plea bargaining in the United States, this article will speak in general terms.

Plea bargaining has been defined as "the exchange of official concessions for a defendant's act of self-conviction," and, less cynically, as the "give-and-take negotiation between the prosecu-

149 Pizzi & Marafioti, supra note 48, at 17.
152 Alschuler, Plea Bargaining, supra note 24, at 3.
tion and defense, which [sic] arguably possess relatively equal bargaining power.\textsuperscript{153} At the center of plea bargaining is the defendant's admission of guilt and waiver of a jury trial,\textsuperscript{154} as well as other important rights. In exchange, the prosecutor might promise one or more of the following: to drop certain charges against the defendant, to reduce the offense charged to a less serious offense, to make a certain sentencing recommendation, or not to oppose a sentence requested by the defendant.\textsuperscript{155} Though the prosecutor might promise a certain sentence to be imposed, that promise generally is not binding on the judge. Nonetheless, only rarely does a judge reject the bargained sentence. In contrast, the Italian Code of Criminal Procedure does not require that the defendant admit guilt, (perhaps more analogous to a plea of nolo contendere in the United States), but provides a statutorily prescribed one-third sentence reduction for exercising such an option. Further, since the Code of Criminal Procedure specifically provides for one-third sentence reduction, the parties engage in little bargaining directly. Given the limits on prosecutorial discretion, prosecutors in Italy cannot agree not to pursue certain charges against the defendant. Reduction of charges is limited to situations where the provision of the penal code includes a separate sentence range for a less serious form of the same offense. In such a situation, the prosecutor might agree with the defense attorney that the particular facts of the case make the offense less serious. This is somewhat similar to "charge bargaining," but is best viewed as limited to instances where the Italian Penal Code, within the same article, defines the crime charged and includes a different, and lower, sentencing provision for the same crime where extenuating circumstances exist. Thus, depending on how a particular offense is set out in the penal code, the prosecutor and defense attorney may have a little more flexibility in "negotiating" the defendant's sentence.\textsuperscript{156} This flexibility is limited, however, to the types of situ-

\textsuperscript{155} See Fed. R. Crim. P. 11(e)(1).
\textsuperscript{156} See supra note 104 and accompanying text (discussing example of receipt of stolen...
ations outlined because an Italian prosecutor does not have the discretion to charge the most serious offense in one article of the penal code and then bargain down to a lesser offense under another article.

Judicial interpretations of both the Italian device of party-agreed sentences and U.S. plea bargaining are rather emphatic that neither the prosecutor nor the parties can bind the judge’s decision on sentencing. In Italy, this is true because the constitution distinguishes between judicial and prosecutorial roles and powers within the magistrate. In the United States, it is due to the doctrine of separation of powers, which similarly dictates that the prosecutor is a figure of the executive branch, whose responsibility is to enforce laws, while the judiciary is responsible for sentencing. However, under both systems, as a practical matter, if judges do not accept the sentences prosecutors have promised, defendants will be discouraged from exercising this option for disposing of charges against them. The Italian Code of Criminal Procedure specifies that the judge must either accept or reject the entire agreement of the parties. This all-or-nothing approach, along with the fact that the defendant’s agreement with the prosecutor does not include any admission of guilt, ensures that the defendant does not risk a prejudicial increase in sentence by the judge based on the mere fact that the defendant requested this procedure but the request was not granted. In contrast, the United States Supreme Court has upheld a bargained sentence where a defendant claimed to have admitted guilt solely due to the fear of facing a much more severe sentence, including the death penalty, if convicted at trial. And more recently, the Supreme Court has held that statements

---

157 See supra note 71 and accompanying text.
159 C.P.P. art. 444(3).
made by a defendant during unsuccessful plea negotiations may be used to impeach the defendant at trial.\textsuperscript{161} The effect of both these aspects of plea bargaining is to encourage this method of resolving criminal cases in the United States.

III. OBSERVATIONS AND CONCLUSIONS

While the trial-avoidance devices of Italy were generally intended to mimic aspects of plea bargaining in the United States, this article has pointed to a number of distinctions which stem primarily from fundamental differences between the two systems, such as the strict limits on prosecutorial discretion in Italy. Interestingly, the drafters of the revised Code of Criminal Procedure state up front that one of the goals is to include a number of aspects of an accusatorial system. These new features include trial-avoidance devices, indicating that the drafters believe that plea bargaining is part of an accusatorial system by definition. In fact, there is little scholarly agreement as to whether plea bargaining is more accusatorial or more inquisitorial.\textsuperscript{162} On the one hand, plea bargaining includes the accusatorial notion of placing more control over the criminal proceedings in the hands of the parties rather than in the judge. On the other hand, plea bargaining also involves the consolidation of several functions (charging, fact-finding, and sentencing) into one party, the prosecutor. Probably the best analysis is that plea bargaining, on a theoretical level, is not characteristic of or endemic to either model, but is simply an aberration which grew out of a practical necessity, or at least a perceived necessity, to streamline the criminal justice system by disposing of a great majority of cases without the time and expense of a trial. Certainly, it is not necessary to label trial-avoidance mechanisms as indicative of either model. Yet this stark utilitarian definition of plea bargaining poses difficulties in resolving the tensions and conflicts the device creates between prosecutors and judges.


