

POWER AND PERSUASION IN THE COURTROOM: THE
FORCE OF LAW AND THE SETTLEMENT DYNAMICS OF
JUDGES

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ABSTRACT

This Article seeks to describe the shift in the legitimation of judicial authority in the age of the “vanishing trial,” in circumstances where adjudication on the merits of the case in question has been replaced by the promotion of judicial settlement. Based on data collected during a five-year study funded by the European Research Council (“ERC”) and drawing from studies in social psychology and conflict resolution, we analyze the judicial conflict resolution practices used in Israel’s Magistrate Court in Tel Aviv to promote settlement, and from this depict a new taxonomy of power relations in the courtroom. This move, from adjudication on the merits of the case to settlement promotion, we argue, has ushered with it new modes of legitimation for judicial activity, as judges now rarely adjudicate overtly, and thus no longer enjoy position-based jurisprudential legitimacy. Rule of law-based legitimacy is being replaced by informally generated persuasion practices, which draw on the new modes of legitimacy developed by judges in response to a lack of judicial time to write verdicts and a lack of legal guidance on how to encourage settlements. Based on the notion of power, as developed by social psychologists French and Raven (1954), we outline modes of influence in the courtroom and classify existing judicial practices according to the distinct bases of power they utilize. We also describe three genuine judicial styles that can be described as best practices in settlement promotion—*dispute designer*, *charismatic*, and *mediator*—developed by judges promoting the

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practice of courtroom settlement. We describe and discuss the power dynamics they deploy in court and demonstrate how the “force of law” today has been replaced by a relational persuasion-based dynamic. The actual effect of the legal rules as sources of legitimation has become blurred and less effective in contemporary courts of settlements given that they are now only a suggested solution at the preliminary hearing stage. Finally, we consider the challenges that this development poses for the role of the judiciary and the legal profession as we move from adjudication to negotiation.

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INTRODUCTION

“The force of law” is based on legitimation, which is founded on reasoned elaboration, rational enforcement of the Rule of Law,¹ and

¹ Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. LEGAL STUD. 232, 232 (2012).

strict application of legal rules through written verdicts. Power and “the force of law” are also linked to authority² and to the inherent tension between justice and power.³ Nevertheless, what happens to the force of law when judges try to persuade litigants and lawyers to settle cases, rather than adjudicating on the merits of the case, during the preliminary hearing stages? How is power played out within the interdependent setting of the pretrial when verdicts are a rare phenomenon? What new sources of legitimacy have emerged for judges as they become gatekeepers, preventing litigants from moving to the trial phase? Can studies in negotiation and social psychology help us in describing the modes of persuasion and power dynamics within the contemporary courtroom?

Power can be described as related to social narratives,⁴ embedded in social mechanisms and directed toward disciplining and policing human behavior,⁵ through which individuals internalize external expectations and exercise internal control. In this Article, we will address power and persuasion from a social psychology-conflict resolution perspective by explaining interactions within the negotiation scene in the contemporary courtroom. The force of law, as conveying narratives of control, will be discussed here within the micro level of the dominant scene of civil litigation today—the negotiation for settlement.

Against the common image of judges applying legitimate power through written verdicts, the phenomenon of the “vanishing trial,” which outlines the decline of trials and adjudication on the merits of the case in favor of settlement agreements, prompts re-evaluation of the power dynamic in the courtroom.⁶ In this Article, we propose a new perspective on the use of power by judges in the courtroom in the

² JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 33 (Oxford, 1979).

³ Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell, Michael Rosenfeld & David Gray Carlson eds., 1992).

⁴ Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1613-15 (1986) (particularly Cover’s discussion of Milgram’s famous role play experiment on students conditioned to overcome inhibitions against applying violence when placed in a hierarchical system once they have an institutional role).

⁵ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 9 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

⁶ Since WWII, there has been a decline in civil trials, as well as settlements and plea bargains far outnumbering fully written and final verdicts despite the rise in case filings. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459, 461-64 (2004).

age of settlement and consequentially a new understanding of the power of the law.

Based on a five-year research project funded by the European Research Council (“ERC”), we have mapped the various judicial conflict resolution practices that judges use when promoting settlements in Israel’s most active Magistrate court, Tel Aviv.⁷ Drawing on an acclaimed analysis of power by social psychologists French and Raven, and on other negotiation perspectives, we argue that these judicial activities manifest a new kind of power typology and persuasion dynamic, dependent on relationships and on litigants and their lawyers, who can have as much power as the judges. At the same time, we show that while judges do use an array of soft powers, most of their work is done by applying pressure on litigants to settle, articulated directly, and resulting from the inherent hierarchy in the courtroom. As parties pursue this legal negotiation and seek information and signals from the judges on their way to settlement, a range of dynamics and persuasion techniques have developed, and distinct intervention styles have emerged. This Article provides a new perspective on power in the courtroom, identifying new forms of legitimation and justice developed by judges as they perform their new roles.

The Article proceeds as follows: In Part I, we set the stage for an analysis of power relations in the courtroom with an overview of the phenomenon of the vanishing trial, its historical development, and the effect that this has had on judicial behavior and on the legitimation of judicial authority. In Part II, we delineate the findings from our research, explicating the judicial practices developed in the promotion of settlements. We underscore the methodology used to carry out the court observations and provide a quantified analysis of these practices, outlining a first-stage map of judicial activities, as observed within a qualitative inquiry. In Part III, we present the groundbreaking work of the social psychologists French and Raven, drawing from their conceptualization of the six bases of power to analyze the judicial conflict resolution practices we mapped out earlier. We also delineate existing practices in terms of negotiation and persuasion techniques and use these theories to conceptualize judicial work and the search for legitimation. We demonstrate the incoherent and sometimes more coercive mode in which judicial power tends to be exercised within settlement hearings, and we propose new modes of legitimation when looking into the quantitative data. In Part IV, we complement our quantitative broad study with a focused qualitative inquiry into the settlement

⁷ See *infra* Part I.

practices of individual judges who are considered settlement champions by the legal community. We identify three types of judicial approaches that these judges have been consciously developing, each manifesting different modalities of powers. We claim that these judges have developed new forms of legitimation for their judicial work, much needed at a time when the old models of legitimation have been almost completely erased. In Part V, we integrate our findings from the previous sections, discussing the implications of the phenomenon of the vanishing trial and the absence of verdicts on the role of courts and judges in resolving legal conflicts. Lastly, we call for a more conscious and reflexive mode of engagement in the search for new modes of legitimation for judicial settlement work.

I. THE PHENOMENON OF THE VANISHING TRIAL—HISTORICAL CONTEXTUALIZATION

Power relations in the courts have been changing since the 1940s, the dawn of the era of the vanishing trial, when despite the rise in the number of case filings, settlements and plea bargains began to outnumber (by far) fully written and final verdicts.⁸ The decline in civil trials traces back to the end of the Second World War. Its origins have been attributed to, among other reasons, the enormous caseload faced by the courts and the need to use judicial time efficiently.⁹ The United States, for example, has seen a steady decrease in civil trials over the last forty years, with the number of federal civil cases resolved by trial dropping to a mere 1.1%.¹⁰ Other jurisdictions, such as England, Canada, and Israel, have shown similar trends.¹¹

The concept of the vanishing trial does not mean that trials do not take place, but rather that the resolution of legal cases takes place during the pretrial stage, or even before. This development is reflected by

⁸ Galanter, *supra* note 6, at 461.

⁹ Marc Galanter, *The Hundred-year Decline of Trials and the Thirty Years War*, 57 STANFORD L. REV. 1255, 1255, 1273 (2005).

¹⁰ Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131 (2018) (see referral to “Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts, 2016 Annual Report of the Director” tbl.C-4 (2016) [hereinafter 2016 Annual Report], <https://www.uscourts.gov/statistics-reports/annual-report-2016> [<https://perma.cc/8MBN-FL29>]).

¹¹ Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7, 34 (2006). For an analysis of the phenomena in England and Canada, see Herbert M. Kritzer, *Disappearing Trials - A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735, 754 (2004); for an analysis of the phenomenon in Israel, see Ayelet Sela & Limor Gabay-Egozi, *The Role of Judges in Adjudication, Settlement and other Vanished Trials: Evidence from Civil Trial Courts* (unpublished manuscript).

the fact that judges settle the cases themselves or send cases to be resolved in out-of-court mediation and arbitration procedures. The early termination of legal cases has been prompted by direct judicial activity seeking to persuade litigants to settle, thus creating a “settlement culture.”¹² This shift has led to a change in the role of judges: from adjudicators to case management and settlement promoters, which means extensive judicial involvement aimed at speeding up resolutions and convincing litigants to settle rather than having their cases tried in court.¹³

The phenomenon has received considerable scholarly attention, part of a broader endeavor to characterize it and underscore its implications. Marc Galanter coined the portmanteau word “litigotiation” to this particular judicial activity taking place between judges and lawyers in court, defining it as the “strategic pursuit of a settlement through mobilizing the court process.”¹⁴ Judith Resnik asserted that while at first judicial management comprised of a host of techniques aimed at narrowing the issues at hand to those solely relevant to the trial, it subsequently evolved into a settlement-inducing dispute resolution method due to the incentives created by the rules of civil procedure.¹⁵ One of the authors of this Article has outlined the various roles that judges play, asserting that “judges are often parties to the negotiation as to whether to adjudicate the legal conflict, third parties in an effort to mediate it, arbitrators as to guiding rules of compromise, and facilitators of dialogue, problem solvers and dispute designers.”¹⁶

¹² D. Michael Risinger, *Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not with a Bang, but a Whimper)*, 60 UCLA L. REV. 1620, 1649 (2013); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 410 (2004).

¹³ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

¹⁴ Marc Galanter, *World of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

¹⁵ Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 234 (1995) (where the author brings an example of discovery rules in the 1938 Federal Rule of Civil Procedure that have generated the need for pre-trials); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986).

¹⁶ Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence foran Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 881 (2015); Hadas Cohen & Michal Albertstein, *Multilevel Access to Justice in a World of Vanishing Trials: A Conflict Resolution Perspective*, 47 FORDHAM URB. L.J. 1, 26-35 (2019); Ayelet Sela, Nourit Zimmerman & Michal Alberstein, *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83, 92 (2018).

This Article examines the ways in which the phenomenon of the vanishing trial has changed the practices of power employed by judges in courts, by using a negotiation framework to identify the new modalities of power and persuasion that have evolved, due to adjudication on the merits of a case and the brute hierarchical power of a verdict being replaced by settlement promotion. Judges who do not decide cases by written verdict need new modes of legitimation for their authority; this Article will identify these through an analysis of power dynamics. The next section delineates our findings regarding such judicial practices in and out of the courtroom.

II. JUDICIAL CONFLICT RESOLUTION PRACTICES—METHODOLOGY AND FINDINGS

A. *Methodology of Courtroom Observations*

The data set that informs this Article was collected during two phases of a five-year research project conducted in Israel by the JCR research group.¹⁷ The findings of the first phase are based on observations of 200 first-instance pretrial and case management hearings at the Tel Aviv Magistrate Court in Israel. This court was chosen because it is the busiest trial court of original jurisdiction in Israel. The observations focused on pretrial hearings, which are fertile sites for settlement activity.¹⁸ According to Rule 140 of the Israeli Rules of Civil

¹⁷ Sela, Zimmerman & Alberstein, *supra* note 16, at 88 (The research project, headed by Professor Michal Alberstein of the Law School at Bar Ilan University, is a comparative project carried out in Israel, England, Wales, and Italy. This paper focuses on data collected in Israel, where the majority of court observations were carried out, allowing us to construct a comprehensive data set for analysis.).

