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The New Italian Code of Criminal Procedure:
The Difficulties of Building an Adversarial
Trial System on a Civil Law Foundation

William T. Pizzi† and Luca Marafioti††

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On October 24, 1989, the Republic of Italy adopted a new Code of Criminal Procedure incorporating significant adversarial procedures into what had previously been a purely inquisitorial system. The architects of the new Code hope that giving the parties, rather than a judge, primary control over the investigation and resolution of cases will yield much-needed efficiencies: Italy, like all Western countries, is burdened with a tremendous backlog of criminal

1. There is an immense Italian literature dealing with the new Code of Criminal Procedure. See, e.g., MARIO CHIVARIO, LA RIFORMA DEL PROCESSO PENALE (2d ed. 1990); COMMENTARIO DEL NUOVO CODICE DI PROCEDURA PENALE (Ennio Amodio & Oreste Dominioni eds., 1989); COMMENTO AL NUOVO CODICE DI PROCEDURA PENALE (Mario Chiavario ed., 1990); GIOVANNI CONTI & ALBERTO MACCHIA, IL NUOVO PROCESSO PENALE (1989); CONTRIBUTI ALLO STUDIO DEL NUOVO PROCESSO PENALE (Achille Melchionda ed., 1989); FRANCO CORDERO, CODICE DI PROCEDURA PENALE COMMENTATO (1989); ANTONIO CRISTIANI, MANUALE DEL NUOVO PROCESSO PENALE (1989); PAOLO FERRUA, STUDI SUL NUOVO PROCESSO PENALE (1990); LEZIONI SUL NUOVO PROCESSO PENALE (Angelo Giarda et al. eds., 1990); LINEAMENTI DEL NUOVO PROCESSO PENALE: DAI SOGGETTI AL GIUDIZIO DI PRIMO GRADO (Nicola Carulli et al. eds., 1989); GILBERTO LOZZI, RIFLESSIONI SUL NUOVO PROCESSO PENALE (1989); MANUALE DI DIRITTO PROCESSUALE PENALE (Delfino Siracusano et al. eds., 1990-1991); ANIELLO NAPPI, GUIDA AL NUOVO CODICE DI PROCEDURA PENALE (1989); MASSIMO NOBILI, LA NUOVA PROCEDURA PENALE: LEZIONI AGLI STUDENTI (1989); LE NUOVE DISPOSIZIONI SUL PROCESSO PENALE (Alfredo Geito ed., 1989); IL NUOVO PROCESSO PENALE: DALLE INDAGINI PRELIMINARI AL DIBATTIMENTO (Giandomenico Pisapia ed., 1989); GIANDOMENICO PISAPIA, LINEAMENTI DEL NUOVO PROCESSO PENALE (2d ed. 1989); PROFILI DEL NUOVO CODICE DI PROCEDURA PENALE (Giovanni Conso & Vittorio Grevi eds., 1990); PROFILI DEL NUOVO PROCESSO PENALE (Mario Garavoglia ed., 1988); 1 CARLO TAORMINA, DIRITTO PROCESSUALE PENALE (1991).

Interest in the new Italian system is also strong elsewhere in Europe. See, e.g., Manfred Maiwald & Alessandra Ippoliti, Eine neue Strafprozeßordnung für Italien, 1989 JURISTEN ZEITUNG (JZ) 874; Claus Marx & Antonio Grilli, Der neue italienische Strafprozeß, 1990 GOLTDAMMER’S ARCHIV FÜR STRAFRECHT 495.

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cases that its old inquisitorial system proved unable to handle.

So radical are the changes embodied in the new Code that the Italian reforms have no modern precedent. Rather, one must look back two hundred years to the period following the French revolution, when France gazed across the Channel and tried to build a justice system based on the English common law model.\(^2\) History teaches us that the English transplant did not long survive in France. The pervasive ethos of the inquisitorial system provided a climate hostile to adversarial reforms, which were either discarded or neutralized so as to fit within the civil law tradition.\(^3\)

Italy now faces the same problem that post-revolutionary France confronted: the new Code of Criminal Procedure attempts to build an adversarial trial system on institutions that remain strongly rooted in the tradition and ideology of civil law. The result is a system caught between two traditions. Unless the Italian legal system comes to grips with this philosophical tension, the procedural reforms that Italy desperately needs in order to cope with its judicial backlog will never be effective.

This article is divided into five parts. Part I describes the pressures, including the tremendous case backlog, that led Italy to seek fundamental changes in its system of criminal procedure. Part II discusses Italy's leap from a classic civil law system to one that attempts to graft an adversarial trial system onto the civil law structure. Part III highlights a series of special procedures (procedimenti speciali) in the Code that are intended to achieve important efficiencies, either by eliminating steps in the trial process or by eliminating trial altogether. Part IV examines how Italy's pervasive civil law ethos will frustrate the use of these special procedures, depriving the new system of the efficiencies it desperately needs. Finally, Part V offers some concluding reflections on the new Italian Code, followed by a short glossary.

I. INTRODUCTION: THE NEED FOR REFORM IN ITALY

A. The History of the Former Code

There is no doubt that reform of the Italian criminal procedure was long overdue. The former system was a relic of the Fascist era, dating back to the 1930s. As originally conceived, the 1930 Code of Criminal Procedure envisioned a mixed system. During a closed pretrial inquisitorial phase, evidence was gathered to determine if a crime had been committed and, if so, by whom. A judge controlled the pretrial examination phase (istruzione formale), per-

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2. See Amodio & Selvaggi, supra note 1, at 1211.
forming the roles of both judge and investigator, but the investigative function clearly dominated.4

In theory, a public trial followed the examination phase, which developed all the evidence on which the defendant might be convicted. In practice, however, the examination phase grew in importance at the expense of the trial, and the trial became a purely formal exercise. The traditional principles of orality and immediacy5 were abandoned, and records and materials collected during the investigative phase became the basis of the verdict and sentence.6

In short, the trial merely confirmed what had taken place during the pretrial examination phase.7 As a final twist, the examination phase was conducted secretly. The defense had no right to participate or even to be notified of the investigation. Without the presence of the defendant or defense counsel at the examination, interrogators could put considerable pressure on witnesses who appeared before them.

The need for major reforms became painfully clear following the adoption of a constitution in 1947. Some reforms did occur in the post-war period. Parliament enacted criminal procedure reforms in 1955.8 A series of decisions by the Corte costituzionale (Constitutional Court) in the period from 1965-

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4. In the simplest cases, a public prosecutor oversaw a summary proceeding (*istruzione sommaria*). The Code reserved the *istruzione sommaria* for cases in which the evidence was stronger and the investigations seemed likely to be shorter and less complicated than in those cases that required the *istruzione formale*. See *Codice di procedura penale* [C.P.P.] art. 389 (1930) (Italy) [all subsequent citations are to C.P.P. (1989) (Italy) unless otherwise noted]. The law also specified that all crimes involving a sentence of life imprisonment (the maximum punishment available) had to be processed through an *istruzione formale*. Id.; see also Alfredo Gaito, Il giudizio direttissimo (1981); Paolo Tonini, La scelta del rito istruttorio nel processo penale (1974).

5. "Orality" and "immediacy" are terms of art in civil law systems. "Orality" connotes the practice of presenting evidence orally in open court, rather than relying on written statements. "Immediacy" refers to the fact that no intermediary separates the trier of fact and law from the parties and witnesses. John H. Merryman, The Civil Law Tradition 138, 144 (2d ed. 1985); see also Mauro Cappelletti et al., The Italian Legal System 112-13 (1967).

6. For an account of the damage that these *mediazioni istruttorie* (mediation hearings) caused to defendants' rights of orality and immediacy, see Michele Massa, Contributo all'analisi del giudizio penale di primo grado [Contribution to the Analysis of First Degree Criminal Justice] (1964). See also Massimo Nobili, Il principio del libero convincimento del giudice [The Principle of Free Persuasion of the Judge] (1974).


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1972\(^2\) had the cumulative effect of allowing the defense more participation in the pretrial phase. But while these decisions guaranteed greater protections (garantismo inquisitorio) for the defendant in the pretrial phase,\(^10\) they did nothing to temper the system’s exclusive focus on the pretrial phase.

Parliament considered the wholesale reform of criminal procedure as early as 1965, but it did not delegate formal responsibility to draft a new code until 1974.\(^11\) The government completed a preliminary draft in 1978, at the beginning of a period of intense terrorist activity in Italy. After a series of delays and repeated requests that Parliament extend the deadline for approval, the last deadline passed and the statutory delegation expired.\(^12\) In 1987, Parliament issued a new delegation of authority,\(^13\) and the following year it approved a new Code of Criminal Procedure, effective October 24, 1989.\(^14\) One of the most significant reforms attempted in the new Code is the restructuring of criminal trials along adversarial lines.\(^15\)

B. Italy’s Pressing Need for Efficiency

Italy’s decision to adopt an adversarial trial system constitutes an abrupt and somewhat inexplicable break with its strong civil law tradition. While the full reasoning behind Italy’s choice of systems is beyond the scope of this

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\(^10\) The terminology was first used in Ennio Amodio, Il processo penale nella parabola dell’emergenza, 1983 Cassazione penale [Cass. pen.] 2118.

\(^11\) Under the Italian Constitution, Parliament can delegate to the government the power to adopt legislation subject to guidelines and criteria set by Parliament. COSTITUZIONE [Cost.] art. 176 (Italy); see also CAPPELLETTI ET AL., supra note 5, at 73. Parliament also sets the time period within which the government must act. Id. at 73. Law No. 108 of Apr. 3, 1974, 1974 Racc. Uff. II 561. For a thorough discussion of the period from the legge-delega (delegation) of 1974 up to the preliminary draft of a new code of criminal procedure in 1978, including statutory materials, see IL NUOVO CODICE DI PROCEDURA PENALE (Giovanni Conso et al. eds., 1989) [hereinafter IL NUOVO CODICE].

\(^12\) It is unclear why the government failed to gain approval for the new Code of Criminal Procedure. Commentators have speculated that this failure stemmed from one or more of the following: 1) a lack of consensus on the direction reforms should take, 2) the changing socio-political situation caused by terrorism and organized crime, or 3) a time period that was simply too short. See Giovanni Conso, Precedentistorici ed iter della legge n. 108 del 1974 [Historical Precedents and Course of Law No. 108 of 1974], in IL NUOVO CODICE, supra note 11, at 3, 74.

\(^13\) Law No. 81 of Feb. 16, 1987, 1987 Racc. Uff. I 220. This document outlines Parliament’s vision of the Code of Criminal Procedure. Apparently, Parliament intended the new Code to establish an accusatorial system in which prosecution and defense would participate on an equal basis at every stage. Id. art. 2, paras. 1, 3.

\(^14\) Presidential Decree No. 447 of Sept. 22, 1988, reprinted in LE NUOVE NORME SUL PROCESSO PENALE 151 (Nicola Carulli & Andrea Antonio Dalia eds., 1989) [hereinafter LE NUOVE NORME].

\(^15\) Works that have acquainted Italian scholars and professionals with the basic features of the common law adversarial tradition include: Vittorio Fanchiotti, LINEAMENTI DEL PROCESSO PENALE STATUNITENSE (1987); IL PROCESSO PENALE NEGLI STATI UNITI D’AMERICA (Ennio Amodio & M. Cherif Bassiouni eds., 1988); METELLO SCAPARONE, "COMMON LAW" E PROCESSO PENALE (1974).
article, two of Italy’s motives for adopting an adversarial system are readily
discernible. First, Italy sought a way to "open up" its criminal justice system,
both to reflect its status as a modern democratic society and to make a dramat-
ical break with past reliance on closed pretrial hearings. Of course, open trials
are not unique to adversarial systems; France and Germany also employ open
trials under an inquisitorial civil law system.