\textsuperscript{162} See supra note 111.
Both of the current Italian trial-avoidance devices were subjected to constitutional challenges based on the potential veto power of prosecutors who refuse to consent to the defendant's request for one of these procedures.\(^{163}\) An analogous challenge arose in the context of California's so-called "Three Strikes and You're Out"\(^{164}\) law. In \textit{People v. Romero},\(^ {165}\) the defendant was charged with what would have been his third felony, making him eligible for an "indeterminate term of life imprisonment." The information charging Romero with possession of 0.13 grams of cocaine base also alleged the prior convictions of second degree burglary, attempted burglary, first degree burglary and two convictions based on possession of a controlled substance. Romero initially pled not guilty. At a subsequent hearing, the defendant changed his plea to guilty after the judge offered to strike the prior convictions, subjecting Romero to a sentence from one to six years. The prosecutor objected, arguing that the court could not on its own dismiss prior felony convictions without the prosecutor's consent. The judge nonetheless accepted the guilty plea, struck the prior felony allegations from the record, and sentenced Romero to six years imprisonment. Before the California Supreme Court, the defendant argued that requiring the prosecutor's assent to striking the prior felonies would violate the separation of powers doctrine\(^ {166}\) by giving the prosecutor a veto power over a court's decision to dismiss. The California Supreme Court upheld the trial judge's authority to dismiss prior felonies \textit{sua sponte}. The court's approach focused on the power to dispose of properly filed criminal charges as a judicial function and found that requiring the prosecutor's approval of such judicial action would violate the doctrine of separation of powers. This analysis is analogous to the Italian Constitutional Court's analysis of the prosecutor's role in the trial-avoidance procedures under the 1989 Code of Criminal Procedure. Where a prosecutor in Italy refuses to consent to one of the mechanisms discussed

\(^{163}\) See supra text accompanying notes 66, 143.
\(^{165}\) 917 P.2d 628 (Cal. 1996).
\(^{166}\) CAL. CONST. art. III, § 3.
above, the concern is with giving the prosecutor a veto power, effectively binding the judge's sentencing decision. However, the Italian Constitutional Court's resolution of this conflict between the judge and prosecutor did not promote the goal of resolving cases without a trial. Rather, the prosecutor's refusal to consent blocks the use of the trial-avoidance mechanism, thereby requiring a trial. In contrast, the *Romero* holding furthers the disposition of cases without trial, even where this means that the goal of the "Three Strikes" legislation is frustrated because a "threepeat" offender will not serve an indeterminate life sentence.

Another example of the tensions between the roles of judges and prosecutors relates to sentencing guidelines. 167 Commentators claim that such guidelines take the traditionally judicial task of sentencing away from judges and place it in the hands of prosecutors. 168 Specifically, by setting out severe mandatory minimum sentences, narrowly defining appropriate situations for departures, and leaving untouched the broad charging discretion and the practice of plea negotiating, the guidelines give prosecutors a great deal of leverage in plea negotiations with defendants. 169 If convicted, the defendant faces a certain and much stiffer sentence with little possibility of parole under sentencing guidelines. 170 The parallel criticism of sentencing guidelines is that they "turn thinking and feeling judges into robotic comput-

170 Burton, *supra* note 168, at 177-78.
ers" who must calculate the upward and downward departures mathematically. Within the context of plea bargaining, the effect of sentencing guidelines is to substantially increase the power and leverage of the prosecutor in whom the functions of charging, fact-finding and sentencing are already collapsed, while concomitantly diminishing the role of the judge to that of a mere rubber-stamper.

As discussed earlier, there is a similar concern in Italy that the judge's role is inappropriately reduced to that of a notary under the trial-avoidance procedure of a party-agreed sentence. Subsequent sentences of the Italian Constitutional Court achieve a slightly better balance between these tensions by holding that judges are still required to explain in writing their reasons for accepting the proposed agreement of the parties. More important is the fact that prosecutors in Italy do not have the broad charging discretion that prosecutors in the United States have. This narrow charging discretion, coupled with the 1989 Code's division of functions between the prosecutor and judge, have the effect of avoiding the collapse of roles into one player. This is especially important in Italy where a significant result of the 1989 Code was to eliminate the role of the investigative judge and give the prosecutor more of a role in the system as a party. Therefore, while Italy has eliminated the monocratic and largely unchecked power of the investigative judge, the United States has enhanced the similarly unchecked power of a different player—the prosecutor—while still treating the prosecutor primarily as an adversarial party. Once again, resolution of such tensions in the United States results in the increased ability to dispose of cases without trial, in contrast to that in Italy which results in barriers to the avoidance of trial.