¹⁸ Sela, Zimmerman & Alberstein, *supra* note 16, at 97-98, where the previous analysis was carried out and in which the justification for the selection of pre-trial case management conferences: “Israeli civil trial courts are a particularly suitable setting for studying judges’ role in settlement. First, under Israeli law, judges have authority over all procedural and dispositive decisions; . . . [typically,] the same judge who conducts pretrial case management and settlement hearings usually continues to preside over the case if it goes to trial. As a result, the pre-trial judge’s settlement-promoting practices [during the pretrial phase] provide particularly significant information signals for the parties’ bargaining process as they project a highly relevant and immediate ‘shadow of the law’ should the case proceed to trial.” Additionally, “all litigation-related in-person interaction with the judge [including settlement promotion, takes place in a public hearing in an open court of law].” *Id.* at n.41. “This allows researchers to enter the courtroom freely to document judicial settlement promotion practices, which are typically not transcribed in full in the formal record. Thus, our observations provide a unique account of otherwise undocumented judicial practices, as they occur in the field.” See also Simon Roberts, *A Court in the City: Civil and Commercial Litigation at the Beginning of the 21st*

Procedure, judges are mandated to use this the pretrial stage to simplify, shorten, accelerate, and reinforce the efficiency of the procedure, while examining settlement options with the litigants.¹⁹ A new civil procedure act, which came into force in 2020, reemphasizes the role of judges in controlling the case, explicitly stating that judicial intervention should be proportionate to the claim and that effective case management is a primary goal of the new code.²⁰

The observations were carried out by law students who were part of a legal clinic at Bar Ilan University in Israel.²¹ They underwent structured training, during which they were taught how to observe the hearings and what to document from the interactions they witnessed.²² The students submitted their documented reports and received additional feedback on their work to ensure full documentation.²³

The students were instructed to arbitrarily choose the hearings that they will attend, with the goal of observing as many judges as possible. The hearings were initially documented by the students in court and were subsequently processed at home by the students to provide a rich description.²⁴ The students were instructed to pay close attention to judicial conflict resolution activity, to the legal and conflict resolution aspects, and to the interaction between judges, lawyers, and litigants.²⁵ The thematic categorization of the first round of observations identified eleven practices, in two forms: based on structural features of the judicial process, and directly oriented to promoting settlement. Judges were described as gatekeepers to the trial phase in this study, portraying the trial as having a potentially negative impact on the litigants and entailing unnecessary risk.²⁶

Century, 9 J. COMP. L. 322 (2014); Woolf & Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission*, 47 COURT REV. 84 (2011); Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 LAW & SOC'Y REV. 473 (1970-1971); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RESOL. 271, 275-77 (2011).

¹⁹ Sela, Zimmerman & Alberstein, *supra* note 16, at 97. At first, eleven judicial settlement promotion practices were detected. These were mapped without quantifying the number of times they occurred, which was done in the second stage of the research. *Id.* at 86.

²⁰ Israeli Civil Procedure Regulations 5744-1984, § 10, art. 63 (2018).

²¹ Sela, Zimmerman & Alberstein, *supra* note 16, at 99.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

In the second phase of the empirical inquiry, we collected more courtroom data based on hundreds of observations conducted by students attached to seminars, courses, and clinics at Bar Ilan University.²⁷ Once completed, the observations were uploaded to Atlas.ti, a qualitative analysis software program. They were systematically analyzed and categorized, initially using the eleven practices derived from the earlier research.²⁸ Two coders, both law school students trained in the use of Atlas.ti, coded the observations; their analysis was validated by a third legal researcher.²⁹ Overall, sixty-two judges were observed, of whom twenty-nine were female and thirty-three male. The observations took place between 2017 and 2020.³⁰

B. Thematic Mapping

The judicial practices identified during the first phase included the use of structural elements related to the legal hearing: an *opening statement conveying the expectation or an invitation to settle* by the judge expressed at the start of the hearing;³¹ holding hearings by alternating adjudication *on and off the record*, as a way of creating an informal and semi-confidential space for judges to carry out judicial settlement promoting activities;³² the *lawyer-client-judge interactional triangle* captured instances in which judges spoke directly with litigants present in court to “understand their expressed emotional reaction or to enable them to vent their feelings,”³³ or in other cases, the judges directly addressed the lawyer’s own interest in reaching a settlement for the particular cases tried in court.³⁴ Judges also invoke their authority when using *court procedure and legal costs* to persuade litigants to settle.³⁵ Here, judges set a future hearing date to allow litigants the opportunity to settle or set a relatively close date so as to

²⁷ Sela, Zimmerman & Alberstein, *supra* note 16, at 98-99.

²⁸ *Id.* at 100-17 (listing and explaining practices).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 100.

³² *Id.* at 101 (“[A] different solution is used to allow some degree of confidentiality and informality in judicial settlement discussions. The general requirement to keep full transcripts of court hearings is relaxed in pretrial hearings. According to the Israeli Courts Law, in pretrial hearings, judges are allowed to obtain the parties’ consent to record only the main points discussed at the pretrial hearings, and only with the parties’ consent.”).

³³ Sela, Zimmerman & Alberstein, *supra* note 16, at 101.

³⁴ *Id.*

³⁵ *Id.* at 103.

pressure lawyers into preparing the case within a short period while pointing to the possibility of settlement.³⁶ Judges also use the possibility of mandating costs as a way of encouraging litigants to settle and avoid the financial expense of a full trial.³⁷ Practices oriented to settlement promotion were also identified. Judges engage in *direct facilitation of litigotiation* between litigants to help them arrive at an agreement themselves. They might offer settlement proposals, ask litigants about out-of-court negotiations that may have taken place, or inquire as to what has prevented them from reaching an agreement.³⁸ Judges might give a *prediction* of the legal outcome, either directly or by implying the strengths and weaknesses of each side's case, in order to give litigants an indication of the judge's perception regarding the legal outcome that the litigants can expect.³⁹ Judges sometimes asked parties if they would like them to serve as quasi-arbitrators, employing *procedural contract and quasi-arbitration techniques*.⁴⁰ In such cases, judges propose that the litigants set a monetary range with a minimum and a maximum amount, between which they can reach a mutual agreement. This practice is particularly pertinent in Israel, where Article 79(a) of the Israeli Courts Law allows judges to design such judicial arbitration modes if litigants authorize the judge to rule by way of compromise. Judges point to the negative aspects of the legal process or outcome, thus creating a *legal aversion*, by emphasizing the possible negative outcomes, expected and unexpected, of the legal processes.⁴¹ These include the high costs that a litigant may incur during the legal case or the emotional distress that may result from a publicized trial as opposed to a settlement agreement that will not be made public. Emphasizing the negative aspects of the legal process is done as a way of encouraging parties to agree to a settlement proposal that the judge might offer or to nudge them into negotiation rather than carrying on with the full legal process. While judges have some official training in mediation, in most cases this is not as comprehensive as the training received by mediators. However, court observation revealed that judges employ a host of *ADR techniques* to facilitate settlements.⁴² They might express empathy towards litigants, refer to the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sela, Zimmerman & Alberstein *supra* note 16, at 106.

⁴⁰ *Id.* at 118.

⁴¹ *Id.* at 121.

⁴² *Id.* at 125-27.

relationship between them, or reflect on the parties' non-legal interests. Another practice detected the *style and tone of judicial intervention*, which elicited different reactions from lawyers and litigants.⁴³ The same sentence spoken softly may have a very different effect if uttered harshly or with anger. We also detected a *carryover effect*, that had to do with the fact that pretrial hearings are typically held consecutively, such that a judge holds several hearings in a single courtroom sitting, usually in the morning. We have seen judges schedule between one and ten pretrial hearings in a single one-hour timeslot. In the criminal setting, the number is even higher. "In such a setting, the judge's behavior and pronounced attitude regarding settlement in any given case or series of cases can impact not only the litigants and lawyers involved, but also those who wait in the courtroom for their case to be heard."⁴⁴ "As a result, judicial practices in one hearing or series of hearings may set the tone for settlement discussions in subsequent hearings."⁴⁵ The settlement atmosphere in court has an effect beyond the concrete hearing itself.⁴⁶

Following the second phase and the Atlas.ti coding, we further noticed that judges use *humor* as a way of creating a positive atmosphere and mutual trust. They invoke their own personal relationships when attempting to convince lawyers and litigants regarding hearing dates: "I will do everything to prevent postponing the hearing, including fighting with my wife."⁴⁷ They refer to the difficulties of getting witnesses to testify: "You cannot control any witnesses, unless they are tied in your balcony, and then [we have] a completely different set of rules."⁴⁸ Or they refer to politics as a way of demonstrating their impartiality and the futility of the conflict in question: "As Begin [a former Israeli prime minister] said about the Iran-Iraq war: 'I wish both sides good luck.'"⁴⁹

⁴³ *Id.* at 108.

⁴⁴ *Id.* at 115.

⁴⁵ This statement is based on unofficial conversations between lawyers and the authors (Tel Aviv, 2019).

⁴⁶ See discussion *infra* Section IV.A-B, where the judicial styles of two judges, who have made a name for themselves regarding their specific styles among the lawyers who frequent their courtrooms, are analyzed.

⁴⁷ Kim Yankolovitz, Judicial Conflict Resolution from the Point of View of the Judge, 31 (2019) (unpublished seminar paper) (on file with Bar Ilan University).

⁴⁸ *Id.*

⁴⁹ Both Iran and Iraq were enemies of the State of Israel, thus not only was there no investment for Israelis in either of them winning, but there was an interest in both sides keeping on fighting—as then they would be too occupied with each other to attempt to attack Israel. See Zalmen Wishdeski, "I Wish Both Sides Good Luck",

We also saw that judges sometimes *apply pressure*, both mild and strong, on parties and lawyers, encouraging them to settle. As an example, a judge referred to the unreasonable length of the proceedings when opening the hearing, stating:

“Either the sides will settle, or I will ‘terminate’ the case... The case has been going on since 2014 and I have no intention in having this business go on any further.”⁵⁰ Or they might refer to the interests of powerful litigants when *encouraging settlements*:

The case is unclear, and it should end in a settlement. This is exactly the type of case in which the state health services do not want me to write a verdict There are good mediators who know the field and you will be much better off going to them. Believe me, you don’t want me to write a verdict here.⁵¹

In another case, a judge implied that should he write a verdict, it may very well harm the interests of one of the parties—thus, encouraging them to use mediation, where they would have more control over the outcome since they must agree to it.⁵²

A softer way of incentivizing settlements is when judges refer to their own limitations in providing a suitable solution to the conflict at hand. In a case of medical negligence—the litigant’s eye had been enucleated; the litigants were not present in court—the judge almost pleaded with the lawyers:

I ask you to implore your clients to go to mediation since mediators have tools that I do not. The mediator can explain to the plaintiff a situation in which there is no liability... to say no to mediation in this case is a position that cannot be accepted. If [you will not go to mediation] the court will have to appoint a specialist How can I know if a certain medical practice is common in this medical area?⁵³

We noticed that at times, judges *mirrored* to litigants the legal situation the way they perceived it, usually before giving them a *prediction* of the legal outcome. In other cases, they *mirrored* while giving a prediction. We identified this dynamic in a defamation case,

CHABAD LUBAWITSCH BASEL (Mar. 23, 2018, 2:00 AM), https://www.chabad-basel.com/templates/blog/post_cdo/aid/2570355/PostID/79700/sc/fb_share [<https://perma.cc/PBW2-5FFF>].

⁵⁰ Observation 1 (on file with author). All the quotes are taken from hearings collected to our database and are labelled in the order they were recorded.

⁵¹ *Id.*

⁵² Observation 11 (on file with author).

⁵³ Observation 32 (on file with author).

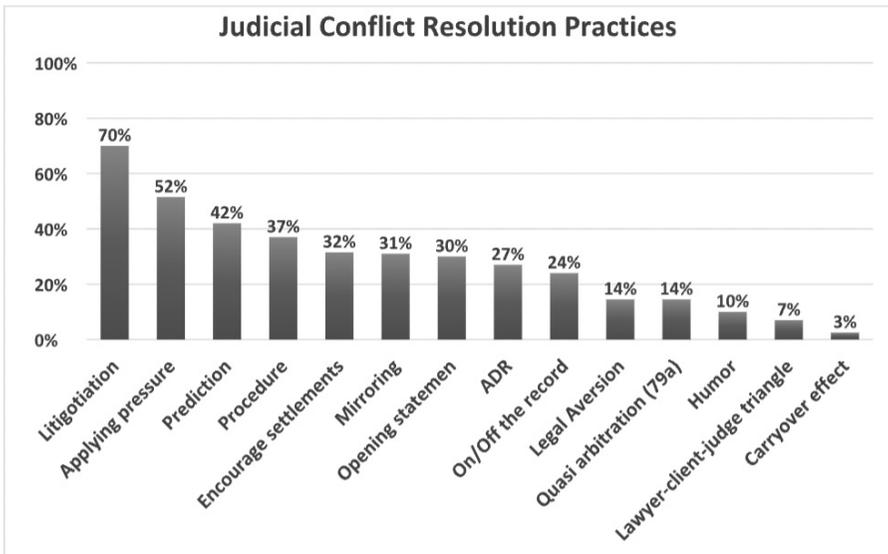
when the judge mirrored the legal situation in his opinion to the prosecutor, stating that:

“[W]hile the documents of the prosecution are very detailed, I do not find any basis for a defamation case in the indictment, not in terms of the damages listed nor in terms of the factual basis.”⁵⁴

At other times, judges are hesitant when they see that the litigants and their lawyers are ready to act out on their mirroring. In a case concerning a car accident, the judge said what he thought about the facts of the case without making a prediction about the legal outcome.⁵⁵ Based on video documentation of the incident, the judge said that he believed that the case involved malpractice on the part of the driver. When the lawyer heard this, he asked to withdraw the lawsuit; the judge then said that he could be wrong and that they should nevertheless proceed with the case, as this was only his preliminary opinion.⁵⁶

C. Statistical Analysis

To conclude this section, below presents a statistical representation of the frequency with which the judicial conflict resolution practices manifest, as documented by the Atlas.ti software. It represents the recurrence of judicial practices across all hearings and emphasizes the relative frequency of each.