Second, the staggering inefficiency of the former system required a dramat-
ic change. The Italian system of criminal justice was a shambles under the old
Code. Its enormous backlog of cases delayed even routine cases for ten years
or longer.16 The European Court of Human Rights repeatedly condemned the
fundamental denial of fairness caused by such monumental delays.17 On a
number of occasions the backlog was so severe that Parliament felt compelled
to grant amnesty to whole classes of defendants, in the vain hope that its action
would provide the overburdened system with a fresh start.18 Against this
background, it is not surprising for Parliament to conclude that tinkering with
the criminal justice system was ultimately futile. Instead, desperate lawmakers
looked to a more radical solution to the backlog problem—the adoption of an
adversarial trial system.

An adversarial trial system is not necessarily more efficient than an inquisi-
torial system. For example, the U.S. system is arguably the most complex trial
system of all Western systems of criminal justice. But many of the most time-
consuming features of the U.S. trial system, such as jury selection and the
observance of complex evidentiary rules, have no counterparts in the Italian
system. In contrast, the new Italian system seeks efficiency by avoiding a full
adversarial trial through a series of special procedures, including a version of
plea bargaining. An adversarial system is not an essential prerequisite to
expedited procedures or negotiated settlements. Negotiated settlements are
more easily made in a system that assigns control over the presentation of
evidence to the parties and recognizes that the parties have a right to dispose
of a case without trial. However, the proper functioning of an adversarial
system depends on the parties’ ability and willingness to function as adversar-
ies. As Part II demonstrates, lawyers accustomed to a purely civil law trial
system may have trouble adapting to adversarial procedures.

16. See, e.g., Giuseppe Di Federico, The Crisis of the Justice System and the Referendum on the
Judiciary, in 3 ITALIAN POLITICS: A REVIEW 25, 26-27 (Robert Leonardi & Piergiorgio Corbetta eds.,
1989). For an outline of the practical difficulties in granting speedy trials in Italy, and for a comparative
approach contrasting the U.S. and German experiences, see MARAFIOTI, SEPARAZIONE, supra note 7, at
3-82, 386-407.

Federico, supra note 16.

II. THE ITALIAN CRIMINAL JUSTICE SYSTEM

A. The Civil Law Paradigm

To appreciate the effect of switching from a civil law trial system to a more adversarial trial system, it is important to understand some of the fundamental differences between the two paradigmatic systems.

As an initial matter, the central issue in a civil law trial is very different from the central issue in an adversarial trial. In an adversarial trial, the central determination is whether the prosecution can prove the defendant's guilt beyond a reasonable doubt. If the prosecutor fails to meet this burden, whether because of negligence or simply a lack of evidence, the rules of the adversarial system dictate that the prosecution loses. The judge in the adversarial system is kept largely unfamiliar with the pretrial file in an effort to preserve neutrality. Once at trial, the judge plays only a passive role in the development of evidence.

Judges are far more active trial participants in civil law systems. The judge, rather than the parties, is responsible for developing the evidence at trial, calling and questioning witnesses himself.\(^\text{19}\) To aid in his investigation, the judge has access to the pretrial file prior to the trial's commencement. The involvement of the public prosecutor and defense attorney is generally limited to asking occasional follow-up questions or suggesting other lines of inquiry. As the name implies, the inquisitorial system places primary responsibility for developing the facts in the hands of the judge.

Because the civil law system places singular importance on ascertaining the truth at trial,\(^\text{20}\) it erects few evidentiary barriers that restrict the information the judge can consider in determining guilt. Continental systems of criminal justice have no equivalent of the Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence.\(^\text{21}\) Constitutional exclusionary rules, such as those that have been read into the Fourth Amendment, similarly are anathema.\(^\text{22}\) In contrast, the U.S. system of criminal justice frequently subordinates the finding of truth to the protection of constitutional rights. Exclusion is used to deter improper police conduct and protect the rights of citizens, despite the potential effect on the

\(^{19}\) For an examination of criminal trials in Germany, see John H. Langbein, Comparative Criminal Procedure: Germany 3-60 (1977).

\(^{20}\) See Merryman, supra note 5, at 132; Mirjam Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure, 121 U. Pa. L. Rev. 506, 586 (1973).

\(^{21}\) See Langbein, supra note 19, at 68-69.

\(^{22}\) Id.
outcome of certain trials. Defendant participation also differs greatly under the two systems. The trial in a civil law system usually begins with an examination of the defendant by the judge, exploring the defendant's background as well as his knowledge of, or participation in, the alleged crime. Questions are frequently directed to the defendant throughout the remainder of the trial. While the defendant has the right to refuse to answer any questions, such refusals are exceptional; the presumption in civil law systems is that the defendant should cooperate with the trial judge and answer questions completely. The defendant's cooperation is also encouraged by the fact that his sentence, as well as his guilt, is determined at a single trial. A defendant who wishes to offer evidence of mitigating circumstances thus must speak at trial in order to place such evidence before the court. Since pretrial investigations usually are quite thorough, and since most defendants also cooperate with the pretrial investigation, the inquisitorial system presents less potential for evidentiary surprises than a criminal trial in the United States. A complete file, which includes statements from all potential witnesses, is assembled in advance of trial and made available to the defense.

The system creates a danger that the judge who has already studied the case file will come to the trial convinced of the defendant's guilt or innocence. The civil law system tries to protect against prejudiced judges in two ways. First, in all but the most minor cases only one member of the panel of judges who tries a case will have examined the file. This collegial approach to decision-making counterbalances at least some of the inherent dangers of the inquisitorial system.

Second, in contrast to the U.S. system, the trial does not result in a simple verdict of guilty or not guilty. Instead, the court prepares a written judgment that summarizes the evidence developed at trial, the conclusions drawn from the evidence, and any legal issues that arose during the trial. Because a civil law trial determines both guilt and sentencing, if the defendant is found guilty the judgment will also state the sentence and why the court considered this sentence appropriate.

Forcing the fact-finder to justify its conclusions facilitates the appeals process. The civil law system accords a verdict none of the finality given a

23. See Damańka, supra note 20, at 586 ("[T]he idea that criminal proceedings could justifiably be used for purposes other than those of establishing the truth and enforcing the substantive criminal law is simply not part of the continental legal tradition.").
24. See LANGBEIN, supra note 19, at 65.
25. See id. at 62-63; Damańka, supra note 20, at 527.
26. On the use of the defendant as a source of evidence in continental systems of criminal procedure, see DAMAŃKA, supra note 3, at 127-29, 164-68; Damańka, supra note 20, at 526-30.
27. See LANGBEIN, supra note 19, at 62-63; MERRYMAN, supra note 5, at 131.
28. See LANGBEIN, supra note 19, at 67.
29. Id. at 56-58.
jury verdict in a common law system. Extremely broad rights of appeal are extended to both parties after a trial. The parties can appeal the judgment's factual conclusions as fully and easily as its legal conclusions. The parties may even introduce new evidence on appeal if the appellate court deems it necessary. Not even an acquittal is final: the prosecutor may appeal if he believes that the trial court mistakenly reached a judgment of not guilty. The trial is viewed as simply one step in a process that will lead to the resolution of the criminal charges—it is not the "all or nothing" struggle that it often seems to be in the U.S. system.

A concomitant of the civil law system’s strong commitment to discovering the truth at trial is an emphasis on uniformity. The U.S. system relies on lay juries, believing that they serve as a valuable check on the criminal justice system. Civil law systems, on the other hand, strongly disfavor lay juries because they introduce uncontrolled and unreviewable decisionmaking into the system. Obviously, the civil law system finds jury nullification and inconsistent verdicts unacceptable, although they are generally accepted in common law systems.

If lay jurors are used at all in civil law systems, they serve on hybrid panels alongside professional judges. These panels permit judges to benefit from the experience of laypersons while maintaining control over the development of evidence and the application of law. Since professional judges are always involved in the deliberations, there is no need for a lengthy set of jury instructions. Any legal advice needed during the deliberations of a mixed jury is provided by one of the participating professional judges. Like all-judge panels, mixed juries are expected to set forth the verdict in a thorough written judgment.

The civil law emphasis on uniform results manifests itself in a strong aversion to prosecutorial discretion. The civil law system has no counterpart to the broad prosecutorial discretion existing in the United States. The very notion that a prosecutor would have any leeway in choosing whether to file a criminal charge is alien to the civil law ethos. Instead, prosecutors must file criminal charges whenever the evidence indicates that the suspect has violated

30. See id. at 82-84; MERRYMAN, supra note 5, at 120.
31. See LANGBEIN, supra note 19, at 84-85.
32. See DAMAŠKA, supra note 3, at 48-50.
34. See, e.g., United States v. Powell, 469 U.S. 57 (1984) (refusing to vacate convictions merely because jury verdicts could not be rationally reconciled).
35. See LANGBEIN, supra note 19, at 119-20.
36. See Damalska, supra note 3, at 510 n.4.
37. See LANGBEIN, supra note 19, at 79-80.
38. Id. at 55-57.
the law.\textsuperscript{39} If, for example, some evidence indicated that a suspect committed a serious crime, but the prosecutor believed that there were reasons for not prosecuting the case, the prosecutor would be expected to file a formal criminal charge and seek dismissal of the charge by a judge, who has the authority to review the prosecutor's decision.\textsuperscript{40}

Consequently, a system of plea bargaining like that existing in the United States is viewed as fundamentally inconsistent with the sacrosanct civil law values of uniformity and truth.\textsuperscript{41} While the U.S. system has come to accept the practice of plea bargaining, seemingly motivated by the belief that half a loaf is better than none, civil law systems have made no such compromise.\textsuperscript{42} Indeed, so inflexible is the civil law's commitment to its principles that, even where a defendant has fully admitted his guilt and offered a detailed confession, the law still requires a full trial. The court, not the defendant, determines guilt.\textsuperscript{43}

B. An Introduction to the New Italian Code of Criminal Procedure

To a lawyer who has not studied civil law systems, the Italian Code of Criminal Procedure is a difficult and comprehensive\textsuperscript{44} document with no true common law analogue. This part demonstrates how the new "adversarial" system works by outlining the various procedural steps from an initial crime report through trial and appeal.

A victim's report of a crime places the police under a tight deadline: within forty-eight hours they must inform the public prosecutor of the crime and send him all the information they have gathered.\textsuperscript{45} Upon learning of the crime, the public prosecutor must record the crime in the crime register.\textsuperscript{46} This act is more than simple record-keeping. Recording the crime triggers certain time

\textsuperscript{39} See Mirjan Damaška, \textit{Structures of Authority and Comparative Criminal Procedure}, 84 YALB L.J. 480, 503-04 (1975); see also Langbein, supra note 19, at 87-105; Joachim Herrmann, \textit{The Rule of Compulsory Prosecution and the Scope of Prosectorial Discretion in Germany}, 41 U. CHI. L. REV. 468 (1974).

\textsuperscript{40} See Langbein, supra note 19, at 100-09.

\textsuperscript{41} Id. at 97 n.5. Professor Langbein states that "plea bargaining is all but incomprehensible to the Germans, whose ordinary dispositive procedure is workable without such evasions." See also Merryman, supra note 5, at 130. This assertion is not completely accurate today. A sort of informal plea bargaining, which German scholars find very troubling, has arisen in Germany. See infra notes 181-186 and accompanying text.

\textsuperscript{42} See Damaška, supra note 3, at 193.

\textsuperscript{43} See merryman, supra note 5, at 131.

\textsuperscript{44} The Code of Criminal Procedure comprises 11 books and 746 sections. The first four books constitute the "static" part of the Code, so called because they deal with the structure in which trials and other procedures take place. The remaining seven books constitute the "dynamic" part of the Code, dealing with the actual steps in the process from the preliminary investigation through execution of the sentence.