A final example of the tensions regarding the role of the prosecutor in the United States is where the defendant opts for a judge trial. Of course, where a defendant pleads guilty to a criminal charge, a jury trial is no longer necessary, but a defendant

---

might waive the constitutional right to a jury trial without admitting guilt and opt for a bench trial. The United States Supreme Court, however, has held that a defendant does not have a correlative right to a bench trial in such a situation.\footnote[172]{Singer v. United States, 380 U.S. 24, 34 (1965).} Thus, the requirement under the Federal Rules of Criminal Procedure that the prosecutor and the judge consent to a judge trial\footnote[173]{FED. R. CRIM. P. 23(a).} does not violate the constitution.\footnote[174]{Interestingly, in the context of court-martials the prosecutor's consent is not necessary for a bench trial. Manual for Courts-Martial, United States, Rule for Courts-Martial [R.C.M.] 903(c)(2) (1995).} In addition, the Court held that, given the government attorney's role as a "servant of the law"\footnote[175]{Singer, 380 U.S. at 37 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).} and the Court's "confidence in the integrity of the federal prosecutor,"\footnote[176]{Id.} the prosecutor need not articulate reasons for withholding consent to the defendant's waiver of a jury trial. This analysis makes it difficult for a defendant to challenge the prosecutor's refusal to dispose of the case by a judge trial. The deference to the prosecutor's integrity and discretion in this situation is significant to this comparison of mechanisms for streamlining the criminal justice systems in Italy and the United States because one potential advantage of a judge trial is that the defendant might be subjected to a less severe sentence based on the savings in judicial resources.\footnote[177]{Pizzi & Marafioti, supra note 48, at 37 n.187 (quoting Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 HARV. L. REV. 1037, 1051 (1984)).} Certainly, scholars have noted that such a perception exists.\footnote[178]{Id.} Therefore, although there is no specific statutory basis for reducing the sentence of a defendant who has foregone a trial by jury, like there is in Italy, there exists at least this possibility of a reduced sentence. Yet, the largely unreviewable power of the prosecutor to refuse to consent to the defendant's request could deprive the defendant of such a sentencing benefit. As discussed earlier, the Italian Constitutional Court has determined that while the prosecutor can block the use of an abbreviated procedure, a prosecutor's improper dissent cannot deny the defendant the benefits of the statuto-
ry one-third sentence reduction. Thus, subjecting the prosecutor's refusal to consent to judicial review is a type of "check" typical of the accusatorial model of criminal justice.

More interesting, however, is that the Supreme Court in Singer based its determination that the prosecutor need not articulate reasons for refusing to consent on the notion that the prosecutor "is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.'" This description of the prosecutor as an impartial party to the case hints of aspects of an inquisitorial system and raises the question of the proper conception of the prosecutor's role. The criminal justice system in the United States is an adversarial model which emphasizes the importance and control of the parties, yet a prosecutor also has the "responsibility of a minister of justice and not simply that of an advocate." Analogously, in Italy prosecutors and judges come under the umbrella title of Magistrati (magistrates). Even after adoption of the 1989 Code of Criminal Procedure, the prosecutor and judge both continue to be considered members of the judicial branch, in contrast to a prosecutor in the United States who is separate from the judge, and an arm of the executive branch. The blurring of the prosecutor's role in the language and reasoning used by the Court in Singer is inconsistent with the fact that the prosecutor is not a member of the judicial branch. Similarly, implementing a criminal justice system which emphasizes the adversarial role of the parties, where one of the parties, the prosecutor, is a magistrate, has given rise to the same types of tensions in Italy. The concern is framed in terms of the appearance of impropriety of a player who should be an adversary against the defendant, yet forms part of the branch of the government which is to be impartial in deciding the defendant's guilt or innocence.