⁵⁴ Observation 156 (on file with author).

⁵⁵ Observation 33 (on file with author).

⁵⁶ *Id.*

When examining the frequency of judicial practices to promote settlement, it can be seen that applying pressure by judges is a dominant practice. Besides encouraging the parties to reach a settlement independently and to pursue litigotiation, judges exercise pressure in many pretrial hearings. They use prediction and mirroring to provide parties with more information regarding their case; in about a third of all cases, they used the opening statement to invite parties to settle. The use of humor is quite rare, as too is the use of the lawyer-client-judge triangle. ADR practices are used, but only in less than a third of the cases. The use of judicial arbitration through Section 79(a) is also discussed and sometimes exercised in 15% of the cases. Legal aversion is expressed in 15% of the cases, and the use of legal procedure is quite common in incentivizing parties to settle. These practices are not stand-alone but are used in conjunction with each another. Thus, beyond a simple quantification of the percentage of hearings in which judges used these practices, we discuss the meaning of these practices in terms of negotiation, persuasion techniques, and power analysis. This will be presented in the next section.

III. POWER AND PERSUASION IN THE COURTROOM—A TAXONOMY OF JUDICIAL CONFLICT RESOLUTION PRACTICES

A. *Hard and Soft Powers in the Court*

The concept of power has been used to underscore underlying dynamics across a range of academic disciplines, including political science,⁵⁷ sociology,⁵⁸ psychology,⁵⁹ and other perspectives. In conflict resolution studies, negotiations based on power are usually contrasted with the use of rights or interests, where interests-based

⁵⁷ See generally PETER BACHRACH & MORTON S. BARATZ, *POWER AND POVERTY: THEORY AND PRACTICE* (1970); ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); C. WRIGHT MILLS, *THE POWER ELITE* (1956).

⁵⁸ See generally HUBERT DREYFUS & PAUL RAINBOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* (2d ed. 1983); FOUCAULT, *supra* note 5; MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (A.M. Henderson & Talcott Parsons trans., 1947); Isidor Wallimann, Nicholas Ch. Tatsis & George V. Zito, *On Max Weber's Definition of Power*, 13 *AUSTL. & N.Z. J. SOC.* 231 (1977).

⁵⁹ See generally Malin Fors, *Power Dynamics in the Clinical Situation: A Confluence of Perspectives*, 57(2) *CONTEMP. PSYCHOANALYSIS* 242 (2021).

negotiation is considered the preferred track.⁶⁰ The field of social psychology, which articulates power relations in multi-party forums, is especially useful for understanding such dynamics in court, given that the strict hierarchy between judges, litigants, and lawyers is permeated with power relations that fuse personal affiliations and social structures.

At a first glance, the relationship between judges and litigants is very hierarchical. It might seem that judges have ultimate authority in court, where power relations are supposedly simple: judges give orders that litigants and lawyers must comply with. This is a straightforward exercise of coercive power backed by procedural and substantive legal rules. In the age of the vanishing trial, however, when judicial-led settlements far outnumber written verdicts, and with judicial settlement promotion institutionalized by law, this is no longer the case.⁶¹ The effort to settle cases during preliminary hearings and to avoid reaching the trial phase posits the judge within two negotiation settings. The first is between the litigants, which they try to constructively promote by providing information and using various persuasion techniques. Second is a more implicit negotiation between the judge and the litigants, on the question of whether the case should indeed continue to the trial phase. Within this negotiation, the judges in our study had a clear interest in closing the litigation gate due to their caseload and following institutional incentives. Litigants were in most cases interested—or at least presented themselves as being interested—in reaching the trial phase and having their day in court to assert their legal rights and ultimately receive a written verdict. As discussed earlier, judges use a host of techniques and practices to promote settlements, which involve direct and indirect forms of power. To this end, judges are dependent on the litigants and rely on their agreement to press for a settlement. They are parties to a negotiation over the right of the litigants to pursue the trial and to be given a written verdict. The judges must therefore convince the litigants to agree to either a concrete settlement that they propose or to reach an agreement on their own. If litigants are sent to a mediator or arbitrator, they must first agree to this and must pay for the service. Judges, then, cannot use hierarchical hard powers in simply ordering the litigants to do things

⁶⁰ See WILLIAM L. URY, JEANNE BRETT & STEPHEN GOLDBERG, *GETTING DISPUTES RESOLVED* 4-5 (2d ed. 1993).

⁶¹ See, e.g., Fed. R. Civ. P. 16(c)(2)(l) (stipulating that “the court may consider and take appropriate action . . . settling the case and using special procedures to assist in resolving the dispute”).

that they, the judges, want. This will make them less effective in the second negotiation, in which they have a clear stake in avoiding the trial and verdict. Thus, they must incorporate into their practices an array of direct and indirect soft powers that are dependent on sophisticated persuasion, capable of influencing the litigants' attitudes, goals, and beliefs—to “activate” them into behaving in a certain way.⁶² Assuming this interactional dynamic, French and Raven's typology of power, as a relational one that exists in an interdependent setting, provides a nuanced and complex understating of judicial activity when promoting settlements and when motivating litigants to agree to settle in court or outside.

B. Power and Persuasion Dynamics

Social psychologists John R. P. French and Bertram H. Raven famously characterized power as the potential ability to influence the behavior of another person through the use of force and to bring about change in a person's behavior and opinions.⁶³ Their typology of power has been applied to various academic fields in the social sciences.⁶⁴ It has also been used to analyze mediation and to examine the complex relationship between mediators, parties, and their representatives.⁶⁵ Building on this analysis and expanding it, French and Raven's understanding of power is used to analyze the interactions between judges, litigants, and lawyers in court.

⁶² See discussion *supra* Section III.A.

⁶³ John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER 150, 151 (Dorwin Cartwright ed., 1959).

⁶⁴ See Meni Koslowsky & Joseph Schwarzwald, *The Power Interaction Model: Theory, Methodology, and Empirical Applications*, in THE USE AND ABUSE OF POWER: MULTIPLE PERSPECTIVES ON THE CAUSES OF CORRUPTION 195, 197 (Annette Y. Lee-Chai & John A. Bargh eds. 2001) (“The French and Raven (1959) typology of social power is thought to be ‘the most comprehensive and insightful theory of social influence in functional terms or more generally.’ Indeed, it has been used in a variety of fields for studying interpersonal power and influence. These include familial relations, education, marketing and consumer psychology, and health and medicine.”); see also Bertram H. Raven, *A Power/Interaction Model of Interpersonal Influence: French and Raven Thirty Years Later*, 7 J. SOC. BEHAV. & PERSONALITY 217, 239-40 (1992) (noting that “[the] model was developed as a guide for research, and for an analysis of on-going interactive situations. As such, it may also be useful for those who are in positions of influence, to help them understand more clearly the bases for their own actions, and the possibilities of alternatives”).

⁶⁵ Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. DISP. RESOL. 535, 540 (2009).

French and Raven defined six bases of power, broadly divided into hard and soft forms of power.⁶⁶ *Reward* and *Coercive* power are “hard” forms of power, which delineate the ability to administer positive valences and remove negative ones, or to inflict punishment.⁶⁷ When using these forms of power, there is no attempt to change or affect the other person’s attitude or perception of reality, but rather to force them to change their behavior out of fear of punishment or due to dependency and expectation of a promised result.⁶⁸ The other four bases of power delineate a more nuanced taxonomy of power relations, which has to do with influence rather than coercion. They reflect social hierarchies and automatic behavior patterns based on the “mental shortcuts” that people adopt to handle complex information,⁶⁹ identification with others,⁷⁰ the obligation to treat and be treated fairly,⁷¹ and more. These include *Legitimate* power, which is based on the social perception that one has the ability to prescribe certain behaviors to another; *Referent* power, which is based on the identification of one with another; and *Expert* power, based on the understanding that another person holds knowledge or *expertise*.⁷² Later, a sixth source of power, *Information*, was added to the list.⁷³ Experts in power dynamics have further emphasized the greater effectiveness of soft powers tactics such as inspiration, legitimacy, and rational persuasion for acquiring and sustaining influence.⁷⁴ Some differentiate between potential, perceived, exercised, and realized power.⁷⁵ The personal orientation of the individual, whether cognitive, motivational, moral, or negotiation skill-based,⁷⁶ has a further and significant effect on the use of the various bases of power. Judges with competitive dispositions,

66 Raven, *supra* note 64, at 234-39.

67 French & Raven, *supra* note 63, at 156-58.

68 *Id.*; see also Raven, *supra* note 64, at 234-39.

69 Shapira, *supra* note 65, at 545.

70 *Id.* at 548.

71 *Id.* at 550.

72 French & Raven, *supra* note 63, at 152-56.

73 Bertram H. Raven, *Social Influence and Power*, in CURRENT STUDIES IN SOCIAL PSYCHOLOGY 371, 372 (Ivan D. Steiner & Martin Fishbein eds., 1965).

74 Gary Yukl & J. Bruce Tracey, *Consequences of Influence Tactics Used With Subordinates, Peers, And The Boss*, 77 J. APPLIED PSYCH. 525 (1992).

75 Peter H. Kim, Robin L. Pinkley & Alison R. Fragale, *Power Dynamics in Negotiation*, 30 ACAD. MGMT. REV. 799, 799-800 (2005).

76 ROY J. LEWICKI, DAVID M. SAUNDERS, & BRUCE BARRY, ESSENTIALS OF NEGOTIATION 183, 191-92 (5th ed. 2011).

for example, may emphasize “power over,” while the more cooperative will align with the “power with” approach.⁷⁷

In contrast to power dynamics, which aim to change people’s behaviors and negotiation outcomes, persuasion aims to change people’s minds.⁷⁸ Research on social influence has established that if compliance is not accompanied by private acceptance, the outcomes of influence are typically ephemeral and unstable.⁷⁹ Persuasion is, therefore, a critical tool in creating lasting settlements between parties in conflict with one another.⁸⁰ In conflict resolution studies, it has been proved that the intuitive heuristic processing of conflict information, in contrast to systematic processing, introduces biases such as fixed pie assumptions, anchoring, and stereotypes.⁸¹ The pretrial setting can be described as addressing the need to develop a more systematic understanding of the conflict while not conducting the full systematic process of the trial and verdict. Judges at the pretrial stage are expected to provide litigants with a more balanced and coherent perspective of their conflict, frame the controversial legal issues clearly, reduce personal bias, and gather information. This process of increased knowledge is accompanied, usually, by an indication of the expected decisions. While judges usually claim that their legal assessment is tentative and based on the current knowledge available, i.e., heuristic litigants take this indication seriously, and will perceive it as an anchor for the judge. They may still insist on pursuing the trial if they strongly believe that a more thorough process of fact-finding will persuade the judge. However, given that time is of the essence for judges because they are allocated more cases than they are able to adjudicate on the merits, and since systematic and thorough decision making requires much more time, judges will try to persuade the parties that their current legal assessment is solidly founded.⁸² Persuasion techniques may

⁷⁷ *Id.* at 152-53.

⁷⁸ Alison Ledgerwood, Shannon P. Callahan & Shelly Chaiken, *Changing Minds: Persuasion in Negotiation and Conflict Resolution*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 533-57 (Peter T. Coleman, Morton Deutsch, & Eric C. Marcus eds., 3d ed. 2014).

⁷⁹ *Id.*

⁸⁰ *Id.* at 533.

⁸¹ Carsten K. W. Dreu, *Social Conflict: The Emergence and Consequences of Struggle and Negotiation*, in *HANDBOOK ON SOCIAL PSYCHOLOGY* 983, 1005 (S. T. Fiske, D. T. Gilbert & G. Lindzey eds., 2010).