\textsuperscript{45} See C.P.P. art. 347.

\textsuperscript{46} Id. art. 335. Every crime must be registered in the \textit{registro delle notizie di reato} (register of reported crimes).
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limits within which investigation of the crime must be completed, creating in effect a speedy trial provision.\(^{47}\) The Italian Code places the public prosecutor, rather than the police, in control of the pretrial investigation of a crime,\(^{48}\) although the police are at the prosecutor’s disposal.\(^{49}\) The public prosecutor functions to some extent as an advocate, but the Code also places on him an obligation of fairness that requires him to investigate exculpatory as well as incriminatory evidence.\(^{50}\) Arrested suspects are not accorded Miranda\(^{51}\) protections, primarily because statements obtained through police questioning are not admissible at trial unless defense counsel was present.\(^{52}\)

Italy, like other civil law countries, is wary of broad prosecutorial discretion in deciding whether or not to charge a suspect.\(^{53}\) The Italian Constitution reflects this distrust by mandating compulsory prosecution.\(^{54}\) Nevertheless, the Code provides a method for disposing of weak cases. A prosecutor may ask the judge for a judgment of dismissal (decreto di archiviazione) whenever...
the evidence is insufficient to prove that a crime was committed or that it was committed by a particular defendant.56

The incidente probatorio, a deposition-like procedure, is an important investigatory device that can occur at any time before trial.57 This procedure allows either the prosecutor or defense to request the hearing of testimony from a witness if there is a compelling reason for the request, such as the need to protect a witness from physical harm or the need to obtain the testimony of a witness who may die before trial.58 The incidente probatorio thus serves to "freeze" the testimony of a witness, as evidence so obtained is included in the file the judge receives at the start of trial.59 A judge is assigned specifically to supervise all preliminary investigations. The judge determines such matters as bail and preserves the impartiality of the investigation. While control of the investigation is largely in the hands of the public prosecutor, the judge

55. See C.P.P. arts. 408-411. See generally NICOLA CARULLI, DELL'ARCHIVIAZIONE E DELLE PROVE (1989); Vittorio Grevi, Archiviazione per "indoneità probatoria" ed obbligatorietà dell'azione penale [Dismissal for "Insufficient Evidence" and Compulsory Trial], 1990 Rivista italiana di diritto e procedura penale 1274 (Italy).

56. See Legislative Decree No. 271 of July 28, 1989, art. 125, reprinted in LE NUOVE NORME, supra note 14, at 816 ("Il pubblico ministero presenta al giudice la richiesta di archiviazione quando ritiene l'infondatezza della notizia di reato perché gli elementi acquisiti nelle indagini preliminari non sono idonei a sostenere l'accusa in giudizio." ("The prosecutor presents a request for dismissal to the judge when evidence gathered by the preliminary investigation is insufficient to uphold the charges.")); see also 1 COMMENTARIO DEL NUOVO CODICE DI PROCEDURA PENALE, supra note 1, at 295; Giuseppe Turone, Il pubblico ministero nel nuovo processo penale: criteri guida per la gestione delle indagini preliminari in funzione delle determinazioni inerenti all'escercizio dell'azione penale, 1989 Quaderni del Consiglio superiore della magistratura 233 (Italy); Grevi, supra note 55, at 1274. For the distinction drawn in the Code between the pretrial phase and the trial phase, see Andrea Antonio Dalia, Il sistema, in 1 MANUALE DI DiritO processuaLe PEnale, supra note 1, at 2, 79.

57. See Legislative Decree No. 271 of July 28, 1989, art. 125, reprinted in LE NUOVE NORME, supra note 14, at 816 ("Il pubblico ministero presenta al giudice la richiesta di archiviazione quando ritiene l'infondatezza della notizia di reato perché gli elementi acquisiti nelle indagini preliminari non sono idonei a sostenere l'accusa in giudizio." ("The prosecutor presents a request for dismissal to the judge when evidence gathered by the preliminary investigation is insufficient to uphold the charges.")); see also 1 COMMENTARIO DEL NUOVO CODICE DI PROCEDURA PENALE, supra note 1, at 295; Giuseppe Turone, Il pubblico ministero nel nuovo processo penale: criteri guida per la gestione delle indagini preliminari in funzione delle determinazioni inerenti all'escercizio dell'azione penale, 1989 Quaderni del Consiglio superiore della magistratura 233 (Italy); Grevi, supra note 55, at 1274. For the distinction drawn in the Code between the pretrial phase and the trial phase, see Andrea Antonio Dalia, Il sistema, in 1 MANUALE DI DiritO processuaLe PEnale, supra note 1, at 2, 79.

58. See C.P.P. art. 392.

59. Id. art. 431.
New Italian Code of Criminal Procedure

serves as a check on his power.  

The Italian Code also provides for a preliminary hearing (udienza preliminare), which unlike its U.S. equivalent is essentially a document review by the judge. A public prosecutor requesting a preliminary hearing sends the judge a file containing all documents and reports collected during the investigation.  

At the hearing (held in camera), the public prosecutor presents no witnesses, but instead outlines the investigation and its results using the documents developed in the investigation. The defense, also working from the investigation file, has the opportunity in turn to argue against setting the case for trial. In addition, the defendant may ask to be examined by the judge, and he may not be cross-examined. The judge may ask the parties for any additional evidence he considers necessary. The judge then must decide whether or not to set the matter for a trial at the conclusion of the preliminary hearing.  

The preliminary hearing is largely a formality, however, because the judge applies an extremely lenient standard to the prosecutor's case. A weak case against the accused is not a basis for dismissal. Rather, a judge may dismiss the case only if he concludes that no crime actually took place, that the events described in the charges do not constitute a crime, or that the defendant clearly did not commit the crime. In short, the decision to dismiss the charges against a suspect after the preliminary hearing amounts to a declaration that the defendant must be acquitted immediately without a trial.  

Italy's preference for a preliminary hearing based on documents is consistent with the civil law tradition, which places a premium on the careful assembly of a complete dossier on the case. This dossier usually serves as the basis of the judge's questioning at trial. But while the preliminary hearing permits the judge to make use of the entire investigative file, the new Code parts company with civil law tradition by limiting the written materials a court may consider at trial. Article 431 limits the file sent to the trial judges to the charging documents, physical evidence connected with the crime, and evidence

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60. The gradual movement away from judicial control of investigation and toward prosecutorial control, subject to neutral judicial oversight, is typical of the evolution in other civil law countries, including Germany in 1974 and Portugal in 1988. France, however, continues to vest control of the pretrial investigation in the judge. See, e.g., Ferrua, supra note 1, at 51; Giovanni Conti, Il giudice per le indagini preliminari [The Role of the Judge in Controlling Investigations and the Preliminary Hearing], 1988 Documenti giustizia 117; Francesco Gianniti, La poliedrica figura del giudice per le indagini preliminari, 1989 L'indice penale 603 (Italy).

61. C.P.P. art. 416.

62. Id. art. 421, para. 2.

63. Id. arts. 64, 65, 421.

64. Id. art. 422.

65. Id.

66. Id. art. 425, para. 1.
gathered using the *incipente probatorio*. The rest of the evidence must be presented at the trial by the parties. For trial judges educated and trained in the civil law tradition, these innovations are significant. Given the civil law's distaste for excluding probative evidence, judges will probably feel pressure to read broadly the exceptions contained in Article 431.

In Italy, as in other civil law countries, injured persons are entitled to participate through representatives as parties to a criminal case, from the pretrial hearing to the appeal. Injured parties have both an interest in "seeing justice done" to the defendant and the possibility of recovering monetary compensation. Injured parties may recover damages from criminals by drawing upon either tort law or a specific Criminal Code provision making convicted criminals liable for restitution and reparation. As full participants, injured parties are able to protect these interests by examining and cross-examining witnesses, presenting evidence, asking for further investigation, and opposing motions to dismiss.

The trial itself begins with opening statements by the public prosecutor, the lawyers representing any civil parties, and the defense attorney, in that order. Parties bring witnesses in the same order, and each party is granted an opportunity to cross-examine the others' witnesses. Closing statements then follow in the same order. After closing statements, each of the advocates is entitled to present a rebuttal to the other summations. Unlike U.S. trials, in which the prosecution is allowed the last word, the defense always has the opportunity to speak last in an Italian trial.

The defendant traditionally plays an active role in a civil law trial. The new Code continues the tradition by permitting the defendant to speak at any point in the trial to challenge a witness's testimony. While a defendant may remain silent, a defendant who wishes to present mitigating facts relevant to sentencing must do so at trial. It is unclear whether adversarial trial procedures will encourage more defendants to exercise the right to remain silent.

67. Evidence obtained by the police or the public prosecutor through procedures that cannot be repeated, such as evidence from wiretaps, is included in the file. *Id.* art. 431.
68. Injured persons entitled to representation throughout the process include not only the victim but also the victim's family and unrelated third parties. *Id.* art. 74.
69. *Id.* art. 90.
70. *Codice Penale* [C.P.] art. 185 (Italy) ("Every offense which has caused damage, whether to property or not, obliges the guilty party and those responsible for his action, according to the civil law, to render compensation.") (translation from Italian).
71. See C.P.P. arts. 496, 498, 523, 493, para. 2.
72. *Id.* art. 410.
73. *Id.* art. 493.
74. *Id.* art. 496.
75. *Id.* art. 498.
76. *Id.* art. 523.
77. *Id.* para. 5.
78. *Id.* art. 494.
79. *Id.* art. 533; *supra* notes 24-26 and accompanying text.
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Following trial, the court must explain its decision in an opinion that reviews the evidence and explains in detail the grounds (motivazione) for the decision. If the court cannot draft its opinion immediately after the trial, it must do so within thirty to ninety days, depending on the complexity and seriousness of the case.

The new Code retains the broad appellate review characteristic of civil law systems; in fact, the 1988 reform left the Code provisions concerning appeal virtually untouched. The appellate process centers on the formal opinion of the court setting out the evidence that the court relied upon in reaching its verdict and explaining the reasoning behind the court's decision. All parties, including civil parties injured by the crime, may appeal the decision of the trial court. The appellate court may reform any aspect of the decision, including the sentence, in part or completely. An appellate court even has the power to take new evidence in appropriate cases.

The broad scope of appellate rights in Italy is exemplified by the right of a defendant to appeal even an acquittal. This counter-intuitive result stems from the fact that the Italian system provides for more than one type of acquittal. Judges can choose from a range of acquittals. Ranging from strongest to weakest, the forms of acquittal are findings as follows: 1) that no crime was committed; 2) that there was a crime, but the defendant did not commit it; 3) that the defendant is innocent of the crime, because evidence was insufficient to convict him; 4) that there was no crime, because the defendant had a justification for his action (such as self-defense or necessity); or 5) that it was not possible to decide the case due to a procedural fault. A defendant has the right to appeal an acquittal to seek a stronger form of acquittal.

III. COPING WITH JUDICIAL BACKLOG: U.S. AND ITALIAN ATTEMPTS TO SOLVE THE PROBLEM

All western systems of criminal justice increasingly face the problem of
judicial backlog. This section examines U.S. and Italian attempts to cope with crowded criminal dockets without sacrificing procedural fairness.

