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DAVID FREEMAN ENGSTROM, DAVID MARCUS &  
ELLIOT SETZER

## Managerial Courts

**ABSTRACT.** In recent decades, American courts have undergone a quiet but far-reaching revolution in their function and role. Particularly in state courts facing a crush of cases in high-volume dockets for debt, eviction, and family-law matters, case-by-case judging has gradually given way to court-devised systems that govern adjudication through centralized, routinized, and often digital and data-driven practices. Cases are triaged into differentiated procedural pathways; docket calendars are engineered to shape litigant behavior; decisional aids, digital dashboards, and order templates channel the discretion exercised by judges and staff; teams of quasi-judicial officers, staff attorneys, case-management professionals, and clerks absorb tasks once thought quintessentially judicial in order to ration scarce “judicial attention”; and internal and, increasingly, digitized and even AI-based tools perform quality-control tasks once left exclusively to appellate review. The upshot is that courts pervasively mix adjudication and bureaucracy, with profound but largely unexamined implications for fair and accurate adjudication, access to justice, due process, and the production of law.

This Feature surveys the managerial turn transforming American courts, tracing its roots, forms, and normative implications. An opening historical narrative situates the rise of court managerialism within a century-long arc from the New Deal to the digital age, highlighting its shifting causes and its consequences for American justice. Turning to the present, we offer a novel taxonomy of current managerial techniques that identifies the operational components of the managerial turn and synthesizes their many commonalities and interconnections. Finally, our normative and doctrinal analysis develops principles for reconciling court managerialism with classical conceptions of American courts and judges as passive, neutral adjudicators of whatever the adversarial process serves up. Can courts adopt bureaucratic tools without losing their distinctive institutional identity? Given twenty-first-century litigation realities, including the bracing fact that the majority of cases in the American civil-justice system now pit represented parties against unrepresented ones, managerial approaches will often outperform an unmediated adversary process on metrics of accuracy and efficiency. A constitutional reckoning awaits: while some parts of the new managerialism may run afoul of due process, others may be constitutionally required.

**AUTHORS.** David Freeman Engstrom is the LSVF Professor of Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School. David Marcus is a Professor of Law at UCLA School of Law. Elliot Setzer is a Ph.D. Candidate in Political Science at Yale University and received his J.D. in 2025 from Stanford Law School. Thanks to Jennifer D. Bailey, Bryan Borys, Stacey Marz, David Noll, Nicholas R. Parrillo, Emily Taylor Poppe, Judith Resnik,



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## INTRODUCTION

In 1982, Justice Powell penned a bracing essay in the *ABA Journal* titled “Are the Federal Courts Becoming Bureaucracies?”<sup>1</sup> In it, Powell gave voice to a growing chorus of critics charging that swelling dockets were turning the federal courts into “large-scale bureaucracies in which the individual judge no longer bears the responsibility for deciding cases and writing opinions.”<sup>2</sup> Powell noted particular concern about “institutional judging,” in which a court’s decisions resulted from bureaucratic rather than “personal decision-making.”<sup>3</sup> As more colorful critics put it, opinions were increasingly the work of “many hands,”<sup>4</sup> including a tangle of court staff, judicial clerks, and even “the computer,”<sup>5</sup> rather than a judge’s “single mind.”<sup>6</sup> The result, as Yale Law School’s Owen M. Fiss wrote, was “Rule by Nobody” as opposed to “Rule by Rules.”<sup>7</sup> Adding another layer to the critique, Powell warned that unchecked bureaucratization and the conversion of courts into a “business operation” could move the system toward “wholesale justice” by treating cases in bulk, rather than the careful, case-level individuation that due process demands.<sup>8</sup> For these reasons, Powell and other critics seemed to agree that “institutional judging” would never enjoy full legitimacy in the eyes of a public that needed to “hear a person speaking through” a decision.<sup>9</sup>