⁸² This statement is based on unofficial conversations with ten Israeli presiding judges, in which they told us that they would not have been able to write full verdicts in all of their cases due to time constraints—one of the reasons why they encouraged settlements (Jerusalem and Tel Aviv, 2019-2020).

further address psychological aspects, sometimes unconscious to the litigants themselves, such as a fear of settling, the search for fairness, the need for a sense of choice, and an inviting atmosphere. In terms of the judge as a party to the negotiation over admitting the trial for full adjudication, persuasion entails settlement praise and more information about the costs of a trial.

Going back to the analysis of the power that judges hold, by the nature of their position and as granted by the law, judges have *coercive* power, embedded in their authority to give verdicts and to potentially bring about negative outcomes for the litigants in the cases they are trying. Coercive power derives from high social status, physical strength, or control over resources, as well as from the expectation that a failure to comply will result in punishment.⁸³ Nevertheless, the exercise of the judicial role is backed by the *legitimacy* of the law, which provides a reason to obey, and is not considered a brutal force.⁸⁴ Judges have *legitimate* power, reflecting the rule of law, which is the governance of law. When writing legal opinions, judges are considered to be expressing reason and authority, rendered to them by the people. They are also backed by their perceived legal expertise.⁸⁵ In the courtroom, judicial legitimacy power manifests in the judges' ability to compel testimonies and impose decisions that affect the lives of the litigants before them. The judge can impose sanctions, control behavior, and decide about the process. The stronger the potential punishment—or even the mere threat of it—the stronger the coercive power the judge holds.⁸⁶ Yet, this power is backed by the legitimacy of the law. As judicial decision becomes rarer, the legitimation of power becomes more interdependent and is not founded on pure legal reasoning. The judge's expertise is also not in settlement promotion or conflict resolution. This is another cause of diminished legitimacy. In what follows, this Article will draw on the practices identified in court to analyze the coercive and reward powers that judges use, along with persuasion techniques.

When promoting settlements, judges forego their legitimacy power to decide by law and instead use coercive powers in one of two ways, for which they rely indirectly on the rule of law. First, judges can directly *apply pressure* on litigants and their lawyers to agree to a

⁸³ French & Raven, *supra* note 63, at 153-54.

⁸⁴ See also RAZ, *supra* note 2, at 48.

⁸⁵ *Id.* (In his philosophical discussion of the notion of the authority of law, Raz defines it as providing a reason to obey on the basis of expertise.)

⁸⁶ French & Raven, *supra* note 63, at 152.

settlement offer proposed by the judge. They can also threaten the *legal costs* (which is part of the legal *procedure* judges apply to encourage settlements) that the litigants will incur if they do not settle. For example, in a case between an insurance company and a private person, the judge explicitly told the insurance company's lawyers that he did not side with them: "great judges did not accept arguments as the ones you put forth, even though I must say that you have done a great job doing so."⁸⁷ The judge went on to explain the reason for his opinion: "You go from one jurisdiction to another, 'forum shopping' for the judge who will give you the verdict you want . . . and I am telling you" [pointing to the defendants' lawyer] "I am inclined to side with them."⁸⁸ In this case, coercive power operates in the background, owing to the fact that if the parties do not settle, they know that the judge could eventually use coercive power in the trial that will ensue. In this sense, the coercive power held by judges is a horizon of a potential future of negative implications, either real or imagined, that could materialize should the parties refuse to settle.

The second way judges use power within the settlement hearing is much less direct. It takes place without an explicit assertion of power, and it stems from the mere possibility of the judges using it. This occurs because litigants know that the same judge who made the settlement offer at the pre-trial stage will also preside over the trial should they not settle.⁸⁹ Refusing a settlement offer, especially if the judge is the one who made it and even if the judge "only" encourages that they accept it, has threatening implications that are part of the hierarchy of the courtroom.⁹⁰ This dynamic is exacerbated in the Israeli legal system, where judges have authority over all procedural and dispositive decisions as there are no jury trials.⁹¹

Applying pressure or predicting, then, relies on a form of legitimacy that derives from the authority that judges have in court to apply sanctions should the sides find themselves unable to settle, and the

⁸⁷ Observation 17 (on file with author).

⁸⁸ *Id.*

⁸⁹ See RCA 288/89 Ushiyot Insurance Company v. Cohen, 43(4) PD 427, 432 (1989) (Isr.) (noting that under Israeli law, the pretrial and trial phases are considered separate procedural units, such that the presiding pretrial judge will not necessarily preside over the trial); see also Israeli Civil Procedure Regulations, 5744-1984 (Isr.); see also CSA 1168/02 Falah vs. Civil Service Authority, 56(6) PD 197, 202 (2002) (Isr.) (noting that the general rule is that "all hearings should be held before the same judicial panel, as much as possible").

⁹⁰ Sela, Zimmerman & Alberstein, *supra* note 16, at 116.

⁹¹ *Id.*

case will end in a trial. The indirect use of coercive power relies on legitimate power that is based on the Rule of Law since it alludes to the possibility that the judge who proposed the settlement will preside over the trial if the sides do not agree to their suggestion for settlement. The Rule of Law becomes a source of coercion rather than legitimacy in this sense. The perceived and remote nature of the application of legal rules makes it less legitimate and more coercive. Applying pressure and imposing costs, combined with prediction and mirroring, accordingly manifested regularly in our observations.⁹²

Rewards power, similarly to coercive power, stems from control over resources and potential outcomes. It is also a direct form of power; however, unlike coercive power, it holds the ability to bring about a positive outcome.⁹³ Judges use it to motivate litigants to make concessions that they otherwise would not have made.⁹⁴ Usually, judges use *court procedure and legal costs* as a *reward* form of hard power.⁹⁵ They often point out to litigants that settling at that point would save the litigants money as they will not have to pay the lawyers, the costs of the other side, or court fees, stating that the risk is now worth it for them.⁹⁶ Sometimes, they also threaten to impose more costs, as noted earlier with reference to coercive powers.⁹⁷ As one judge said: “This is not a case for which you should stand on your back two feet [be stubborn] and insist on litigating. You might end up losing a lot here.”⁹⁸ The saving of costs becomes the reward the judges flag to motivate the litigants to settle.

These two forms of hard power are very dominant in the settlement scene. Judges do not usually consider them as “hard,” since they perceive them as the legitimate persuasion and incentivization of

⁹² See *supra* Figure 1.

⁹³ Jan Bruins, *Social Power and Influence Tactics: A Theoretical Introduction*, 55 J. SOC. ISSUES 7, 9 (1999) (suggesting that the difference between theories that focus on the bases of power and theories that focus on influencing tactics is that the first approach represents a move from theory to facts, i.e. a theory is developed and then tested by empirical research, while the latter approach represents a move from empirical findings on methods of influence to an explanation of these findings by a theory). Each approach has its advantages and disadvantages, and the ideal is to integrate the advantages of both. Influence tactics sometimes serve to enhance the bases of power and increase the effectiveness of influence attempts.

⁹⁴ Observation 1 (on file with author).

⁹⁵ Sela, Zimmerman & Alberstein, *supra* note 16, at 103.

⁹⁶ *Id.* at 104.

⁹⁷ *Id.*

⁹⁸ Observation 17 (on file with author).

litigants to close the case.⁹⁹ Still, this is a hard tactic that they exercise in the negotiation in which they are parties with strong interests: the interest to close the case.¹⁰⁰ They use the hierarchy that has been given to them as a legitimized judicial power to decide, to influence an outcome in a negotiation in which they do not have the power to decide since they are not about to give a verdict in it.¹⁰¹ The parties are free to pursue the trial and to ask for it; judges close the gate to them by applying these hard powers.¹⁰² They do not motivate the parties from within by using these tactics, but rather from the outside by offering sticks and carrots. French and Raven's understanding of soft powers, on the other hand, underscores a much more subtle taxonomy of power relations that counts for the indirect effects on those that they are applied. These powers can help judges to negotiate more effectively and to encourage more trust and compliance by and between the parties.

Of these, the first form of power is *Expert* power. This is based on the perception, be it false or real, that the one who holds power has superior knowledge and experience.¹⁰³ Experts automatically have this power attributed to them because of the psychological and mental shortcuts that assist them in processing large amounts of information quickly.¹⁰⁴ Judges are perceived as experts in law by virtue of their position and their experience. As a result, statements made by judges are more likely to be perceived as correct without close examination and could therefore go a long way in convincing litigants to agree to settle.¹⁰⁵ This would be especially the case if the judge is perceived as an expert in the particular field of law in which the case is being litigated if it requires specific knowledge, such as labor law or patent law. Sometimes, judges might demonstrate their expertise by referring to minute details of a case, referring to parties and lawyers by name, or showing mastery of the nuances of the legal dispute and its development. In a manner that goes beyond the status attributed to judges by law, judicial expertise is continuously constructed and maintained in court hearings, based on the dynamics that they create in the courtroom, their personality, and their charisma. Consequentially, such

⁹⁹ Sela, Zimmerman & Alberstein, *supra* note 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ French & Raven, *supra* note 63, at 163.

¹⁰⁴ See ROBERT B. CIALDINI, *INFLUENCE SCIENCE AND PRACTICE* 6-7 (3d ed. 1993).

¹⁰⁵ *Id.* at 8; ERWIN P. BETINGHAUS & MICHAEL J. CODY, *PERSUASIVE COMMUNICATION* 71-72, 125-33 (5th ed. 1994).

attributed expertise equips judges with more psychological leverage when attempting to convince litigants to settle. A drawback experienced by judges in the settlement scene is that they usually are not experts in conflict resolution and mediation, and they are not perceived by the litigants as such. Therefore, the litigants rely on the judges' legal knowledge, but they do not perceive them as informed enough to exercise it during the preliminary hearing.

The following judicial practices, which were identified in the courtroom, demonstrate the use of expert power. First, judges encourage *litigotiation* when speaking from a position of experience and knowledge, assessing the risks for litigants if they do not settle at the pretrial stage and continue to a full trial. They further identify and evaluate the litigants' interests, offering a new solution or making a unique settlement proposal for the matter at hand. This occurred in a defamation case determining whether the reputation of a piano teacher had been damaged.¹⁰⁶ The judge used expert power when summarizing the legal strengths and weaknesses of the case to the litigants and followed with a proposal for arbitration:

This is not a simple case – on the one hand there was an invasion of privacy, but then again while it was fully proven that the responsibility was the defendant's, the damages were not proven. Therefore, I propose you settle by 79a [judicial arbitration] and allow me to decide on the compensation, which will be between a minimum of [New Israeli Shekels] 2000 and a maximum of ₪ 6000.¹⁰⁷

Here, the judge established expert power by showing that he knew the case thoroughly enough to determine the partial liability of the litigants, while setting realistic expectations for them that will help them accept his proposed settlement. The judge further wielded coercive power by subtly insinuating the verdict that he would give, should the sides choose to continue to a full trial rather than settle, when stating the range of the minimum and maximum damages that he will decide.¹⁰⁸ When the plaintiff's lawyer exclaimed that the damage incurred had been extensive, the judge said that this had not been proven, explaining:

“You can ask for a verdict, but please remember that you could lose everything and have to pay expenses.”¹⁰⁹

¹⁰⁶ Observation 89 (on file with author).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Following the judge's demonstration of a mix of coercive and expert power, the two sides agreed to the judge's proposal for arbitration.¹¹⁰

The judge's statement is extremely significant, once analyzed with French and Raven's typology of power relations, which is contextual and relational. As such, power operates differently in different settings; while such a statement might seem neutral if said between equals, it holds very threatening implications if said by a person in a position of authority, such as a judge.

Strong *opening statements* are another tactic used by judges to establish their expertise directly and indirectly by underscoring the details of the case and guiding the direction of the hearing toward settlement. A judge used this tactic in a case pertaining to the mishandling of an apartment sale.¹¹¹ He began the session by stating that he had read both sides' pleadings carefully, as well as their affidavits—including the last one, submitted just the day before.¹¹² After making sure that the litigants had acknowledged that he was up to speed with the case's details, he asked if the mediation that they had participated in had succeeded.¹¹³ When they told him that it had not, the judge asked if they were ready to settle, given that the only relevant question for him was whether the defendant did his job and now could tell the purchasers of the apartment how much they had to pay.¹¹⁴ In this case, the judge used soft power in his opening statement when suggesting a settlement and framing the hearing in that tone. In doing so, he established his expertise by demonstrating detailed knowledge of the case and its legal aspects.