A. The U.S. Solution: Acceptance of a System of Negotiation and Compromise

The United States has dealt with swelling criminal dockets in two principal ways. First, the U.S. system grants prosecutors broad discretion. Because U.S. trials are highly adversarial, prosecutors typically are reluctant to pursue a full trial if they think the chances of conviction are poor. Thus, prosecutors generally will not seek an indictment unless the evidence against a defendant establishes more than simple probable cause, as neither prosecutors nor judges feel they have the time to devote to a case that is unlikely to result in conviction. The system also keeps a substantial percentage of cases out of the system through deferred prosecutions as well as pretrial diversion programs that provide offenders with treatment or with vocational training. Broad prosecutorial discretion also permits selective prosecution in order to maximize the deterrent value of those cases filed. For example, the Internal Revenue Service cannot feasibly prosecute all tax evaders, but it brings a few well-publicized cases each year before the filing deadline to deter potential cheats. The U.S. system permits such selective prosecution.

Second, U.S. prosecutors rely on plea bargaining to dispose of the vast majority of cases prosecuted. All defendants in the United States have the right to trial and the protections that a full adversarial trial entails. Nevertheless, trials have become very much the exception for resolving criminal cases. Instead, criminal cases are routinely resolved in plea bargains that spare the system the expense of trial. While statistics vary from jurisdiction to jurisdiction, some scholars have estimated that plea bargaining is responsible for close to ninety percent of convictions in the United States.

87. For a discussion of some of the alternatives to full trial that have evolved either in the statutes or practice of other European countries, see infra notes 173-186 and accompanying text.
88. See generally LAFAVE & ISRAEL, supra note 33, §§ 13.1, 13.6.
89. The percentage of defendants processed through pre-trial diversion programs varies from jurisdiction to jurisdiction, but a Justice Department study of felony arrests in 1987 estimated that perhaps five percent of felony arrests are diverted. See BARBARA BOLAND, THE PROSECUTION OF FELONY ARRESTS 3 (1990).
90. The only limit on selective prosecution is that cases chosen for prosecution may not be selected on the basis of race, religion, or other characteristics that would raise equal protection concerns. See Wayte v. United States, 470 U.S. 598, 608 (1985).
91. Using figures from 1984, the authors of one study concluded that guilty pleas outnumbered trials by a ratio greater than five to one at the federal level and by about ten to one at the state and local level. See Barbara Boland & Brian Forst, Prosecutors Don’t Always Aim to Pleas, 49 FED. PROBATION 10, 13-14 (1985).
Plea bargaining takes a variety of forms, but it essentially involves exchanging a reduced charge in return for a plea of guilty. Plea bargaining greatly increases the ability of the U.S. system to handle a tremendous volume of cases, so that the system is generally able to fulfill the speedy trial rights of those defendants who choose to proceed to trial. But plea bargaining is not without costs. It takes sentencing discretion away from judges and gives it to prosecutors. It is also unpopular. Backroom deals lack both the cathartic effect and legitimacy of a verdict at trial, and all parties may feel frustrated with a compromise result.

B. The Proposed Italian Solution: The Special Procedures of the New Code

The new Code was, in significant part, intended to provide the Italian criminal justice system with new, efficient procedures to combat its perennial case backlog. The Italian approach to prosecution differs substantially from U.S. methods. In the United States, essentially one rigid system of trial applies to all non-petty offenses, whether the evidence is overwhelming or doubtful, or whether conviction entails a sentence of years or only a few days. The selection of the jury, the rules of evidence, the principles of examination and cross-examination, and so on, remain the same. Italy takes a more flexible approach. Instead of requiring all cases to proceed down a single highway, Italy sets up a number of different avenues along which a case may proceed to resolution, governed by factors such as the seriousness of the crime and the strength of the evidence. The new Code offers defendants significant sentencing reductions in exchange for selecting simplified procedures.

The special procedures in the new Code can be broken down into two general categories: procedures that eliminate the preliminary hearing in the interest of expediting the case, and procedures that offer an alternative to trial (see Table).
C. Procedures That Avoid a Preliminary Hearing: Giudizio Direttissimo and Giudizio Immediato

When the investigation of a crime is concluded and the public prosecutor believes there is enough evidence to merit prosecution, she asks the judge for a preliminary hearing. But a preliminary hearing in Italy is very much a formality, since it is essentially a review of the investigative file and the review is very narrow. It is thus not surprising that the framers of the new Code developed procedures to avoid preliminary hearings. The two procedures that allow the system to skip the preliminary hearing stage of the process entirely and set the matter for immediate trial are the giudizio direttissimo and the giudizio immediato.98

1. Giudizio Direttissimo

The giudizio direttissimo is available in four types of situations, each involving strong evidence of the defendant’s culpability.99 The first type involves defendants caught and arrested in the act of committing a crime.100 Under such circumstances, the prosecutor may bring the defendant before the trial judge within forty-eight hours to have the arrest ratified and the matter set for immediate trial.101 The defendant is permitted a full trial, but it is straightforward and takes place quickly because the evidence is clear and overwhelming.

The second and third applications of the giudizio direttissimo are variations on the first. Even if the defendant is not caught in the act, he may still consent

98. The giudizio direttissimo is provided for at C.P.P. art. 449; the giudizio immediato, at id. arts. 453-456.
99. See Alfredo Gaito, Il giudizio direttissimo ed il giudizio immediato, in QUESTIONI NUOVE, supra note 96, at 167-68.
100. See C.P.P. art. 449, para. 1. For the doctrine underlying the giudizio direttissimo, see, e.g., Andrea Antonio Dalia, Il giudizio direttissimo, in I RITI DIFFERENZIATI, supra note 96, at 191; Giacomo Fumu, Aspetti problematici del giudizio direttissimo e del giudizio immediato, in QUESTIONI NUOVE, supra note 96, at 247 [hereinafter Fumu, Aspetti problematici]; Giacomo Fumu, Titolo III: Giudizio direttissimo, in 4 COMMENTO AL NUOVO CODICE DI PROCEDURA PENALE, supra note 1, at 817; Giusto, supra note 99, at 155; Giuseppe Riccio, Libro VI: Procedimento speciali, in PROFILI DEL NUOVO CODICE DI PROCEDURA PENALE, supra note 1, at 312.
101. See C.P.P. art. 449, para. 1.
<table>
<thead>
<tr>
<th>Procedure</th>
<th>Finding of Guilt</th>
<th>Trial</th>
<th>Preliminary Hearing</th>
<th>When Available</th>
</tr>
</thead>
<tbody>
<tr>
<td>giudizio</td>
<td>Defendent is to be convicted</td>
<td>No, full adversary trial</td>
<td>No, direct trial</td>
<td>Defendant caught in act or others full confession</td>
</tr>
<tr>
<td>diretto</td>
<td></td>
<td></td>
<td></td>
<td>Cases where evidence is overwhelming</td>
</tr>
<tr>
<td>immediato</td>
<td></td>
<td></td>
<td></td>
<td>Minor cases where fine is the punishment</td>
</tr>
<tr>
<td>procedimento</td>
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<td>Relatively minor crimes, because final sentence, after one-third discount, may not exceed two years</td>
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<tr>
<td>penale</td>
<td></td>
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<tr>
<td>abreviato</td>
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<tr>
<th>Procedure</th>
<th>Limitations on Appeal</th>
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<tbody>
<tr>
<td>giudizio</td>
<td>None</td>
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<tr>
<td>diretto</td>
<td>None</td>
</tr>
<tr>
<td>immediato</td>
<td>None</td>
</tr>
<tr>
<td>procedimento</td>
<td>No appeals; defendant</td>
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<tr>
<td>penale</td>
<td>is free to reject penal</td>
</tr>
<tr>
<td>abreviato</td>
<td>decree and go to trial</td>
</tr>
</tbody>
</table>

Agreed-upon plea bargain disposed of case

Yes, severely limited appellate rights

Normal verdict and written judgment, with sentence reduced by one-third

Table: Special Procedures of the New Italian Code of Criminal Procedure
to an immediate trial under the second application of the procedure. The third application concerns situations in which a defendant is caught in the act of committing a crime that requires further investigation. In such circumstances, a prosecutor may wait up to fifteen days to request a giudizio direttissimo so that a more complete investigation can take place.

The fourth situation permitting an immediate trial under giudizio direttissimo involves defendants who have made a full confession to the public prosecutor. When this occurs, the prosecutor may request a giudizio direttissimo within fifteen days of recording the crime in the crime register.

2. Giudizio Immediato

The other procedure for bypassing the preliminary hearing is the giudizio immediato, intended for use in situations in which the evidence against a defendant is very strong, though falling short of the standards of the giudizio direttissimo. The Code provides that within ninety days of commencing investigation of the crime, where the inquiry has revealed conclusive evidence against a defendant and after the defendant has been interrogated or asked to give a statement, the public prosecutor may ask the judge in charge of the preliminary investigation to set the matter for trial without holding a preliminary hearing. There is no hearing on the request; the judge merely reviews the records of the investigation, which the prosecutor submits for review, and rules within five days. The defendant also may request giudizio immediato, which is analogous to waiver of a preliminary hearing in the U.S. system.

D. Three Alternatives to Trial

1. Proceeding by Penal Decree

The second category of special procedures in the new Code of Criminal

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102. Id. para. 2.
103. Id. para. 3.
104. Id. para. 5. Every report of a crime must be recorded by the prosecutor in the proper crime register. See supra note 46 and accompanying text.
105. Article 27 of the Legislative Decree of January 1, 1991 has partially modified C.P.P. art. 453, para. 1. Article 453 originally made interrogation of the defendant compulsory, but it now requires only that the defendant have the opportunity to give a statement to the authorities, which he may or may not accept. See Giovanni Paolozzi, Ombre di involuzione sul giudizio immediato [Shadows of Involution over the "giudizio immediato"], 1991 Giust. pen. III 193.
106. See C.P.P. art. 453, para. 1, art. 454, para. 1. See generally Andrea Antonio Dalia, Giudizio immediato, in I PROCEDIMENTI SPECIALI, supra note 96, at 211; Fumu, Aspetti problematici, supra note 100, at 259; Giacomo Fumu, Titolo IV, in IV COMMENTO AL NUOVO CODICE DI PROCEDURA PENALE, supra note 1, at 835; Gaito, supra note 99, at 196; Giulio Illuminati, Giudizio immediato, in I PROCEDIMENTI SPECIALI, supra note 96, at 139.
107. See C.P.P. art. 453, para. 3.
New Italian Code of Criminal Procedure

Procedure includes alternatives to trial. The first of these is the *procedimento per decreto penale*, which translates roughly as "a proceeding by penal decree." A penal decree is, in essence, a unilateral offer by the public prosecutor to resolve the case by a discounted fine. The defendant is free to accept or reject the offer. It is available only for minor crimes where the public prosecutor believes that a fine would be sufficient punishment. In such cases, the public prosecutor can ask the judge to sentence the defendant directly, resulting in a fifty percent fine reduction. There is no preliminary hearing and no trial—simply the direct imposition of the fine. The large discount in the fine is obviously intended to encourage defendants charged with minor crimes to accept the penal decree. But if the defendant is dissatisfied with the fine or desires a trial for other reasons, he is entitled to demand a trial any time within fifteen days after the judge imposes the fine.

A conviction by penal decree is not a new procedure in Italy. Even under the old Code, lower courts trying minor crimes punishable by fines used a form of the penal decree. The new Code's innovations include the requirement that the prosecutor initiate the penal decree, and the fixed fifty percent discount in the fine.

Although the penal decree can be used only for minor criminal cases, it is nonetheless important to the entire Italian system as a mechanism for quickly resolving these cases.

2. Italian Plea Bargaining

The United States does not need a procedure such as the penal decree, in part because large numbers of minor cases are handled through plea bargaining. Italy, too, has adopted a mild form of plea bargaining in the new Code: the *applicazione della pena su richiesta delle parti*, the second of the three alternatives to trial. The phrase roughly translates as "the application of punishment upon the request of the parties." Under this procedure, before the

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109. See C.P.P. art. 459.