But fast forward thirty years, and drop down to the nation’s beleaguered state courts, and Justice Powell’s anxieties about “institutional judging” and

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1. Lewis F. Powell, Jr., *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370 (1982).
  2. *Id.* at 1370.
  3. *Id.* (quoting Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 652 (1980)).
  4. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983); Joseph Vining, *Justice and the Bureaucratization of Appellate Courts*, 2 WINDSOR Y.B. ACCESS TO JUST. 3, 12, 14 (1982).
  5. Powell, *supra* note 1, at 1370.
  6. Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 249 (1981); see Harry T. Edwards, *A Judge’s View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259, 266-67 (1981) (describing Vining’s view that “bureaucratic” decision-making from the Supreme Court lacked legitimacy because it did not “reflect the workings of a unified mind”); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787-91 (1981) (describing the “cancerous growth” of court staff attorneys and arguing that these changes alter “the ‘personal’ character of the judicial office”).
  7. Fiss, *supra* note 4, at 1451-53.
  8. See Powell, *supra* note 1, at 1370, 1372.
  9. Vining, *supra* note 6, at 257; see also Fiss, *supra* note 4, at 1443 (“Bureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy.”).

“wholesale justice” can seem downright quaint. A vivid illustration: in 2009, as the mortgage-foreclosure crisis deepened, the presiding judge of the civil division in Miami-Dade County, Florida, took momentous, even radical, action. After foreclosure filings in her court skyrocketed from some 9,500 cases just a few years before to more than 121,000, Judge Jennifer D. Bailey concluded that her court could not “judge our way out.” It would instead have to rely on an array of “case management” techniques to move the elephantine mass of foreclosure cases to resolution.<sup>10</sup> The court hired a battalion of civil “case managers” – not the in-chambers “elbow clerks” sitting at a judge’s right hand idealized by Powell and other critics of bureaucratization,<sup>11</sup> but trained court staff tasked with pre-screening cases and adding a “top sheet” flagging legal and evidentiary issues for whichever judge was ultimately assigned to hear it.<sup>12</sup> A 53-page “bench book” followed with standardized instructions and checklists to aid the civil division’s two dozen judges and battalion of case managers,<sup>13</sup> who were paired with administrative staff to form “case management teams” tracked for performance.<sup>14</sup> A “Managed Mediation Program” was hastily built, overseen by court staff, to resolve cases without any judge involvement.<sup>15</sup> Finally, even as the crisis cooled, a court task force considered further reforms, including sorting cases into “differentiated case management” tracks and routing case clusters brought by a particular bank or mortgage trust to a single judge to monitor their litigation tactics.<sup>16</sup> Bailey later recounted: “What I’ve been interested [in] over the years [is]