Judges further establish expertise when holding part of the hearing *off the record*, when discussions are not documented. Judges use this informal space, in which what is said remains only between them, to clarify to the litigants their position regarding the legal and the factual aspects of the conflict, or to tell the litigants what part of the factual story they deem relevant to the hearing. Due to the informality of such exchanges, a more intimate setting is created, one that has less of a hierarchy framing it. Consequently, whatever the judge reflects regarding the case, their position is perceived as coming from an expert on the matter—but without the forceful and top-down aspects, and

¹¹⁰ *Id.*

¹¹¹ Observation 84 (on file with author).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

thus is more likely to be received.¹¹⁵ The discussion remains heuristic and off the record, but nevertheless it increases persuasion by providing more knowledge, including on the judge's interstitial legal perspective.

Another form of indirect power is *Referent power*, which one has when another person identifies with the power that they hold or if one finds common points of likeness with them.¹¹⁶ Referent power motivates the individual to obey and follow the power holder because others identify with them or because they are charismatic.¹¹⁷ In the courtroom, judges come to wield such power when they *use humor* or if they express empathy with the litigants' hardships. In common with the off the record dynamic, this creates a sense of closeness with the litigants, which breaks down the judge-litigant hierarchy.¹¹⁸ The trust created in the courtroom persuades the litigants to give more weight to what the judges advise, and it persuades them to become more cooperative and less resistant to attempts to influence them to agree to settle.¹¹⁹

These dynamics can be seen in the following court observation. A judge we observed at the Tel Aviv Magistrate Court was a "settlement champion," who closed three times more cases than his colleagues in the real estate section of the court.¹²⁰ While *directly facilitating litigotiation* and expressing *expectation or invitation to settle* and even when *applying pressure*, he made particular use of his charisma and *humor* to establish referent power. When explaining to the parties the benefits of reaching an agreement themselves, the judge made an off the protocol statement, hinting at his expert power and ability to unilaterally resolve the case vis-a-vis their capacity to control the outcome—but did so humorously:

"I have a big toolbox, with hammers of various sizes, but this case needs a tweezer. And yet, in my toolbox I do not have a tweezer, but you (the litigants) have a tweezer, and you need to use it."¹²¹

¹¹⁵ This dynamic is expanded on in the discussion of the Dispute Design Judge who uses this practice extensively. See *infra* Section IV(A).

¹¹⁶ French & Raven, *supra* note 63, at 161-62.

¹¹⁷ Raven, *supra* note 64, at 221. Conversely, one tends to reject the advice given by someone they find repulsive.

¹¹⁸ *Id.*

¹¹⁹ Such practices in mediation have been researched. See Deborah M. Kolb, *Strategy and the Tactics of Mediation*, 36 HUM. REL. 247, 249 (1983).

¹²⁰ Yankolovitz, *supra* note 47, at 28-29.

¹²¹ *Id.* at 30; see *infra* Part IV.

Thus, the harshness of the implications of the judge's intervention was mitigated by the softer forms of power that he used.

Another form of soft power that judges hold that is not directly coercive but nevertheless is not as nuanced as referent or expert power is *legitimate power*. This power is inherent to the judge's position; litigants must comply, as by law they are obliged to do what judges request.¹²² During pretrial, judges have the authority to determine the scope of the claim, to eliminate issues, to hear testimonies, and to decide facts after hearing the litigants. Therefore, their legal power as a judge can be used at the pretrial stage in the traditional sense; in fact, it can be argued that they conduct a circumscribed trial.¹²³ There are several other types of soft power that are part of the legitimate power held by judges. First, judges have *position power*, deriving from the role they hold and stemming from their position as ascribed by law and enforced by social norms. This type of power mandates them to hand down verdicts, order litigants to testify, or refrain from doing certain things. Judges can use this power in a sophisticated and less apparent way, by demonstrating that they have specific knowledge of a certain field relevant to the case, alluding to their expert power as discussed before, and sometimes to settlement expertise.

The *power of equity*, which is based on the idea of fairness and the right to compensation if one has been wronged, is used by judges when attempting to influence litigants or their lawyers to act.¹²⁴ When parties refuse to settle on a fair resolution, the judge might invoke this power dynamic in order to influence litigants to accept a settlement proposal or to agree to a concession. The *power of weakness*, another form of indirect soft power, is based on the ingrained responsibility one has to help those who cannot help themselves or those dependent on others.¹²⁵ While these two forms of power describe a dynamic that exists between the litigants, judges use them to convince parties to settle in different cases, such as when a witness connected to one party or the other is particularly vulnerable, by noting that continuing to a full trial would harm them. There is a famous saying that judges have "no influence over either the sword or the purse"¹²⁶ and therefore are weak within the social sphere, possessing only the legitimacy of the

¹²² Raven, *supra* note 64, at 220-21.

¹²³ Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2138 (2018).

¹²⁴ Raven, *supra* note 64, at 220-21.

¹²⁵ *Id.*

¹²⁶ THE FEDERALIST NO. 78 (ALEXANDER HAMILTON).

law and the trust of the people. In the pretrial hearing, it can be argued that they even have less power, given that they cannot apply the law fully yet. Nevertheless, significant or explicit use of the power of weakness within the settlement hearings has not been observed, although judges did mention it during interviews. The only use found was with reference to the weakness of the litigants. In some situations, judges stated that the easiest way forward for them would be to decide the case and use the authority and reason of the law; still, they preferred the hard way of encouraging consent-based dispositions.

These two forms of power played out in a case in which a Holocaust survivor sued the German government for compensation.¹²⁷ The survivor sued his previous lawyer, demanding a refund of part of the lawyer's fee.¹²⁸ During the hearing, an exchange between the lawyers became very heated when the judge attempted to have them agree to a settlement.¹²⁹ The judge used the judicial conflict resolution practice of *mirroring* each side's disadvantages in the case, at some point exclaiming in exasperation:

“Calm down! Please respect the fact that the litigant is a Holocaust survivor who has gone through very difficult ordeals in his life. Look at how calm he is! And now, let's talk about the risks you will take if you decide to go ahead with a trial”¹³⁰

In emphasizing the hardships experienced by the litigant as a Holocaust survivor, the judge employed the powers of *weakness*, *equity*, and *reciprocity*. Given the centrality of the Holocaust in Israeli society, mentioning the litigant's history not only invoked his weakness as someone who had suffered trauma, but also the responsibility ingrained in Israelis to respect that collective trauma and to honor survivors.¹³¹ As we have seen, the judge alluded to the power of equity, and indirectly to the power of reciprocity, directed especially to the lawyer of the other party, who was asked to behave “properly” given that someone who had suffered much more could behave calmly.

¹²⁷ Observation 22 (on file with author).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* (Jerusalem, 1991); Yael Zerubavel, *The Death of Memory and the Memory of Death: Massada and the Holocaust as Historical Metaphors*, 45 *REPRESENTATIONS* 70 (1994); Hadas Cohen & Dani Kranz, *Israeli Jews in the New Berlin From Shoah Memories to Middle Eastern Encounters*, in *CULTURAL TOPOGRAPHIES OF THE NEW BERLIN: AN ANTHOLOGY*, 322, 322-46 (Berghan, 2017).

The last type of soft power used by judges that is also related to reciprocity, weakness, and equity is *third-party power*, in which judges rely on the existence of a third party, neither a litigant nor a lawyer representing them, and who is not necessarily in court to influence them.¹³² Judges do so, for instance, when mentioning conflict resolution professionals, such as a mediator who is also a retired judge, who could use their professional experience to help the litigants resolve not only the matter at hand but also the main conflicts that brought them to court. Such professionals, said one judge can “really resolve the conflict.”¹³³ At other times, judges may invoke third-party power by mentioning vulnerable parties associated with the litigants, who would suffer if the parties go ahead with a full legal process.¹³⁴

Different from legitimate power stemming from the position that judges hold, *informational power* has to do with information judges have that could help them convince litigants to settle.¹³⁵ Such use of information could be direct or indirect; it could involve applying strong pressure by directly giving *predictions* regarding the legal matter at hand, stating the weaknesses of each side.¹³⁶ Judges can use informational power indirectly, by saying, for instance, that they know that the mediator they are referring the sides to is a specialist in the field and that they have been able to craft creative settlements in the past, beneficial to both sides in ways that the court could not achieve. Thus, while the sides will independently decide whether to continue to settlement or to continue to trial, they are nevertheless heavily influenced by the information that they receive from the judges.

Another form of soft power employed by judges is *environmental power*,¹³⁷ which affects the atmosphere in the courtroom and in turn, helps them steer litigants into responding to their settlement efforts. This type of power plays out in the courtroom when judges directly intervene and influence the negotiations between the litigants in order to encourage them to settle. Without handing down verdicts or directly using strong powers, judges control the legal procedure when deciding which aspects of the legal conflict they will address, how much time will be spent on each topic, and the issues they will focus on.

¹³² Raven, *supra* note 64, at 222 (when they discuss invoking an external third party as a way to influence the power relations between the parties who are engaged with each other).

¹³³ Observation 165 (on file with author).

¹³⁴ Raven, *supra* note 64, at 222.

¹³⁵ *Id.* at 221-22.

¹³⁶ *Id.* at 222.

¹³⁷ *Id.*

An example of the use of a mix of strong and soft powers can be seen in a damages lawsuit following the death of a garbage truck worker, who was crushed to death by a car while uploading it onto a garbage can.¹³⁸ The parties had to determine responsibility for the accident between the municipality, the truck manufacturing company, and the worker—the last sharing this responsibility with the municipality.¹³⁹ The judge proposed mediation, agreeing to set the next hearing 120 days hence. When the lawyers asked whether the judge would agree to postpone the hearing if they ask for this, the judge answered:

“Only if you tell me when you ask to postpone that you have already begun mediation, otherwise we will move immediately to the evidence hearing.”¹⁴⁰

Here, the judge explicitly conditioned the option of postponing upon the litigants beginning mediation, which could lead to a settlement agreement.¹⁴¹

The atmosphere created by the judge was only encouragement and not designed to force the parties to settle. Still, the judge used his *control of procedure* to send a very clear message regarding his expectation that the sides should negotiate a settlement. In other words, while he did not make a decision on the merits of the case, his ability to control the technical and procedural aspects, as well as the explicit understanding that he will be the judge should the case reach the trial stage, created a very clear dynamic of hierarchy.

C. *Persuasion-Power Dynamics in Action*

The decline in adjudication on the merits also means, as aforementioned, a decline in the legitimate power possessed by judges. In the absence of the direct application of the law, new modes of legitimation and new taxonomies of power were created when judges began to attempt to influence litigants to settle. Furthermore, since the law does not ascribe precisely how to promote settlements, judges were indirectly expected to fill this void themselves. In our observations, we found that while most of the judges that we observed had not developed a reflexive or coherent perspective on their new role and mostly used hard powers, a few had developed unique approaches, which can be described as JCR styles, using a mix of soft power and

¹³⁸ Observation 29 (on file with author).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

authority based hard power to promote settlements in their courtrooms.

IV. JUDICIAL STYLES

This section outlines three distinct judicial styles as developed by judges, each utilizing a unique technique to promote agreements between litigants in or outside of court. The judges, who are considered champions of settlement, combine various JCR practices and use various aspects of judicial procedure to design a repeating “script,” into which they have integrated coercive and rewards hard forms of power, along with softer types of power, to generate new modes of legitimacy.

Methodologically, this Article did not set out to identify judicial settlement-making styles. But after analyzing multiple hearings from the same judges and being informed by their established reputation among lawyers and fellow judges, it was realized that a few of them had developed a particular approach for both encouraging settlement and for addressing litigants’ resistance to settlement. In what follows, the judicial style is described first, and then examples taken from our observations are provided.

A. *The Dispute Designer Judge*

Section 68(a) of the Israeli Court Law grants judges a degree of discretion regarding what they may or may not include in the official court protocol of pretrial hearings, allowing them leeway to dictate “the main matters of the hearings,” so long as they do so with the litigants’ permission.¹⁴²

Originally, we conducted seven court observations of the same judge, which revealed a recurring method demonstrating how he used the discretion granted to him by the law to create an informal “off the protocol” space. In this space, he promoted settlements using “soft” judicial conflict resolution practices. We supplemented the original data set with twenty more observations, which revealed the recurring use of “off the record” hearings. In these hearings, the judge used soft powers together with direct and implied coercive power, the latter taking effect should the parties refuse to settle and instead insist on a full court hearing.