110. Id. art. 461.

111. Other countries have procedures that are more or less similar to the *procedimento per decreto penale*. For example, a prosecutor in Germany may opt to dispose of minor crimes through a "penal order" (*Strafbefehl*), in which he files a proposal for a certain disposition of the crime, which may be a fine, but not imprisonment. The defendant may then accept the proposed disposition or ask for a criminal trial. See LANGBEIN, supra note 19, at 96-97. Unlike the *procedimento per decreto penale*, the German procedure has no sentencing discount.


113. See C.P.P. arts. 444-448.
trial begins the public prosecutor and the defense attorney may agree on a sentence to be imposed and ask the judge to impose it. The normal sentence can be reduced by as much as one-third, so long as the final negotiated sentence is not more than two years. Prosecutors can bargain to defer the sentence, since any sentence up to two years can be deferred.

Although Italian-style plea bargaining may appear similar to U.S. plea bargaining—and is even referred to by Italian lawyers as a patteggiamento, which is the Italian word for "bargain"—certain limitations differentiate it from what occurs in U.S. courts. First, in the Italian system the public prosecutor and the defendant do not bargain over the nature of the crime to which the defendant will plead guilty. If a defendant is charged with assault and the charge fits the facts of the case, the Code does not provide for a plea to a lesser included offense, such as menacing, to lower the defendant's sentencing exposure. Second, the fixed maximum reduction of one-third of the normal sentence, coupled with the restriction that the final sentence may not exceed two years, considerably limits the range of cases that qualify for plea bargaining. A defendant subject to a sentence of more than three years cannot plea bargain because the resulting sentence would exceed the two-year limitation. Third, the defense may ask the judge for the one-third reduction in sentencing under the statute even if the prosecutor refuses to join in such a request.

In such cases, the prosecutor must state his reasons for refusing the proposed disposition. The intent of the Italian Code is to make sentence reduction

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114. Id. art. 444. See generally Giovanni Aricé, Applicazione della pena su richiesta delle parti [Application of the Penalty upon Request of the Parties, or Plea Bargaining], in I PROCEDIMENTI SPECIALI, supra note 96, at 97; Massimo Biffa, Il patteggiamento nei procedimenti differenziati [Negotiation in Differentiated Procedures], 1989 Giurisprudenza di merito 805 (Italy); Gilberto Lozzi, L'applicazione della pena su richiesta delle parti, in I RITI DIFFERENZIATI, supra note 96, at 31.

In 1981, the Italian legislature introduced a very limited type of plea bargaining for crimes punishable by up to three months in prison. The provision allowed the defendant to avoid actual imprisonment under a provision permitting an alternative sanction—the sanzioni sostitutive delle pene detentive brevi. See Law No. 689 of Nov. 24, 1981, 1981 Rac. Uff. XIII 3657; see generally ENRICO MARZADURI, L'APPLICAZIONE DI SANZIONI SOSTITUTIVE SU RICHIESTA DELL'IMPUTATO (1985); GAETANO VICCONTE, L'APPLICAZIONE DI SANZIONI SOSTITUTIVE SU RICHIESTA DELL'IMPUTATO (1989). For a comparative approach, see ROSANNA GAMBINI MUSSO, IL "PLEA BARGAINING" FRA COMMON LAW E CIVIL LAW (1985).

115. The statute provides, ambiguously, that a sentence reduction fino ad un terzo is possible. The courts initially interpreted the provision to hold that a plea bargain could reduce the final sentence to a third of the normal sentence or, in other words, by two-thirds. However, the Corte di cassazione has now rejected that argument, ruling that the maximum possible sentence reduction through plea bargaining is one-third of the normal sentence. See Judgment of Mar. 24, 1990, Cass. Sez. Un., 1990 Cass. pen. 118 ("In plea bargaining the phrase 'decreased up to one third' in C.P.P. art. 444 indicates that the amount of the reduction cannot exceed one third, not that the possible sentence could be reduced to one third of the original.") (translation from Italian).

116. C.P.P. art. 444, para. 3.
117. C.P. art. 163 (1930).
118. See C.P.P. arts. 444, 446.
119. Id. art. 446, para. 6, art. 448, para. 1. For a decision in which a court granted the defendant a reduction despite the prosecutor's refusal to join in the request, see Judgment of Feb. 1, 1990, Trib. Perugia, 1990 Giur. It. 276 & note (Paola Sechi, Sul dissenso del pubblico ministero dall'applicazione della pena su richiesta [Dissent of the Prosecutor in Plea-Bargaining]).
available to all defendants who wish to plea bargain, whether or not the prosecutor agrees. This arrangement reflects the traditional civil law distrust of prosecutorial discretion and commitment to uniform treatment of defendants\textsuperscript{120}—that defendants would receive different sentences simply because of a prosecutor's whim is anathema to civil law.

The final difference between U.S. and Italian plea bargaining is perhaps one more of form than of substance. The Italian variant involves no actual plea of guilty. The Italian Code omits the guilty plea requirement because the drafters feared an admission of guilt would undermine the presumption of innocence guaranteed all defendants in the Italian Constitution.\textsuperscript{121} Since any defendant who enters into a plea bargain waives his right to trial and ends up with a conviction on his criminal record, this squeamishness as to an actual admission of guilt seems hypocritical. However, since there is no actual plea of guilty in Italian plea bargaining, it remains possible that a judge asked to approve a plea bargain would review the records (as required prior to approving the agreement\textsuperscript{122}) and conclude that the defendant is not guilty.\textsuperscript{123} The fact that a person could go to prison for up to two years with neither an admission nor a formal finding of guilt illustrates Italy's difficulty in reconciling plea bargaining with its civil law tradition.

3. Giudizio Abbreviato

The third alternative to a trial is the \textit{giudizio abbreviato} or "summary trial." This procedure grants a defendant quick resolution of his case based solely on the investigative file, in return for a substantial sentencing reduction should he be found guilty. It is not a U.S.-style plea bargain, because the issue of guilt remains open, nor is it a trial, because the evidence is limited to the materials in the investigative file. Only the defendant may appear as a witness, and he may request interrogation by the judge.\textsuperscript{124} Thus, the \textit{giudizio abbreviato} has aspects of both plea bargain and trial—it is like a plea bargain in that the defendant gets a sentence reduction in exchange for choosing an expedited resolution of the case, and it is like a trial in that the issue of guilt

\begin{footnotesize}
\textsuperscript{120} If the judge grants the defendant's requested disposition, the prosecutor may appeal that decision. \textit{See} C.P.P. art. 448, para. 2. That is the only case in which the sentence is appealable by \textit{appello}. The \textit{ricorso per cassazione} is always permitted under Article 111 of the Italian Constitution. \textit{Cost.} art. 111.
\textsuperscript{121} For an explanation of the civil law system's strong emphasis on uniformity, see \textit{supra} notes 33-40 and accompanying text.
\textsuperscript{122} \textit{Cost.} art. 27, § 2 (accused is not to be considered guilty until final judgment). \textit{See generally} Oreste Dominioni, \textit{La presunzione d'innocenza, in le parti nel processo penale} 203 (1985); GIULIO ILLUMINATI, \textit{LA PRESUNZIONE D'INNOCENZA DELL'IMPUTATO} (1979).
\textsuperscript{123} See C.P.P. art. 444, para. 2.
\textsuperscript{124} The statute specifically mentions this possibility. \textit{Id.} (referring to C.P.P. art. 129, which governs acquittals).
\textsuperscript{125} \textit{Id.} arts. 421, 441.
\end{footnotesize}
must still be decided by the judge. The *giudizio abbreviato* is the most important of the special procedures in the new Italian Code, because it is designed to resolve a substantial percentage of the system's criminal cases without a full adversarial trial.125

A defendant may request a *giudizio abbreviato*;126 the public prosecutor must join in this request.127 This joint request may be made 1) before the preliminary hearing, in which case it must be filed with the court at least five days in advance, or 2) during the preliminary hearing, in which case it may be oral and must be made prior to closing arguments.128

Once he receives a request for a *giudizio abbreviato*, the judge must decide whether the case can be resolved definitively on the basis of the preliminary hearing documents.129 As explained earlier,130 the preliminary hearing in Italy is quite different from one in the United States, which normally takes the form of a public mini-trial. At an Italian preliminary hearing the only testimony taken is that of the defendant.131 The hearing is based on the complete case file, which includes all documents and reports produced through the investigation, as well as statements made in front of a judge during the investigation.132 The judge at the preliminary hearing may ask the parties for additional evidence to decide whether to set the matter for trial.133 Such a request is not permitted at a *giudizio abbreviato*.134 A *giudizio abbreviato* thus requires a very straightforward case.

The *giudizio abbreviato*, by sparing the state a full adversarial trial, offers

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126. C.P.P. art. 438.

127. Injured parties do not have to consent to the use of the summary trial. The *parte civile* does not have the power to veto a summary trial and need not consent for one to occur. C.P.P. art. 441. But if the *parte civile* chooses to participate after the court has agreed that the case is appropriate for summary trial, this amounts to acceptance of the summary trial by the *parte civile*. Id. para. 2. If the *parte civile* does not appear after that point, he then can pursue his civil remedy independently of the summary trial. Id. para. 3.

128. Id. art. 439, para. 1.

129. Id. art. 440. If the request is made prior to the preliminary hearing, the judge must inform the parties of his decision at least three days before the hearing. Id. para. 2. If the judge denies the request, it may be renewed at the preliminary hearing. Id. para. 3. If the request is made during the preliminary hearing, the judge must rule immediately. Id. para. 2.

130. See supra notes 61-65 and accompanying text.

131. See C.P.P. art. 421, para. 2.

132. Id. art. 416, para. 2.

133. Id. art. 422.

134. Id. art. 441, para. 1. This tight restriction on evidence has been subject to criticism. See Paolo Tonini, *I procedimenti semplificati*, in *LE NUOVE DISPOSIZIONI SUL PROCESSO PENALE*, supra note 1, at 109; Siracusano, supra note 48, at 215.

For a discussion of some of the confrontational issues that may arise in the case of a request for a summary trial where there are statements from a codefendant, see Luca Marafioti, *Giudizio abbreviato cumulativo e diritto dei coimputati al contraddittorio* [Multi-Party "Giudizio Abbreviato" and the Rights of Codefendants Regarding the Right to Confrontation], 1990 Giur. It. II 25.
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tremendous savings of judicial resources. The procedure is also designed to save resources at the other end of the process, by tightly restricting appellate review of the judgment. A defendant cannot appeal a giudizio abbreviato acquittal in search of a stronger acquittal, nor can he appeal a fine or suspended sentence. In turn, the prosecution cannot appeal a sentence other than imprisonment. These restrictions may not seem unusual compared to the U.S. system of appeals, but mark an important change in a civil law system, where every phase of the trial is subject to thorough appellate review and possible modification.

Article 442 contains a feature that the drafters no doubt hoped would make the giudizio abbreviato procedure attractive to many defendants: in the event that the defendant is found guilty, the judge is to reduce the normal sentence (taking into account aggravating and mitigating circumstances) by one-third. For example, if a judge decides that the defendant should receive a sentence of six years for the crime he committed, the defendant is entitled to a sentence of just four years if he opted for a giudizio abbreviato. As this example indicates, a giudizio abbreviato is available even for serious crimes.

The Code originally permitted the use of the giudizio abbreviato procedure to reduce a sentence of life imprisonment—the highest level of punishment available in Italy—to a sentence of thirty years. Recently, however, the Italian Constitutional Court held this provision unconstitutional on the grounds that the drafters exceeded their delegated authority, which permitted application of the giudizio abbreviato only to crimes with fixed-term sentences. The giudizio abbreviato procedure remains available in all criminal cases not carrying a life sentence.