---

179 Singer, 380 U.S. at 37 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
181 See supra note 71 and accompanying text.
Recently, an Italian senator proposed a law which would separate the careers of judges and prosecutors.182 If passed, prosecutors would no longer come under the umbrella title of magistrati and would have to pursue a different career path and pass different entrance exams than judges. Just as the drafters of the 1989 Code of Criminal Procedure looked to the United States, this proposed law was inspired by the aspect of criminal justice in the United States which does not place the prosecutor within the judicial branch of the government. One common complaint of Italian defense attorneys is that under the current system an individual who has served as a prosecutor (on one side of the bench) might suddenly become a judge and serve on the other side of the bench. This is especially troubling now that the 1989 Code of Criminal Procedure has placed prosecutors in the role of advocates. Where one comes to the bench with the background of having acted as an advocate for the state in prosecuting criminal defendants, the fear is that this person will necessarily be biased against criminal defendants. In the United States, however, many judges come to the bench with lengthy experience as prosecutors or criminal defense attorneys since it is rare for graduating law students to directly pursue a judgeship. Perhaps Italy should consider flexible provisions which would give criminal defense attorneys a more realistic opportunity of becoming judges after a career in defense work. Currently, a person must be under the age of 35 to qualify for the examinations for magistrati. Typically, those who have gone into criminal defense work are too early in their careers to consider a change. The possibility of eliminating such an age restriction and opening up the judiciary to defense attorneys might be less offensive than depriving prosecutors of their status, and might avoid the politically charged question of whether prosecutors would then become a completely independent and autonomous branch of the government or, conversely, dependent upon the executive.183


183 This issue is not as politically charged in Italy because there, as well as in other civil law countries, state power is viewed with a greater degree of trust than in the United States. William T. Pizzi, Understanding Prosecutorial Discretion in the United States:
One scholar has already cautioned against calls for reform of the prosecutor's role in the United States based on examples from civil law countries, mainly because the cultural, historical and political differences pose formidable barriers to the effectiveness of such reforms. Similarly, attempts to reform the role of prosecutors in Italy should be approached with caution. Such caution is not based solely on the fact that the traditions and cultures of the countries are different and that these differences are reflected in the prosecutor's role, but is based on a more practical level. That is, were Italy to separate prosecutors from the judicial branch, ethical responsibilities would nonetheless curb the potential for a passionately adversarial prosecutorial role and, thus, not avoid the tension of conflicting roles the 1989 Code of Criminal Procedure places on prosecutors. The Italian Code of Ethics requires *magistrati* and also, specifically, prosecutors, to act impartially, to direct their investigations toward determining the truth, to acquire evidence favorable to the defendant, and not to keep such evidence from the judge. This consideration of the duties and roles of the prosecutor is important in the context of the trial-avoidance procedures of the 1989 Code of Criminal Procedure because the creation of an independent branch of prosecutors, as well as any expansion of the use of trial-avoidance procedures, could eventually lead to greatly increased prosecutorial discretion. This author cautions Italian lawmakers to avoid the replacement of one monocratic and largely autonomous player, the investigative judge, by another, the prosecutor.

The historic mixture of adversarial and nonadversarial characteristics implemented by the 1989 Italian Code of Criminal Procedure are reflective of that country's concern with the impo-

---


184 Id. at 1373.

sition of checks on abuses of power by dividing the functions of the players and the phases of the disposition of a criminal case. In order to ensure justice, though perhaps not the discovery of substantive truth, such checks need to be present even in the disposition of cases without trial. In the United States, due to the broad discretion of the prosecutors, limits and checks are easily circumvented, thus making it extremely difficult to "tame the dragon." However, where Italy has taken small and tentative steps toward trial-avoidance procedures it might be possible to add gradually to the powers of prosecutors allowing for an evaluation each step of the way. At the same time, however, restrained broadening of trial-avoidance procedures is likely to impede rapid relief from case backlog in Italy. Thus, it seems that despite the serious need for quick disposition of cases, it is unlikely that Italian criminal courts will see much decrease in caseloads. Nonetheless, this cautious approach to reform in order to ensure that checks on the process are maintained may well lead to other types of proposals which do not focus only on the role of the judge or prosecutor or on the ability to dispose of cases without trial. For example, commentators have suggested decriminalizing some activities currently defined as crimes.

CONCLUSION

While Italian lawmakers struggle with the tensions between the traditional purpose of a criminal justice system to determine the truth and the need to dispose of cases efficiently, they should look carefully at the current trends in the United States and see the potential dangers of consolidating tremendous power in the prosecutor. They should view the beginnings of incremental reform as an opportunity to maintain control and to consider an

---

186 See supra note 29 for citations to evaluations of various attempts to curb plea bargaining.
188 Pizzi & Marafioti, supra note 48, at 6.
array of possible approaches. In fact, the variety of expediting procedures under the 1989 Code are indicative of their creative abilities.\textsuperscript{190} Thus, it may be that Italy will eventually answer the question of whether plea bargaining is inevitable\textsuperscript{191} in criminal justice systems reflective of liberal democratic ideals in the negative, and refuse to accept the widespread use of plea bargaining as it currently exists in the United States.

\textsuperscript{190} See supra note 92.

\textsuperscript{191} See Schulhofer, supra note 177, at 1037 (challenging idea that plea bargaining is unavoidable in the United States).