Below, the unique framework developed by the judge is presented. He began every observed hearing by asking the litigants or

¹⁴² § 68A Israeli Courts Law, 5744-1984, 1123 LSI 198, (1984), as amended (Isr.).

their lawyers (if only the lawyers were present), for permission to speak off the record, i.e., without documenting on the protocol what he would say. Having secured their agreement (given in all the observed hearings), he proceeded to assess the legal and factual strengths and weaknesses, as well as the strategic advantages and disadvantages, of each side. Subsequently, he either sent the litigants and their lawyers outside to try and reach a settlement or proposed (or tried to propose) a settlement agreement “tailored” to the case discussed at the hearing. This Article names this style “dispute design,” as it reflects a rational structuring of the pretrial hearing with a clear distinction between the off the record softer evaluation combined with high expert power, the guided recess empowers the parties to take decisions, and the invitation back to use formal legal authority and to pursue trial and legitimate legal reasoning in a verdict. This judge reported that when litigants came back to him after choosing the mediation track (which was offered to most of the litigants), and after failing to reach an agreement, he usually went on to the trial phase without using his preferred method. The process awareness of this judge may be implicitly inspired by a Dispute Systems Design (“DSD”) approach,¹⁴³ which takes into account goals, stakeholders, processes, and structures in developing a systematic approach for a distinct form of dispute. Below, two examples are described revealing the technique designed by the judge, despite the differences in the behavior of the litigants and in the dynamic created in the courtroom, with the first hearing ending with an accepted proposal and the second with the sides refusing to hear the judge’s proposal.

Hearing I:

At the start of this hearing, the judge asked for the names of the litigants and their lawyers. He then asked: “Can I speak off the record?”¹⁴⁴ On securing the agreement of the parties, he continued: “If you do not know what this means, I will explain,” thus ensuring that the implications of an off the record hearing were clear.¹⁴⁵ He then told them what it meant, in his courtroom, to speak off the record: “This is an informal hearing, and at its end I will provide you with a settlement offer.”¹⁴⁶

¹⁴³ See generally Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

¹⁴⁴ Supplemented Observation 1 (on file with author).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Once the litigants and their lawyers agreed to proceed informally and without documenting the proceedings, the judge attempted to understand what was at the heart of the hearing, in this case, a conflict between neighbors.¹⁴⁷ The plaintiff asserted that the defendant's barbecue created an odor nuisance; in response, the defendant asserted that he took steps to eliminate the nuisance quickly.¹⁴⁸ The judge tried to understand the factual framework, asking how frequently the barbecue was used and its precise location. Having determined the central facts, the judge told the litigants that he will first listen to their responses, after which he will tell them his take on the case.¹⁴⁹

The judge listened carefully and then outlined his understanding of the strategic advantages and disadvantages of each side's case. He said that while he believed that the defendant's behavior was appropriate and that the law was on his side (thus siding with him), he nevertheless did not believe that the case should be fully adjudicated given that each side would thus incur very high expenses.¹⁵⁰ The judge here used a host of soft power judicial conflict resolution practices: he *mirrored* the sides where they stood; he emphasized the negative aspects of going ahead with a trial, thus creating a *legal aversion*; and he indirectly invoked *procedure* when warning about the costs that each side might incur. After explaining his reasoning, the judge did not propose a settlement agreement but instead said: "I suggest that you go outside and speak," adding encouragingly "it seems to me that there is a willingness to talk."¹⁵¹ When the plaintiff's lawyer attempted to continue with the hearing and asked to present to the judge documents detailing the expense calculations, the judge refused to look at the document and said resolutely: "Resolve this between the two of you outside."¹⁵² In this case, the judge used the soft power outlined above to convey his understanding that the plaintiff had a very slender legal basis for the case and that the defendant should pay solely to avoid the cost of a trial.

After half an hour's deliberation, the lawyers and the litigants returned to the court to report that they had reached an agreement.¹⁵³ In this hearing, the litigants complied with the judge's request that they

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Supplemented Observation 1 (on file with author).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

settle out of court.¹⁵⁴ The defendant agreed to pay the plaintiff to settle the case; following their request, the judge gave their decision the validity of a judicial verdict.¹⁵⁵

Hearing II:

Another case that was observed dealt with a dispute between a contractor and a client regarding an apartment that had been sold with defects. This did not result in a final settlement, instead ending with both sides only agreeing to consider it.¹⁵⁶

In common with the first hearing described above, the judge began the session by asking the lawyers and the litigants their names, after which he asked if they would agree to hold the hearing off the protocol and again explained what this meant.¹⁵⁷ He then went on to describe to them the structure of the hearing: "I read the file and I want to explain to you what I think about it, after which I will send you outside to talk."¹⁵⁸

He asked if the apartment had been "delivered" to the client, to which the sides answered that there was a disagreement on this matter.¹⁵⁹ The judge did not get a chance to explain his interpretation of the facts, as at this point the atmosphere became charged when the litigants demanded the right to show the judge certain documents.¹⁶⁰ He refused their request, angrily stating: "You will not run my hearing!"¹⁶¹

In response, the litigants retorted that they no longer wished to have the hearing off the record.¹⁶² The judge started to dictate everything that had been said to the stenographer, and he had to slow down his speech significantly to enable her to record everything he said.¹⁶³ At this point the judge stopped, and told the litigants that he did not want to continue the hearing on the record as "the pace of dictation makes it hard to continue . . . [and because] the court has limited ability to bring the sides to an agreement in a formal hearing."¹⁶⁴ The judge asked the litigants to reconsider discussing off the record as "having

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Supplemented Observation 2 (on file with author).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Supplemented Observation 2 (on file with author).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

the hearing off the record serves both sides, and we could end this case today or continue to trial.”¹⁶⁵

Once everyone calmed down, the judge apologized for his earlier outburst, saying that he was stressed because he was not able to run the hearing as he saw fit.¹⁶⁶ Hearing this, the litigants agreed to continue with the hearing off the record.¹⁶⁷ When this was settled, the judge litigated by mirroring to the sides his understanding of their case’s respective strengths and weaknesses, saying that the defendants would have a hard time establishing their claims.¹⁶⁸ The judges further stated that the case will have further implications for other tenants in the building.¹⁶⁹ He concluded that at that present time, he was leaning towards the plaintiffs and that they might have a higher chance of winning—but that this could change.¹⁷⁰ To even out his last statement and to dissuade the defendants from insisting on a full trial, the judge ended with a warning about the high costs of the trial experts, should they not succeed in finding the common ground required for a settlement.¹⁷¹

At this point, the respondent stated that they previously arrived at a settlement agreement, but that the plaintiff kept changing his mind.¹⁷² The plaintiff said that they agreed on everything but for one small matter.¹⁷³ The judge asked if they would mind sharing what they did not agree on with him and that perhaps he could help.¹⁷⁴ It turned out that the disagreement was on an amount of about \$10,000 in compensation, and they also were unable to agree on liability regarding a defective air conditioner.¹⁷⁵ Further discussion revealed that the plaintiff’s lawyer had an interest in going to a full trial because he represented six other tenants in the building with similar problems. After hearing this, the judge proposed a settlement:

“Why don’t you have the air condition tunnels re-examined by a professional? If the system is functional, the plaintiff will pay for the

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Supplemented Observation 2 (on file with author).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Supplemented Observation 2 (on file with author).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

examination, and if the system mal-functions the defendant will pay for the examination and the compensation?"¹⁷⁶

In response, both sides began to argue heatedly again regarding the part of the air conditioner's malfunction that each side was liable for.¹⁷⁷ In a final attempt to bring the sides to an agreement, the judge used a host of soft power conflict resolution practices.¹⁷⁸ While he had earlier held out a settlement proposal, he now litigated in an attempt to narrow the points of contention.¹⁷⁹ First, he set an agenda focusing them on the issues that need to be addressed; he then gave a general prediction; he invoked legal aversion while discussing the negative aspects of going ahead with a trial; and he finished by directly encouraging settlement:

[T]he plaintiff has an interest in going to trial because of the other tenants. There is a mere ₪ 13,000 (about \$4500) of difference between you." The judge turned to the plaintiff: "Proving what you will need to prove is going to be expensive . . . I think you should settle today, since carrying on will be costly for you."¹⁸⁰

The judge turned to the respondents:

"If you really want to end this and you don't like my offer, go outside and talk amongst yourselves. The lawyers will go over what you will decide, and I will ratify it."¹⁸¹

The litigants and their lawyers refused to do as he suggested, and the settlement discussion came to a dead end. The judge concluded:

"I think that the dynamic between the litigants is positive, yet the lawyers are preventing us from settling. If they would have let me, I would have gone on."¹⁸²

On realizing that the litigants and their lawyers were not interested in hearing his proposal, the judge ended the hearings.¹⁸³

The Dispute Design judge takes advantage of the flexibility of the law, which allows him to decide what and what not to include in the hearing's protocol.¹⁸⁴ He creates an informal and at times even intimate space, in which the court's hierarchy is much less rigid and what

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Supplemented Observation 2 (on file with author).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

he proposes has a much higher likelihood of being accepted consequently.¹⁸⁵

When analyzing judicial conflict resolution practices through French and Raven's taxonomy of power relations, we can see that the judge applied a simultaneous mix of soft and hard powers, attempting to influence the litigants to settle. He further used various modes of power interchangeably in a dynamic and relational manner, according to the fluctuating dynamic in court between himself and the litigants and their lawyers, and the relationship between the litigants and the lawyers.¹⁸⁶

To start, in both hearings the judge did not impose anything on the litigants. On the contrary, when proposing to hold the hearing off the record he used environmental power to create a particular atmosphere, then used that space to influence the litigants to reach a settlement. Holding the hearing off the record also helped him establish position and expertise power, which once established gave his predictions, invitation, and expectation to settle a much stronger effect, since it came from an expert who was also talking to the litigants in an informal and intimate space.

At the same time, the judge also used coercive and rewards power—even if in a much more nuanced manner than if he had adjudicated on the merits of the case and passed judgment accordingly. This happened when he spoke negatively about continuing with the trial and expressing *legal aversion* to further court hearings, and in the second hearing when he gave a *prediction mirroring* how he perceived the sides' respective legal standings. These constituted coercive forms of power, as these sentiments were expressed by the judge who would ultimately preside over the substantive hearing, should the sides not reach a settlement. Aside from that, while holding the hearing off the record did reduce the judge-litigant hierarchy, the judge *applied pressure* on the litigants to continue with the hearing off the record in the second hearing. While he did not impose it, but rather simply said that he could not dictate quickly to the stenographer should they have a regular hearing, if the litigants had refused it would have been very confrontational. He further applied even more pressure when concluding that they could end the hearing that day with a settlement.

When comparing this judge with other judges who have not developed this concrete dispute design style, it becomes clear that the process he had created, which became coherent for the litigants,

¹⁸⁵ Supplemented Observation 2 (on file with author).

¹⁸⁶ See generally Shapira, *supra* note 65.

maintained a balanced and legitimate exercise of power—even when the use of hard power practices was involved. The ceremonial respectful atmosphere in his courtroom was preserved and protected. The boundaries between the autonomy of the litigants sent outside and the authority of the judge were clear, even when going through cycles of litigotiation.

B. *The Trust-Building Charismatic Judge*

Originally, we carried out fourteen observations of this judge. These revealed a repeating pattern of charisma and humor that created a unique *environmental power*. To confirm this pattern, we supplemented these observations with a further twenty.¹⁸⁷

The most distinct feature of this judge's judicial style was not the type or the order of the judicial conflict resolution practices that he used or the specific interplay of soft powers. Rather, his unique charisma and particular sense of humor created an atmosphere of ease and trust in his courtroom, which made it easier for him to convince the litigants of his settlement attempts.

The observations further revealed that while building mainly on his charisma and personality, the judge used soft powers of judicial conflict resolution practices, which varied according to different factors. These factors included the particularities of the legal and factual case at hand, the litigant and lawyers' attitude towards settlement, and the "ripeness" of the conflict. These practices included the use of *procedure* to set close hearing dates, gently pressure litigants and their lawyers into settling while creating trust, or summon the litigants to hearings to tell them about the advantages and disadvantages of each side's case, to encourage them to settle. The judge also directly *encouraged settlements* by either explaining the benefits of doing so or by convincing litigants to go to mediation. He additionally encouraged the litigants to allow him to carry out *quasi-arbitration* on or *off the protocol*; he *mirrored* and *predicted* what he thought would be the legal outcome of the cases; and in some cases, he visited the property at the center of the dispute.¹⁸⁸

The following hearings demonstrate this dynamic. First, a lawsuit over a rental debt between a landlord and a tenant who lived in a rent-

¹⁸⁷ Overall, the observers did twenty more observations that focused only on this judge. These observations were separate from the other 200 observations carried out for Part I of this article.