135. See C.P.P. art. 443.
136. Id. para 2.
137. Id.
138. See supra notes 30-32 and accompanying text.
139. C.P.P. art. 442, para. 2.
140. Id. para. 2.
141. See Judgment No. 176, Corte cost., 36 Giur. cost. II (1991) (on file with authors). The Court ruled that the statute violated article 76 of the Italian Constitution because the legislation exceeded delegated authority. The Court interpreted article 2, para. 53 of the delegation, which states that after a summary trial the sentence that would otherwise have been imposed shall be reduced "by one-third," to mean that the summary trial should apply only to punishments measured in a specific monetary sum or a fixed term of years, and not to a sentence of life imprisonment.
142. A summary trial is also available in the Pretura, a criminal court for minor offenses carrying sentences of no more than four years. Since the Pretura handles large volumes of minor criminal cases, its need for summary trial procedures is especially great. There are some differences between the summary trial procedures described in the text and the summary trial procedures applicable in the Pretura. Article 560 provides that a defendant in the Pretura may ask for a summary trial during the preliminary investigation or at any time prior to receiving notice of the citation, the charging document in the Pretura. C.P.P. art. 560, para. 11. If the prosecutor consents, the files are sent to the court for a hearing at which both defendant and victim (if present) will be heard. At the conclusion of the hearing, the judge decides whether a summary trial is appropriate or whether, for example, the records need to be supplemented by further evidence. If the case is not appropriate for summary trial, the records are sent back to the prosecutor and the case is set for regular trial. If appropriate, the judge resolves the case as he would any other summary
A defendant whose case has been transferred to a trial judge for immediate trial may, under the provisions of the giudizio direttissimo, ask to transform the case into a giudizio abbreviato. He would then be eligible to have the sentence discounted by one-third. Such a transformation of a giudizio direttissimo into a giudizio abbreviato requires the prosecutor's consent and the judge's agreement that the file is appropriate for disposition as a giudizio abbreviato. The case remains before the trial judge as a giudizio abbreviato, but with an important difference: the trial judge is not restricted to the investigative file, and can ask for additional evidence if necessary.

The giudizio abbreviato procedure may be very attractive for certain classes of defendants. For example, a defendant caught red-handed committing a robbery or other serious crime would not otherwise be permitted to plea bargain under the new Code, because even with the one-third reduction the sentence would exceed the two-year statutory maximum. The one-third discount of the giudizio abbreviato, however, remains available. The giudizio abbreviato is thus expected to supplant plea bargaining in cases involving more serious crimes.

Another class which would benefit from the giudizio abbreviato consists of defendants relying on a straightforward defense that can be evaluated as fairly and completely at a giudizio abbreviato as at a full trial. In such circumstances the benefit of a substantial sentencing reduction, even if the defense is unsuccessful, might provide an adequate incentive to resolve the issue quickly.

Although the giudizio abbreviato procedure has much to offer from a theoretical perspective, whether it will work in practice is a matter of serious doubt.

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144. C.P.P. art. 452, para. 2. A less important use of the summary trial occurs where the evidence is strong and the prosecutor asks for a giudizio immediato. Use of the summary trial in such situations avoids a preliminary hearing and takes the case directly to the trial judge. In such a situation, the defendant can block the giudizio immediato by asking for summary trial in front of the preliminary hearing judge. Id. art. 458.
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IV. THE DIFFICULTIES OF IMPLEMENTING THE CODE: A NEW SYSTEM CAUGHT BETWEEN TWO TRADITIONS

The new Italian Code of Criminal Procedure attempts to graft adversarial procedures onto a fundamentally inquisitorial legal system. The result is a system caught between two different traditions.

A. Leading Horses to Water: Incentives to Use the Special Procedures

If the special procedures are to allay Italy’s backlog problem, they must be made attractive enough that defendants opt to employ them rather than insisting on a full adversarial trial. However, the success of the special procedures may be frustrated by a credibility problem inherited from the former regime. For the reduced sentences to tempt defendants, the threat of a full sentence must be credible for defendants who go to trial. This is unfortunately not the case. Today’s defendants realize that the state’s dawdling may result in an acquittal as evidence is lost, witnesses become unavailable, memories and emotions fade, and amnesties are declared. While a one-third sentencing reduction seems attractive to a defendant facing trial and conviction in the near future, it may prove an inadequate incentive for a defendant free on bail and years from trial. Thus, the fixed statutory reductions available under the giudizio abbreviato and plea bargaining may not be sufficiently attractive to overcome the extravagant expectations of many criminal defendants.

B. The Difficulties of Working Within the Narrow Confines of the Giudizio Abbreviato Statute

The drafters of the new Code intended it to be a comprehensive document, detailing the functioning of the special procedures in all possible situations. The Code also attempts to define the relationship between the different special procedures so that a case can be moved from one special procedure to another. But in the attempt to draft the special procedures with sufficient clarity, the drafters incorporated a certain rigidity that may make the procedures less attractive. Consider, for example, the giudizio abbreviato. While a simplified procedure for reaching the merits of the case is attractive in the abstract, the statute is so tightly drawn that the vast majority of criminal cases fall outside its ambit. This raises two important problems.

First, the attractiveness of the giudizio abbreviato to the defendant depends heavily on the accuracy of the charging document. Prosecutors in the United States, for example, traditionally overcharge for the purpose of convincing a defendant to plea bargain, then negotiate the charges down to a more reason-
Overcharging may be either "vertical," when a prosecutor charges the most serious crime the facts might support, or "horizontal," when she charges the greatest possible number of crimes, or both. While overcharging encourages negotiation in the U.S. system, in Italy it would have precisely the opposite effect: in order to bring the charges down to a realistic level, the overcharged defendant would be forced to go to a full trial. The one-third sentencing discount available to him if he opted for the giudizio abbreviato would be more than offset by the fact that he is charged with a more serious crime. Even when charges are accurate, a defendant might feel compelled to go to trial. Since Italian trials determine both guilt and the sentence, a guilty defendant might not opt for a giudizio abbreviato if the file does not contain all the mitigating evidence that could lower his base sentence. The benefits of the one-third sentence reduction are thus diminished if the file does not contain sentencing information favorable to the defendant.

A second, related structural problem derives from the fact that the evidence considered during the giudizio abbreviato is limited to what was in the case file at the time the defendant requested the procedure. The public prosecutor assembles the case file. The U.S. system engenders serious problems ensuring that the prosecutor has communicated to the defense all evidence that tends to exculpate the defendant. This problem does not arise to the same extent in Italy, since all evidence collected by the prosecutor and the police must be made part of the case file, which is freely available to the defense. However, the chances are low that a prosecutor will have investigated all mitigating evidence. The range of potentially mitigating evidence is so broad that even the most diligent and fair prosecutor realistically could not be expected to explore all the possibilities. Without the ability to supplement the file by adding mitigating evidence, the defendant would be less likely to choose the giudizio abbreviato.

It might appear that this problem could be solved by vigilant defense counsel making efforts to ensure that exculpatory and mitigating evidence was placed in the defendant's file prior to requesting a giudizio abbreviato. But in Italy this is not as simple as it seems, since the defense counsel's role traditionally has been completely passive. Until quite recently no provisions allowed

146. The terminology is that of Professor Alschuler. See Alschuler, supra note 145, at 85-86.
147. Since the decision in Brady v. Maryland, 373 U.S. 83 (1963), a prosecutor constitutionally is obligated to turn over evidence favorable to the accused upon request. Despite a series of decisions that have tried to clarify the boundaries of a prosecutor's obligation under Brady (see, e.g., United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1965)), this remains a complicated area of criminal procedure. See Barbara A. Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133 (1982).
148. C.P.P. art. 416.
149. Id. art. 419, para. 2.
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for public payment of defense attorneys, nor is the recent statute allowing payment of defense attorneys very encouraging. The defense's counsel is normally a lawyer appointed to handle the case without compensation. Because such lawyers usually can devote only a minimal amount of time to the case, they rarely perform an investigation prior to trial. This constraint would not be a defect under Italy's former inquisitorial system, in which the defense lawyer played a subsidiary role in the development of evidence. The move to an adversarial trial system, however, places new responsibilities on defense counsel, responsibilities which members of the defense bar are ill-prepared to assume.

This problem could be solved by loosening some of the evidentiary restrictions built into the giudizio abbreviato procedure. While turning the giudizio abbreviato into a full trial would eliminate the very benefits for which the procedure was designed, permitting defendants to add additional written evidence to the file to mitigate punishment before the giudizio abbreviato, with the prosecution retaining the right to submit any written evidence in rebuttal, would impair the procedure's efficiency only slightly. This protection would serve the important function of assuring defendants of receiving just sentences in giudizio abbreviato procedures.

C. The Achilles' Heel of the Italian System: The Pubblico Ministero

The most difficult institutional obstacle facing the new Code of Criminal Procedure is the role of the pubblico ministero. Throughout this article we have used the term "public prosecutor" to translate the term pubblico ministero. Although the pubblico ministero presents the state's case against the defendant at trial, much like a prosecutor in the United States, this common obligation masks a tremendous difference between the two in outlook and tradition. The Italian prosecutor is in reality a judicial figure who has passed the same examinations as the judge and who has the same salary and career.

150. The amount a lawyer may recover from the state is so limited and the compensation process so complicated that few defense lawyers find it worthwhile. See Law No. 217 of July 30, 1991, 1991 Racc. Uff. I (on file with authors).

Both are members of the *magistratura*, the term used in the Italian Constitution to refer to judicial officials. A person holding the position of *pubblico ministero* may go from that position to being a judge, or vice versa.\(^{153}\)

In his famous analysis of the structures of authority in civil law and common law systems, Professor Mirjan Damas\(\acute{a}\)ka presented a model of civil law justice systems in which prosecutors and judges function in a hierarchical structure, with strong internal guidelines controlling discretion.\(^{154}\) This paradigm is not accurate, however, when applied to judges and prosecutors in the Italian system. Over time, the institution of the *pubblico ministero* has lost the advantages of the civil law model: it lacks an effective hierarchical structure, strong internal guidelines and internal controls, and a strong sense of professionalism.\(^{155}\) The Italian prosecutor is a career bureaucrat who has a lifetime position with almost complete autonomy. A mechanism for automatic wage increases keeps the salaries of the judges and prosecutors at the top of the pay scale for public employees.\(^{156}\) In short, the *pubblico ministero* seems to occupy a unique position which has evolved to retain all the bureaucratic disadvantages of the civil law model, becoming an entrenched, well-paid civil service position.\(^{157}\)

In theory, U.S. prosecutors have broad discretion in carrying out their duties, while prosecutors in civil law systems operate under much tighter controls. In reality, U.S. prosecutors are subject to informal pressures that have no counterpart in the Italian system. For example, no formal barrier

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153. See Giuseppe Di Federico, *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità* [Compulsory Prosecution, Coordination of the Prosecutor’s Activity and Response to Community Views], 1990 Giust. pen. III 147, 150.

154. See Damas\(\acute{a}\)ka, supra note 39, at 487-88, 507-09; see also DAMAS\(\acute{a}\)KA, supra note 3, at 16-23, 48-50.


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prevents a U.S. prosecutor from filing charges against a defendant as long as there is probable cause. But an assistant district attorney who continually pushed cases to trial with only probable cause would invoke the wrath of the district attorney or the trial judge for wasting the system’s resources. In addition, prosecutors feel the pressure of "winning" in the U.S. system: a prosecutor who loses a case usually feels the loss personally. An Italian prosecutor sleeps well even after an acquittal.\textsuperscript{155}

Thus, one of the major shortcomings of the reform of Italian criminal procedure is the Code’s failure to move the pubblico ministero away from the inquisitorial tradition. Although the Italian Parliament asked the government to organize the judiciary so that it could function consistently with the new Code, it issued practically no specific directives on the subject. Since the magistratura is such a powerful political force in Italy—indeed, a substantial percentage of those drafting the new Code came from the magistratura—only cosmetic reforms were made to the organization of the judiciary.\textsuperscript{159} The Italian Constitution mandates prosecution of cases, yet it creates no corresponding pressure on prosecutors to resolve them.

D. The Pubblico Ministero and Giudizio Abbreviato: The Power to Veto?

For the giudizio abbreviato provisions to relieve judicial backlog, the system must encourage defendants to opt for a giudizio abbreviato instead of a full trial. One flaw in the statute is the requirement that both the judge and prosecutor must agree to the procedure. Gaining the public prosecutor’s cooperation is problematic because he is under no institutional pressure to give consent; he need not even give a reason for his refusal. Furthermore, the prosecutor frequently will have no incentive to give consent. If the case against

\textsuperscript{158} The need for the development of a new professional role and deontology for the pubblico ministero is one of the most delicate aspects of the new criminal practice in Italy. See, e.g., Alfredo Gaito, *Accusa e difesa di fronte ai nuovi istituti: problemi di scelta e strategia processuale* [Accusation and Defense before the New Institutions: Problems of Procedural Choice and Strategy], in *QUEsITIONI NUOVE*, supra note 96, at 131; Luca Marafioti, *La "metamorfosi" del pubblico ministero nel nuovo processo penale*, 1990 Giur. It. IV 116.


In fact, one reform enacted in 1988 has actually strengthened the close bond that exists between the career of the pubblico ministero and the career of the judge. Presidential Decree No. 449 of Sept. 22, 1988, art. 29, reprinted in *LE NUOVE NORME*, supra note 14, at 133, made it even easier for a judge to become a pubblico ministero and vice versa.

There is plainly an inconsistency between the new adversarial trial system and the underlying structure of power in the courtroom that places the pubblico ministero on the same institutional level as the judge. See generally Sergio Chiarloni, *Nuovo processo penale e vecchio ordinamento giudiziario* [New Criminal Procedure and Old Judicial Organization], 1989 Rivista di diritto processuale 682; Alfredo Gaito, *L’adeguamento dell’ordinamento giudiziario*, in *LE NUOVE DISPOSIZIONI SUL PROCESSO PENALE*, supra note 1, at 131; *QUEsITIONI NUOVE*, supra note 96, at 7.

Reform of the pubblico ministero remains a major political issue in Italy. See generally ACCUSA PENALE E RUOLO DEL PUBBLICO MINISTERO, supra note 56.
the defendant is strong, for example, the prosecutor will be reluctant to grant a one-third reduction from the sentence the defendant "deserves" under the substantive law when he feels he could win the case at trial. While the prosecutor must be encouraged to consent to a giudizio abbreviato in order to help dispose of cases quickly, convincing him of the necessity of doing so will be difficult where the civil law traditions of uniformity, certainty, and accuracy run counter to solutions that require compromise on sentencing.

The problem of the standards that should govern a prosecutor's refusal to give consent to a giudizio abbreviato is complex. The Constitutional Court recently handed down a decision dealing with the refusal of a prosecutor to consent to a giudizio abbreviato. The Court held that the Code provision permitting a public prosecutor to veto a giudizio abbreviato without giving a reason was unconstitutional. The Court reasoned that it would violate equal protection for two similarly-situated defendants to receive sharply different sentences simply because in one case the prosecutor had consented to a giudizio abbreviato. The Court ruled that the public prosecutor must state his reasons for refusing a giudizio abbreviato and that, after the trial, if the judge were to conclude that the public prosecutor gave insufficient reasons, the judge could then give the defendant the same one-third sentence discount he would have received after a giudizio abbreviato. The Court stated that the only bases on which a public prosecutor could legitimately refuse a giudizio abbreviato are evidentiary, i.e., when the public prosecutor believes that it is not possible to resolve the case based on the file because additional evidence needs to be developed at trial.

To an observer from a common law country, this decision appears to make the benefits of a giudizio abbreviato available to more defendants. However,

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161. Two earlier judgments of the Corte costituzionale, concerning the veto power of the public prosecutor, prefigured this judgment. The first, which raised the issue whether the public prosecutor must state a reason for refusing to consent to a summary trial, was decided under temporary provisions enacted to handle cases that were pending when the new Code came into force. The temporary provisions permitted the use of summary trial if the trial had not yet commenced when the new Code came into effect. See Legislative Decree No. 271, supra note 56, art. 247; see also Judgment No. 66 of Feb. 8, 1990, Corte cost., 36 Giur. cost. I 484 (1991).

The second judgment dealt with a public prosecutor's refusal to consent to a summary trial where the defendant wanted to transform the giudizio direttissimo into a summary trial. See Judgment No. 183 of Apr. 4, 1990, Corte cost., 35 Giur. cost. IV 1073 (1990). For a strong criticism of these two decisions, see Carlo Taormina, Brevissimi appunti sulla dichiarata incostituzionalità della insindacabilità giurisdizionale del dissenso immotivato opposto dal pubblico ministero al giudizio abbreviato previsto dall'art 247 disp. att. cod. proc. pen. 1988, 1990 Giust. pen. I 65.

162. See Judgment No. 81 of Jan. 18, 1991, Corte cost., 36 Giur. cost. I 559 (1991). For a criticism of the Court's reasoning, see Ennio Amodio, Quel piccone dorato della Corte costituzionale, 1991 Studio legale VIII 2-3. Some commentators had suggested even before this decision that the statute possibly allowed a judge to grant a defendant the one-third sentence reduction at the end of the trial if the pubblico ministero had refused a summary trial without good reason. See QUESTIONI NUOVE, supra note 96, at 190; Sechi, supra note 143, at 285.
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the long delays imposed by ex post review of the public prosecutor’s refusal effectively allow the public prosecutor to veto a giudizio abbreviato. Thus, the decision does little to make the giudizio abbreviato a more viable part of Italian criminal procedure. A far better result would have provided for immediate interlocutory review of a public prosecutor’s refusal to consent to a giudizio abbreviato. The system would then be spared the need for a trial if the judge found the prosecutor’s reasons inadequate. The timidity of the Court’s decision is surprising, since a judge in the Italian system is equally capable as a public prosecutor to decide if a case can be resolved through a giudizio abbreviato. Indeed, if the parties want a giudizio abbreviato, a judge must still review the file to see if resort to the procedure is appropriate.164 Given this background, it would be more efficient for a public prosecutor to explain his refusal to consent to a giudizio abbreviato and then let the judge evaluate those reasons immediately: this would allow a defendant to obtain a giudizio abbreviato if the public prosecutor’s reasons were insufficient.

Similar troubles plague the Italian plea bargaining provision: unless the public prosecutor feels personal responsibility for the efficient resolution of minor criminal cases, the system will not produce enough plea bargaining to diminish judicial backlog.

E. Philosophical Conflicts Caused by Negotiation and Compromise in Criminal Cases

Italy’s bold reforms demand a great deal of the participants in its criminal justice system. The judge must withdraw from the role of the dominant inquiring figure and assume a more passive role. The defense lawyer must bear greater responsibility for investigating exculpatory and mitigating evidence and must be prepared to cross-examine witnesses in court, a new experience for most Italian attorneys. The public prosecutor must come down from the bench and face the defense attorney in the courtroom. These changes are so significant that, under the best of circumstances, the adjustment to the new adversarial system would take time.

Both the giudizio abbreviato procedure and the Italian version of plea bargaining require a philosophical reexamination of the system. The heart of a civil law trial has always been the decision of the court—that document which blends verdict and sentence into an opinion that weaves together fact and law.165 The civil law system places a high value on the accuracy of that document and protects that accuracy by allowing full appellate review of every aspect of the decision, including the sentence.166 The judge, as the central

164. See supra note 30.
165. See supra note 29 and accompanying text.
166. See supra text accompanying notes 29-31.
figure in a system that places paramount importance on truth, plays a more active role in the search for truth than a common law judge, and consequently bears more personal responsibility for the accuracy of the decision and verdict. Responsibility cannot be shifted to the advocates if the outcome is not accurate. Since plea bargaining so challenges traditional concepts of justice, the reluctance of civil law systems to embrace it is hardly surprising.

The Code's giudizio abbreviato and plea bargaining provisions thus present a serious challenge to the way the Italian courts treat a case. Both procedures require a judge to determine exactly the sentence that the defendant would receive for his crime. Presumably, the judge considers all the mitigating factors and then cuts that sentence by one-third. In the U.S. system, where plea bargaining is common and where a jury always adds an element of uncertainty, one grows accustomed to negotiated sentences. But the sentencing discount is more difficult for a judge in a civil law system, because the judge must give the defendant a sentence he believes inappropriate for the crime.

A recent decision of the Constitutional Court demonstrates this philosophical difficulty facing the Italian system. In this decision, the Court held the plea bargaining provisions of the Code unconstitutional as a violation of the constitutional presumption of innocence, to the extent that they do not provide judicial review of the bargain to ensure proper balance between the crime and the bargained punishment. The judge who would otherwise preside at the trial and possibly sentence the defendant must review the offered plea bargain to assure an appropriate sentence. This decision also raises the question of whether the applicazione della pena su richiesta delle parti (Italian plea bargaining) will function as a form of plea bargaining in which the defendant receives a substantial discount for saving the system the expense of a trial, or whether it will serve simply as an expedited form of sentencing, which would be no bargain for defendants.

The traditional civil law emphasis on the accuracy of adjudication and the correctness of the sentence is further challenged by the giudizio abbreviato provisions. These provisions encompass more serious crimes, and the occasions for reliance on the procedure that will be most attractive to defendants

167. See supra notes 20-23 and accompanying text.
168. For an attempt to explain the theoretical and juridical bases of this outlook, see Klaus Volk, Wahrheit und materielles recht im strafprozeß (1980); Klaus Volk, Verità, diritto penale sostanziale e processo penale, 1990 Giusto processo VIII 385-411.
169. Recent decisions of the Constitutional Court illustrate Italian attitudes towards plea bargaining. See infra text accompanying notes 171-172. Similarly unsurprising is the German hostility to the practice of shortening trials in exchange for sentencing concessions. See infra text accompanying notes 181-186.
170. While we have been critical of the institution of the pubblico ministero in Italy (see supra notes 154-157 and accompanying text), the same philosophical concerns that make Italian judges reluctant to embrace the institution of the summary trial apply to members of the magistratura who hold the position of public prosecutor.
172. The basis of the decision was Article 27 of the Italian Constitution. See supra note 121.
are precisely those occasions when the evidence is overwhelming. But even if the public prosecutor consents to a *giudizio abbreviato*, will the defendant actually receive the one-third discount? Will judges have a tendency to give such defendants a heavier initial sentence before the one-third reduction, so that the final sentence is closer to what the judge feels appropriate?

When the philosophical compromise inherent in a *giudizio abbreviato* is added to other statutory and institutional problems surrounding the procedure, it seems unlikely that it will successfully divert a substantial percentage of cases away from trial.

V. REFLECTIONS ON THE NEW ITALIAN CODE

A. The Italian Code as a Symptom of the Pressures for Expedited Procedures Among the Civil Law Systems in Europe

Italy was not mistaken to graft adversarial procedures onto a civil law system: its efforts merely demonstrate that procedures cannot be adapted easily from one system to another. Different legal traditions and cultures foster different responsibilities within a system and encourage different expectations. The preceding sections should be read not as criticism of what Italy has attempted in its new Code, but as an explanation of why a substantial period of time, perhaps even a generation, will pass before the procedural changes can be fully and successfully implemented. The forthcoming evolutionary process may breed significant changes in legal institutions and in the Code.