¹⁸⁸ Yankolovitz, *supra* note 47, at 15-24.

controlled apartment.¹⁸⁹ Throughout the hearing, the judge was very empathic towards the tenant.¹⁹⁰ He began the hearing by expressing his empathy with the disadvantaged tenant, stating that he did not want the defendant to have to choose between paying rent or buying medication, therefore the sides should go outside and try to reach an agreement between them.¹⁹¹ Emphasizing that the issue at hand was not only the debt itself but also the matter of feasible payments, the judge said, of the protocol:

“There is no doubt that the defendant owes money. The only question is what will be the terms of the payment.”¹⁹²

The litigants went outside to speak about a possible settlement. After a short while they returned, stating that they could only reach a partial agreement and would be grateful if the court would help them reconcile their disagreements. The judge responded, with a smile: “I see that I need to bring the (car) battery and the cables,” evoking a metaphor of a stalled car that needed to be jump-started.¹⁹³ This comment broke the ice, as the litigants and their lawyers all laughed.¹⁹⁴ With a more relaxed atmosphere in the courtroom now, the landlord agreed to spread the debt further to help the tenant make the payments.¹⁹⁵ The judge continued the hearing by creating sanctions to ensure that payment will be made. In response, when the landlord said that she was not a social worker, the judge implored her jokingly: “I’m trying to make sure the lion will be full, and the sheep will remain whole.”¹⁹⁶ Eventually, she agreed to the new payment schedule, and the judge personally thanked her.

As mentioned earlier, the judicial conflict resolution practices used were not unique. What allowed trust to be created here was the judge’s openness and humor, which created a unique *environmental* base of power. This also happened when the judge explained the rationale behind the sides reaching an agreement on their own, indirectly creating his *expertise power* by deferring the decision-making to the litigants themselves and at the same time empowering them:

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Yankolovitz, *supra* note 47, at 15-24.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

“I have a big toolbox, with hammers of various sizes but this case needs a tweezer. Yet in my toolbox I do not have a tweezer, but you (the litigants) have a tweezer, and you need to use it.”¹⁹⁷

The judge continued with his humorous remarks throughout the hearing. When he referenced the litigants' agreement to his offer, he stated:

“[I]f both sides are equally unhappy with (my) opinion, it inevitably means that it is a good one.”¹⁹⁸

Later, when contemplating the reliability of witnesses, he pondered:

“[N]o witness is in your control unless they are tied in your backyard, and then it's a completely different set of rules.”¹⁹⁹

And about the meaning of reaching the truth, he mused:

“Regardless of this case, every now and then I meet people who are not afraid of the truth simply because they do not know it . . . even if they should see the truth in the street, they would not recognize it.”²⁰⁰

Hearing II:

In another hearing, dealing with a case between the Tel Aviv Municipality and a resident who lived in a property in the city, the judge tried to promote a settlement agreement.²⁰¹ He began the hearing with a story from his days serving in the army, saying that like the army's bureaucracy, the bureaucracy in the municipality has three steps: clarification, examination, and treatment.²⁰²

The litigants and their lawyers laughed, and the atmosphere eased a little. The judge continued by asking them: “What needs to happen for you to consider a settlement? When will you [the litigants] be meeting to discuss this?”²⁰³ They answered that they were scheduled to meet in a few weeks, after the Passover holiday.²⁰⁴

The judge responded, humorously:

I don't want to offend any of you, but I don't feel that I can trust you. We need to have a deadline by which time you will

197 *Id.*

198 *Id.*

199 *Id.*

200 Yankolovitz, *supra* note 47, at 15-24.

201 Yishay Shtern, *Methods for Settlement Promotion in Court between Theory and Practice*, 44 (2019) (unpublished seminar paper) (on file with Bar Ilan University).

202 *Id.*

203 *Id.*

204 *Id.*

have to answer to me, to look me in the eyes—only then will you give me concrete answers and get things going.²⁰⁵

The municipality's lawyer acknowledged that indeed it took a long time for the litigants to respond, saying that he, himself, had received responses from the municipality only just before the hearings and not earlier.²⁰⁶ The judge now used *procedure* to set up another hearing date as a reminder to “speed up the process.” He ended the hearing by cheerily wishing the lawyers a happy Passover.²⁰⁷

This hearing provides a good example of the mixed use of *coercive* and *soft* powers. On the one hand, the judge used coercive power when using *procedure*—for instance, to pressure the litigants to settle by scheduling a hearing date by which time they would have to report to him.

At the same time, he used a host of soft powers, such as referent power by using humor, when conveying his expectations that they will settle. His use of humor, on the one hand, created a sense of trust between himself and the litigants and thus enhanced his *legitimate* and *position* powers; it also indirectly showcased his *expert* power, as a judge with experience and knowledge. The judge used this mix to encourage the litigants and their lawyers to settle. This was especially prevalent when taking into account the fact that if they will not settle, as he strongly recommended on several occasions, he would be the one to preside over their trial.

Hearing III:

The following hearing was not one in which the judge encouraged settlement to end the hearing, but rather one in which he very clearly refrained from doing so. At the same time, it is worthwhile to mention it here since it further demonstrates the mixed use of coercive and soft powers, and as such shows how this practice and the judge's unique judicial style permeated his court hearings—whether or not directed toward promoting settlements.

In this case, which dealt with a property used as a hummus (fava beans) restaurant, which the prosecutors had demanded should be evacuated, the judge began the hearing with a story, from his military service days, about that same restaurant.²⁰⁸ He said that he has already lost in this case regardless of the outcome, as he would no longer be

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Shtern, *supra* note 201, at 44.

²⁰⁸ *Id.* at 39.

able to eat at the restaurant at the center of the hearing, given that he was presiding over the case.²⁰⁹

Hearing this, the litigants and their lawyers laughed, easing the tension. They continued to joke that the property might be demolished as a result of the court case. The judge retorted that he was offered an official office at the building, but he had turned it down when told that he could be there for only half a year, as the building had renovation work scheduled.²¹⁰

After putting the litigants and their lawyers at ease, the judge moved on to litigate the case. He began by stating that he will not accept the defendants' assertions regarding a Magistrate Court's lack of authority, i.e., the judge's jurisdiction.²¹¹ When a lawyer who had just joined the defendants' team said that he wants the hearing to be adjudicated in the Family Court, the judge refused outright, but did so with humor:

"[I]f the Family Court judge will agree to take the case, I will personally send her a gift—a box of chocolates, or in this case humor"²¹² (referring to the culinary specialty of the restaurant).

The judge continued by humorously explaining why he will be keeping the case in his court:

"I will also not pass it to the District Court, since they would rather not have it as they have too many cases to deal with."²¹³

After refusing to change venues, the judge stated that this was a very complicated case, and he could predict its outcome at that point.²¹⁴ He did not try to convince the sides to settle, and he set a date for the litigants to submit evidence, turning down their requests to postpone the date. He concluded the hearing with a story from his days as a lawyer dealing with a similar case, and he ended with a quote from Groucho Marx, who once said: "I abide by my principles, but if you don't like them it's OK, since I have other sets of principles as well"²¹⁵

Here, the judge did not try to persuade the litigants to settle the case, but nevertheless was able to use his sense of humor and charisma to create an atmosphere of trust in his courtroom and to assert *expert*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Shtern, *supra* note 201, at 39.

²¹⁴ *Id.*

²¹⁵ *Id.*

power. Like his attempts to encourage settlements, he *mirrored* and *predicted*, although this time with his inability to foresee the outcome, and he used these practices to enhance his expert power. Thus, even though he used coercive power in this hearing, he nevertheless applied the array of soft powers that we had seen him use in the previous hearing.

The humorous statements that the judge made in all three hearings do not have any legal meaning. Yet, when uttered by a judge in the courtroom, they are placed in a context that has its own hierarchies and logic. To start, these statements not only diffused the court's judge-lawyer-litigants hierarchy, but they also created an atmosphere of shared purpose, creating the sense that the judge was on the litigants' side, trying to help them to end the case. The judge also invoked *referent power*, with the litigants coming to like the judge and being less suspicious of him. The trust thus created further prompted the litigants to give more weight to what the judge had advised, hence they were more cooperative and less resistant to attempts to influence them to agree to settle. Furthermore, since many of the judge's cases relate to real estate disputes, the lawyers who come to his courtroom are the same lawyers who deal with such cases. Therefore, his charismatic judicial style and the positive atmosphere in court have become known in this branch of the legal community. This further establishes his *legitimate power*, as the lawyers before him tend to be familiar with his judicial style, which makes it easier to "sell" his attempts to promote settlements.

To conclude, unlike the dispute design judge who created more of a recurring streamlined model to encourage settlement as an alternative to the loss of law-based legitimacy, this judge's judicial style creates a particular ambiance that leads to more trust and less resistance on behalf of the litigants as a source of legitimacy.

C. *The Mediating Judge – A New Model that is Beyond Coercive Power?*

The last judicial style underscored is a hybrid of a conventional legal hearing and a mediation meeting, in which the judge implemented alternative dispute resolution methods. In such hearings, which are commonly used in Tel Aviv's Magistrate Court, what is addressed is not only the legal and factual aspects of the case but also the interests and the emotional needs of the litigants. While the 200 observations predominately focused on regular court hearings, in this part

the focus is on two hearings by two different judges who regularly lead these procedures in court.

This section ends by dealing with judicial styles with this particular style, as it has a unique dynamic once analyzed within the context of power relations in the courtroom. To start, the judge in these hearings is not the presiding judge at the pretrial phase and consequentially will not preside over the trial itself.²¹⁶ In fact, there is a court mandated “Wall” between the judge presiding over the judicial mediation and the judges adjudicating the case in the “regular” hearings, and the two are not allowed to discuss the case. Therefore, one of the most significant coercive powers of the judges—namely, the litigants’ awareness that if they do not accept the judge’s settlement offer, they will be the presiding judge at the trial—does not exist here. For this reason, their reward power, which in this context is the ability to provide incentives for settling over going to trial, is also limited as they will not preside over the trial itself.

To this end, the judges use an even more extended plethora of soft powers, drawing on mediation practices when addressing the emotional aspects of the litigants’ needs for recognition of a sense of justice, thus creating a unique amalgamation of soft power judicial practices.

Hearing I:

In a hearing dealing with a real-estate dispute, the buyers of an apartment were not informed that a cell phone communication tower was based on the roof of the building.²¹⁷ After buying the apartment and finding out about the tower, they sought to cancel the deal, but the sellers refused. This hearing took place in the Magistrate Court in Tel Aviv and was observed by one of our team.

The judge began the hearing by stating that his goal was to bring the sides to a compromise.²¹⁸ He then proceeded to summarize the facts of the case, ensuring that both sides agreed that he had recounted it correctly and that they both agreed on his version of events. He then noted that both sides knew each other from school, alluding to a common history, stating that in Israel everyone knew everyone and that there were very few degrees of separation.²¹⁹

²¹⁶ See *infra* Part III.B. As stated earlier, in the Israeli legal system the judge that presides in the pretrial phase will also preside at the trial itself should the litigants not settle.

²¹⁷ Supplemented Observation 3 (on file with author).

²¹⁸ *Id.*

²¹⁹ *Id.*

The judge continued to frame the legal aspects of the hearing, stating:

[T]his is not a tort hearing since experts have not been able to determine if any damage is caused by cell phone towers. Instead, we are here to decide whether the sellers were under a duty to disclose the existence of the cell phone tower, or [if] was it the buyers' obligation to try to find out themselves if they cared about such matters . . . there is a contractual disagreement on the extent of the obligation to disclose in this case. This never came up in the conversations between the buyers and the sellers, and we only have the buyers' version after they found out.²²⁰

The judge litigated when he framed the legal responsibility and the question at hand: whether the buyers had agreed to buy the property "as is" or not; and if they had not agreed to a cell phone tower being part of the property, whether it was their responsibility to find out.²²¹

The judge sought the litigants' agreement for him to carry out *quasi-arbitration according to Article 79(a)*,²²² which allows judges to hand down a verdict without explaining the rationale for the decision—for which the litigants have no right of appeal.²²³ The judge attempted to convince them of a "bottom" and a "ceiling" between which he could adjudicate. In doing so, he spoke to both sides' interests:

[F]actually there is no doubt that the buyers did not know about the cellphone tower when they agreed to buy the place . . . and when they did find out about it they had already committed to loan payments . . . They decided to sue and while the appraiser did not determine that there was actual danger from the cell phone tower, it is beyond dispute that most people do not want to live next to it and therefore the existence of the cellphone tower led to a depreciation of [the flat's] value.²²⁴

Following, the judge moved on to *mirror* the sides' contributory negligence:

²²⁰ *Id.*

²²¹ *Id.*

²²² Article 79(a) of The Israeli Courts Law, 1984.