Other European countries are trying to reconcile the civil law tradition with procedures that seek to avoid drawn-out trial and appellate procedures. Spain and Denmark currently have statutes that establish a middle ground between trial and wide-open plea bargaining, similar to the *giudizio abbreviato* in Italy. In 1989, Spain introduced a simplified procedure, the *procedimiento abreviado*, which allows a judge to determine the defendant’s guilt or innocence solely on the basis of investigation records. The crime must not be punishable by more than twelve years imprisonment (the so-called *prisión mayor*), and the judge must believe that a sentence of no more than six years is appropriate. The *procedimiento abreviado* can be used only where the defendant has confessed and both the defendant and prosecutor consent to the

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174. See Ley Orgánica No. 7, supra note 173.
procedure. The statute does not provide for a sentence reduction, but the prosecutor may request a lesser sentence.

Denmark also has an alternative procedure, in which trial is limited to fixing the degree of culpability and the level of punishment. Use of the procedure is limited to cases in which the defendant has confessed to the crime and consented to the procedure. A police officer, rather than a prosecutor, presents the evidence, and the trial takes place in front of a single professional judge, rather than a mixed panel of professional and lay judges.

Innovations in France and Germany are perhaps even more indicative of the strong pressures for alternative procedures in civil law systems. Both countries have developed alternative procedures that might be considered illegal, since they have no statutory basis. In France, more serious crimes (crimes) must be tried before a cour d'assises, whereas less serious crimes (delits correctionnels) can be tried before a tribunal correctionnel. The alternative procedure allows certain serious crimes to be tried before the tribunal correctionnel, if both the prosecution and the defense consent. Defendants rarely object to this procedure, because the trial occurs quickly, thus allowing them to avoid lengthy pretrial incarceration. While no fixed sentence reduction formally exists, the prosecutor and the judge often treat agreement to the procedure as a mitigating factor. While technically illegal, the system tolerates this procedure as "an illegality of general interest."

Even in Germany, generally considered the classic civil law country in which the "written law" strictly applies to each case, a practice of "informal justice" has developed. This practice seriously challenges the basic tenets of the system and demonstrates the pressure for avoiding full trials. Despite limited prosecutorial discretion, informal deals between the judge and the defense counsel (with or without the consent of the prosecutor) often result in shorter, less contested trials, in exchange for sentencing discounts. Approximately one-quarter of all trial proceedings are resolved in this fashion. Different labels are applied to this shadow practice—Absprache, Verständigung, Vergleich—but the nucleus is the same: the defendant receives sentencing assurances for keeping the trial simple. Demonstrating the scholarly concern

175. Id.
176. Along these lines, see the directives for prosecutors handed down by the office of the attorney general in Fiscalía general del Estado I, Circular No. 1/1989, BOLETÍN DE INFORMACIÓN LX, No. 79 (Apr. 1989).
178. See CODE CRIMINAL art. 925 (Den.), quoted in id.
180. Id.
181. See generally Weigend, supra note 177, at 1-5. This book also contains a more general comparative analysis of the problem.
New Italian Code of Criminal Procedure

over this practice, the biannual congress of German jurists devoted its criminal law and procedure section to the subject. Scholarly opinion strongly opposes this practice, and some contend that it is illegal, even criminal. Recently, the Supreme Federal Court of Germany (Bundesgerichtshof) declared the practice illegal, because it is not provided for by law. It seems doubtful, however, that Germany will successfully curb the practice.

B. Lessons for the U.S. System of Criminal Procedure

Parties have only two alternatives in the U.S. system: a full adversarial trial or a plea bargain in which constitutional questions, evidentiary problems, the nature of the offense, and the sentence can be compromised. It may be too late for the U.S. system to draw practical lessons from Italian efforts to resolve cases on the merits without wide-open plea bargaining. Once parties obtain substantial power to control cases through plea bargaining, the power is difficult to restrict. Moreover, none of the institutional players in the U.S. system—prosecutors, defense attorneys, or judges—seem interested in change. Yet, the Italian Code demonstrates that the U.S. system need not be limited to plea bargaining or trial. Alternative procedures for the efficient resolution of criminal cases exist which leave room for determining guilt or innocence on the merits.

Professors Kenneth Graham and Leon Letwin suggested an alternative procedure that would create substantial efficiencies and yet permit judges to resolve cases on the merits. Used in the 1960s in Los Angeles County

183. See generally VERHANDLUNGEN DES ACHT UND FÜNFZIGSTEN DEUTSCHEN JURISTENTAGES (1990). There is a wealth of recent material on this practice in Germany. See THOMAS RÖNNAU, DIE ABSPRACHE IM STRAFPROZESS (1990); WERNER SCHMIDT-HIEBER, VERSTÄNDIGUNG IM StraFVERFAHREN (1986); BERND SCHÖNEMANN, ABSPRACHEN IM STRAFVERFAHREN? GRUNDLAGEN, GEGENSTÄNDE UND GRENZEN (1990).

184. For basic theoretical criticisms of the practice, see KARL F. SCHEUERMANN, DER HANDEL MIT GERECHTIGKEIT (1977).


186. "Deal im Strafprozeß soll nicht mehr gelten, FRANKFURTER RUNDSCHAU, Apr. 6, 1991 (on file with authors).

187. Professor Steven Schulhofer made a similar point, using Philadelphia as an example of a jurisdiction that relies less on plea bargaining. In Philadelphia procedures informally encourage defendants to save time by choosing bench, instead of jury, trials. See Steven J. Schulhofer, Is Plea Bargaining Inevitable?, 97 HARV. L. REV. 1037 (1984). According to Schulhofer, judges who were regarded as more lenient in sentencing were assigned to non-jury trials, while judges who meted out longer sentences were assigned to jury trials. As a result, many defendants waived jury trial in favor of a bench trial, where they were likely to receive a lighter sentence if convicted. Id. at 1051. Bench trials yielded such tremendous savings that the Philadelphia District Attorney's Office offered no significant concessions to induce guilty pleas. Id. at 1062. Schulhofer states that 49% of the defendants opted for a bench trial, 45% pled guilty, and only 6% demanded a jury trial. Id. at 1051. His study also concluded that bench trials were adversarial and not just "slow pleas" of guilty. Professor Schulhofer concluded that the U.S. system's reliance on plea bargaining is not essential, and should be replaced by a system that offers jury-waiver concessions.

in nearly seventy-five percent of all trials, under this procedure the entire transcript of the preliminary hearing was submitted to the trial judge. Although the parties could produce additional testimony at trial, substantially shorter trials resulted, since all the preliminary hearing testimony was not reproduced at trial. In some cases the procedure amounted to a trial on stipulated facts, at which the issue was to determine the inferences to be drawn from them. In others, the procedure amounted to a "slow plea of guilty," but the defendants at least had their day in court, while the danger of being, in effect, "punished" for wasting precious judicial resources in a full trial was eliminated.

A legislature could codify the Los Angeles procedure. Such a statute would discount any sentence by one-third, if the defendant agreed to trial based solely or in part on the preliminary hearing transcript. The Italian model, which resolves cases based on the documents collected, seems too far removed from the common law tradition to be attractive outside a civil law country. Nonetheless, the idea behind the *giudizio abbreviato*—offering defendants a substantial sentencing discount in exchange for agreeing to procedures which expedite the trial or narrow potential issues—suggests possibilities for reducing the U.S. criminal justice system’s heavy reliance on plea bargaining.

VI. CONCLUSION

Italy has adopted certain adversarial features in an attempt to reduce the secretiveness and inefficiency that had permeated its criminal justice system. In adopting such procedures, Italy has followed the lead of other civil law countries that have sought to administer justice with greater efficiency. While it is much too soon to tell how well this new system will work, this article has explored several areas of potential weakness and their consequences. Due to the sweep and boldness of these reforms, Italy’s system will merit careful study in the future.

189. Because the article was based on data assembled during 1960-1967, these percentages may not be accurate today. Traffic offenses and minor drug cases often raise only suppression issues. Previously, one needed to go to trial in order to preserve the constitutional issues for appeal. 3 LAFAYE & ISRAEL, supra note 33, § 20.6(c). The gradual acceptance of conditional pleas of guilty (see, e.g., Fed. R. Crim. P. 11(b)(2); N.Y. Crim. Proc. § 710.70 (McKinney 1984)) creates the possibility of preserving suppression issues for appeal without trial on the issue of guilt. In California, a defendant may raise suppression issues on appeal despite a guilty plea. See People v. Ruggles, 39 Cal. 3d 1 (1985).

190. See Graham & Letwin, supra note 188, at 932.
191. Id.
192. Id. at 935.
193. Id. at 934. The practice was informally encouraged by assigning more lenient judges to the shortened trials. Id.
VII. APPENDIX: GLOSSARY

Applicazione della pena su richiesta delle parti
This phrase translates as "the application of punishment upon the request of the parties," which is Italian-style plea bargaining. Only minor crimes are eligible since the sentence, prior to discount, cannot be more than three years.

Decreto di archiviazione
This term means "a decree of dismissal." Because the Italian Constitution requires mandatory prosecution, a prosecutor who believes a case does not merit prosecution must file the criminal charge and then seek a decree of dismissal from the judge in charge of the pretrial investigation.

Giudice per le indagini preliminari
This term translates to "the judge in charge of the preliminary investigation." This judge supervises the pretrial investigation and presides over any preliminary hearing.

Giudizio abbreviato
This means "summary trial," a special procedure that avoids full trial. Under the giudizio abbreviato, a judge determines guilt or innocence based on documents assembled in the investigative file. Defendants, if convicted, are entitled to a sentencing discount of one-third.

Giudizio direttissimo
This translates as "direct trial," a procedure that avoids a preliminary hearing and provides for an immediate trial. It applies to cases in which the defendant is caught committing the crime or offers a full confession.

Giudizio immediato
"Immediate trial." A procedure which avoids a preliminary hearing and provides an immediate trial. It applies to cases in which the evidence against the defendant is particularly strong.

Incidente probatorio
This is a deposition-like procedure available during the pretrial period in order to preserve the testimony of witnesses unavailable at trial, such as those whose lives are threatened or who are in poor health.

Istruzione formale
This was the name given to the pretrial investigation conducted by a judge under the former Code.

Istruzione sommaria
This was the name for the pretrial investigation conducted by the public prosecutor under the former Code. The public prosecutor, not a judge, could conduct pretrial investigations only when the evidence was very
strong and it appeared that the investigation would not be complicated.

**Magistratura**

Under the Italian Constitution, the *magistratura* embraces both the public prosecutors and members of the judiciary. Both public prosecutors and judges in Italy follow a common career path and often move from a position as public prosecutor to a position as judge and vice versa.

**Procedimenti speciali**

This term translates as "special procedures." It includes those procedures that are designed either 1) to skip over the preliminary hearing and proceed directly to trial or 2) to avoid a full trial in favor of some other resolution of the case, such as a plea bargain.

**Procedimento per decreto penale**

This term means "procedure by penal decree." This special procedure resolves minor cases in which the public prosecutor believes a fine would be an appropriate sanction. Under this procedure, the public prosecutor asks the judge to immediately enter an order stating the fine to be imposed, which can then be reduced by fifty percent to induce the defendant to accept the order. A defendant has fifteen days after the entry of this order to accept the fine imposed or to demand a trial.

**Pubblico ministero**

This translates as "public prosecutor." Although similar to the prosecutor in the U.S. system, the *pubblico ministero* is actually a member of the *magistratura*.

**Udienza preliminare**

This term means "preliminary hearing." A preliminary hearing in the Italian system is based essentially on the investigative file, not the testimony of witnesses.