²²³ Supplemented Observation 3 (on file with author).

²²⁴ *Id.*

“The sellers should have disclosed but the buyers should have made sure to find out . . . After all this a deal of over \$500,000.”²²⁵

Addressing the buyers, he asked:

“So, what did you do to protect yourselves?”²²⁶

The buyer said that he tried to have the tower removed but without success and that if the seller could remove it, he will drop the lawsuit.²²⁷

When the judge asked him why he did not sell the apartment, he said that no one will want to buy it with a cell tower on the roof.²²⁸

At that point, the judge said that he recommended that the litigants agree to quasi-arbitration between an agreed upon “floor” and “ceiling,” or go to mediation. He added that if they did not agree to end with a settlement, the hearing would be returned to the original pretrial judge. The judge continued to narrow the gap between the floor and the ceiling, making sure that both sides agreed to the narrowing range; the sides agreed to think about it and to give him an answer within one week.²²⁹

While the litigants did not leave the court with an agreed upon settlement, the judge managed to convince them to think about his adjudicating in a *quasi-arbitration* and to let him know within one week. He did so without coercive or crude rewards power and by using only soft powers. He used *environmental* power to create a unique hybrid space that, while still within the court, uses only soft powers. In the hearing, the judge had to rely on his *referent* and *expert* powers to convince the sides to agree to think about allowing him to adjudicate in *quasi-arbitration*. To do so he enhanced his *legitimate* power, and he managed to create enough trust in the litigants toward him that it also enhanced his *position* power.

Hearing II:

The next example is taken from another judicial mediation hearing, which was carried out by a Magistrate Court judge in a workshop given to law students at Bar Ilan University.²³⁰ The workshop focused

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Supplemented Observation 3 (on file with author).

²³⁰ Bar-Ilan University,

שביניהם ומה סביבתיים מפגעים, שכנים על: “רחוק מאח קרוב שכן טוב” מבוים דין-פישור [Discussion-reconciliation from “A close neighbor is better than a distant brother?”: about neighbors, environmental hazards, and everything in between], YOUTUBE (June 19,

on a case of a neighbor who, after starting a catering service in her home and beginning to cook commercially, was sued by one of her neighbors. While this was not an actual hearing, the judge demonstrated the techniques she uses in her court when carrying out judicial mediation hearings; as such, it provides an excellent example of the use of soft powers.

In the hearing itself, after both sides had presented their arguments, she began by thanking them; as in the previous hearing, she reflected to both sides how she understood their arguments, ensuring that they both agreed with her version.

She then continued by assessing how she perceived the strengths and weaknesses of each side:

“The defendant, being the decent woman that she is, admitted that she was operating a business without a license.”²³¹

She then addressed the plaintiff directly, acknowledging his need to be heard:

“She heard you, she saw you and she understands, she is now working to get a permit.”²³²

Next, the judge used an ADR technique that framed the dispute at hand with respect to what she saw as relevant:

“I heard both of you, and what we have here is a factual dispute regarding what is actually happening in the building.”²³³

She then directly expressed an invitation for both sides to settle by listing the topics that they needed to reach an agreement on:

[W]e are about to leave for a break, and I propose that both sides will use it to consult with their legal advisors to think about how they can reach an agreement regarding the following matters: *hours of operation, the use of the elevator to transport large quantities of food, the use of the garbage room and the stairway, and of course there is the problem of the smell in the building's hallway.*²³⁴

She then turned to the plaintiff, both acknowledging his needs but also predicting a non-favorable legal outcome:

“I can see without a doubt that you are suffering from what is going in at the building... and even if it is a subjective matter—you

2019), <https://www.youtube.com/watch?v=3vMp7X01hRE> [https://perma.cc/9MPB-J3HB].

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

have rights . . . But, you must understand, there is a chance that she might secure permission to run her business.”²³⁵

The judge then demonstrated how it was in the plaintiff's interests to settle when pointing to the fact that the circumstances leading to the plaintiff suing could become permanent:

[P]erhaps it would be wise at this point, before she [the defendant] has a license and before someone else will dictate the facts on the ground for you, to try and reach an understanding that both sides can live with . . . think of the benefits each side could have from this new situation, and perhaps she could cook for you once a week.²³⁶

The litigants and their lawyers laughed, but the judge said that she did not say it as a joke and that she was merely asking:

“[T]hat you will be creative when thinking about possible solutions.”²³⁷

The litigants and their lawyers went on a five-minute recess. When they returned, the judge went on to divide the big conflict into smaller disputes. She did so by asking the plaintiff what was the thing that bothered him the most. To this, he said: “the smell.”²³⁸

The judge turned to the defendant and said that she is sure she will be happy to solve this problem. In response the defendant immediately said:

“Yes, I will install a steam extractor.”²³⁹

The plaintiff added quickly that there were a few other things that were bothering him. To this, the judge replied:

“Of course, but we just began, so let us write down what we agreed on.”²⁴⁰

She turned to the defendant and asked her when she would install the steam extractor; they agreed on seven days.

The judge went on to inquire what else bothered the plaintiff. The plaintiff replied that the overloaded garbage receptacle was a nuisance. The judge said that he was rightly concerned about this, and she asked the defendant what she planned on doing about this. She said that she was willing to buy another trash container, but she was not sure if the municipality would agree to this and thus, did not want to commit to

²³⁵ *Id.*

²³⁶ Bar-Ilan University, *supra* note 230.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

anything. Instead of entering the question of deciding on the extent of guilt, in response the judge said that answering the question would not be construed as an acknowledgement of responsibility [for the nuisance] on her part.²⁴¹

The judge was very invested in encouraging cooperation between the two neighbors and creating common interests between the two, and thus she asked the plaintiff whether he could help the defendant find out where one could buy such a garbage can.²⁴²

The judge then went on to ask the defendant approximately how many hours a day she needed to work, and then she allowed the litigants to discuss between themselves the number of hours the plaintiff was able to tolerate the nuisance created by the defendant's cooking operation. They then went on to discuss when she would be allowed to use the elevator, since the tenants in the building also need it; the judge then asked the defendant to agree to refrain from agreeing to cater events that would require her to violate these agreements in terms of smell, noise, and the use of public spaces in the building.²⁴³

The judge asked the plaintiff about the other issues that bothered him and went on to litigate them one by one. They began to discuss the extra maintenance the defendant would need to pay to compensate for the environmental nuisance generated by her business; the judge suggested that she should arrange for cleaning every day she had a delivery.²⁴⁴

The judge concluded that an understanding had been reached according to which the defendant would be responsible for any damage caused by her business. The judge also emphasized that their goal was to generate a new healthy relationship between the neighbors in the building, and then ended the hearing.²⁴⁵

As in the previous example, the fact that the judge strived to end the hearing with a settlement deprived her of coercive power that adjudication on the merits would have afforded her. She, therefore, had to use soft powers instead, since her legitimation-based powers were more remote. The judge marshalled these soft powers to create environmental power in the hearing, which emphasized creating a healthy long-term relationship between the building's tenants, enabling them to resolve future disputes. She also used them to enhance her referent

²⁴¹ *Id.*

²⁴² Bar-Ilan University, *supra* note 230.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

power, which will have the litigants abide by her proposals, and she persuaded the sides that it was in their best interests to reach an agreement together, rather than have this imposed on them externally. While legitimate power was used, it stemmed from the expert and referent power that the litigants attributed to her, influenced by the professional manner in which she led the hearing.

D. *Three Modalities of Power and Legitimation - Discussion*

These three distinct judicial styles discussed above developed as a response to the disintegration of law-based legitimacy due to the decline in adjudication on the merits and written verdicts. This, coupled with the lack of guidance in the law on how to promote settlements, encouraged a few judges to informally generate new modes of legitimacy when encouraging litigants to settle. Furthermore, not being seen as conflict resolution experts and lacking the legitimacy rendered to them as legal experts, judges were incentivized to formulate alternative sources of legitimacy. Each judge drew on different sources, structural and personality based, and used a different amalgamation of power bases when influencing litigants to settle. At the outset, they all used environmental power to create a new atmosphere in their courtrooms, which enabled them to influence and convince rather than relying on the classic force of law to encourage litigants to settle. The Dispute Design Judge used legal procedure and the space granted to him by law to adjudicate off the record, where he held informal undocumented hearings conducted according to a particular structure. In this informal intimate space, he used different forms of power, both hard and soft, while replacing law-based legitimacy with a ceremonial hearing based on a repetitive script in which authority-based top-down hierarchical power relations between the judge and the litigants were maintained. The litigants were provided with a proposed solution based on legal arguments and were sent to reach a settlement based on a clear assessment by the judge. In contrast, the charismatic judge, who also used environmental power to create a particular atmosphere in court, relied on trust to promote settlement between the parties. Thus, instead of the vertical top-down power relations invoked by the dispute design judge, he succeeded in creating a more horizontal relationship with the litigants, nudging them into accepting his settlement proposals because they identified with him, felt that he had their interests at heart, and were not overly influenced by his coercive power. In other words, the charismatic judge relied on the litigants' willing cooperation, rather than their respect for the law or authority. His ability

to create the right atmosphere had an effect on the negotiation dynamic, which motivated the litigants to collaborate. The mediating judges were the most remote from legal-based legitimacy—in part because they would not be presiding over the court hearings should the pretrial negotiations fail. In some cases, their hearings were completely external to the “regular” proceedings, to which the litigants could return at any time, should they choose to do so. While these are external to the procedure and as such need to establish other sources of legitimation altogether, at the same time, this mediation procedure was created by the court itself as an institutional alternative to the legal hearing. Thus, paradoxically—unlike the other two judges, who created informal settings to generate sources of legitimation—the mediating judges, who rely on informal and non-legal soft power mediation-based techniques, enjoyed formal, system-based legitimacy. Such legitimacy derives from the conflict resolution expertise that they have.

V. NEW MODES OF LEGITIMACY AND POWER RELATIONS IN COURT – CONCLUSION

In this Article, we examined new concepts of legitimation and power dynamics in order to understand the evolving roles of judges. The phenomenon of the vanishing trial reflects a shift from adjudication on the merits of the case in question to settlements and plea bargaining, together with an emphasis on the pretrial rather than the trial itself as the main arena in which judicial activity takes place. In these new settings, judges have become settlement promoters and case managers, rather than decision makers who resolve conflicts.²⁴⁶ We began with the quantitative findings of courtroom practices that have been conceptualized during our observations. We then proposed models of power and persuasion to understand these practices and their roles. After not finding coherent new schemes of legitimation, we turned to a more qualitative inquiry into the unique styles of judicial interventions, articulating three coherent perspectives on power that have the potential to become a foundation for new legitimation claims. We have demonstrated how judges in settlement hearings no longer use legitimate power by applying the law and adjudicating, but rather tend to rely on a much more nuanced mix of strong and soft powers to encourage settlements. Thus, it can be argued that the force of law today has been replaced by a relational persuasion-based dynamic. The

²⁴⁶ Resnik, *supra* note 13.

actual effect of the legal rules as sources of legitimation is blurred and reduced in contemporary courts of settlements when they become merely a suggested solution within the preliminary hearing. Judicial roles have further changed due to the fact that judges want—and at times need—litigants to settle, and they had no legitimate power to force or encourage the litigants to do so. Our final claim is that a reflexive practice in search of new forms of legitimation is crucial for all judges, and that policymakers and judicial administrators, together with legislators, should focus on building a coherent perspective of judicial practice in the age of settlement. We believe that new forms of legitimation, such as those that we identified for the mediator judge can meet the challenge of legitimizing settlement promotion in the shadow of authority. New training for judges to promote Judicial Conflict Resolution,²⁴⁷ together with revised legal education for lawyers, may contribute to more responsive legal systems,²⁴⁸ a more coherent body of judicial practice and precedent, and a new notion of the force of law through negotiation.

²⁴⁷ Bar – Ilan University, *International Advanced Conflict Resolution Training ERC - JCR Project, Italy*, YOUTUBE (Aug. 11, 2020), https://youtu.be/5htx0qRUE_g [<https://perma.cc/4B4D-PXPP>].

²⁴⁸ See generally Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22 PEPP. DISP. RESOL. L.J. 263 (2022).