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10. See Interview by Jon Rosen with Jennifer D. Bailey, Judge, Fla. Cir. Ct. 4, 7–8, 10 (June 8, 2021) [hereinafter Bailey 2021 Interview], [https://predatorylending.duke.edu/wp-content/uploads/sites/9/2021/09/APL21\\_OH\\_Jennifer\\_Bailey\\_Transcript.pdf](https://predatorylending.duke.edu/wp-content/uploads/sites/9/2021/09/APL21_OH_Jennifer_Bailey_Transcript.pdf) [<https://perma.cc/6NCM-5S9F>].
  11. *Id.* at 8; Fiss, *supra* note 4, at 1446 (contrasting “elbow clerks” and “central legal staff”).
  12. See Bailey 2021 Interview, *supra* note 10, at 8; see also Lydia Hamblin & Paula Hannaford-Agor, *Civil Justice Initiative: Evaluation of the Civil Justice Initiative Pilot Project (CJIPP)*, NAT’L CTR. FOR STATE CTS. 2 (2019), <https://ncsc.contentdm.oclc.org/digital/collection/civil/id/177> [<https://perma.cc/WLN9-NXC7>] (describing the role of case managers in the Eleventh Judicial Circuit of Florida).
  13. See Jennifer D. Bailey & Doris Bermudez-Goodrich, *Residential Foreclosure Bench Book*, 11TH JUD. CIR. FLA. (2010), [https://www.aclu.org/sites/default/files/field\\_document/tjp-ff\\_7c\\_0001-0300.pdf](https://www.aclu.org/sites/default/files/field_document/tjp-ff_7c_0001-0300.pdf) [<https://perma.cc/D7QQ-GUCA>].
  14. See Paula Hannaford-Agor, *Reimagining Civil Case Management*, NAT’L CTR. FOR STATE CTS. 10 (2021), <https://www.ncsc.org/sites/default/files/media/document/NCSC-Reimagining-Civil-Case-Management.pdf> [<https://perma.cc/FFY5-KQ5N>].
  15. See Bailey 2021 Interview, *supra* note 10, at 9–10; Administrative Order, *In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, No. AOSC09-54, at 2–5 (Fla. Dec. 28, 2009), [https://supremecourt.flcourts.gov/content/download/242863/file/AOSC09-54\\_Foreclosures.pdf](https://supremecourt.flcourts.gov/content/download/242863/file/AOSC09-54_Foreclosures.pdf) [<https://perma.cc/2BQJ-DCSL>].
  16. See Bailey 2021 Interview, *supra* note 10, at 13.

trying to bring common-sense business and management skills that are used in the for-profit sector to . . . the work of the courts.”<sup>17</sup>

Zooming out, the managerial turn has been much more than a crisis response. Even as Justice Powell and others were wringing their hands about federal-court bureaucratization in the 1980s, state courts around the country had already begun a profound managerial transformation that continues to this day. Drawing inspiration from public administration and private-sector management, courts have built out an extensive suite of bureaucratic tools, processes, and techniques. This includes the delegation of adjudicative tasks to nonjudicial court staff via “teaming” and other forms of personnel management; the proliferation of discretion-cabining decisional aids, such as “bench cards,” dashboards, and order templates; growing use of staff-run triage and “caseflow management” systems to allocate cases to “differentiated” procedural and case management “pathways”; new judge- and staff-focused performance metrics, made possible by growing court data-analytics operations; and court-mandated “forms” and digital interfaces that standardize pleadings and papers.<sup>18</sup> All would have been unthinkable just a few decades ago.

This transformation has many causes, including brute docket pressures and tightening court budgets. But the managerial turn dates back to the mid-twentieth century, when court administration first emerged as a distinct profession and displaced what had been, until then, a bifurcated governance system, with managerial responsibilities divided between judges who handled courtroom procedure and elected court clerks who managed administrative matters.<sup>19</sup> The professionalization of court management, spurred soon after by federal funding as part of the War on Crime,<sup>20</sup> also coincided with judges’ efforts to establish greater independence from state legislative and executive branches. Control over court administration became increasingly viewed as essential to judicial autonomy and the rule of law.<sup>21</sup> Whatever the moment of creation or precise mix of causes, an entirely new judicial professional—the court administrator—now walks courthouse hallways and plays an increasingly central role in organizing and directing the dispensation of justice. Indeed, court administrators now talk openly about allocating “judicial attention” to only those higher-order tasks that

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17. Ross Todd, ‘*Holding Court*’ with Miami-Dade Administrative Judge Jennifer Bailey: ‘I Need Trials,’ LAW.COM (Oct. 13, 2020, 7:30 AM), <https://www.law.com/litigationdaily/2020/10/13/holding-court-with-miami-dade-administrative-judge-jennifer-bailey-i-need-trials> [https://perma.cc/KA5S-RY34].

18. See *infra* Section II.A.

19. See *infra* Section I.A.

20. See *infra* Section I.A.

21. See *infra* Section I.A.

require a judge's unique training and expertise,<sup>22</sup> thus expressly advocating an unbundled, "many hands" approach to moving overloaded dockets that was anathema to Justice Powell and the other 1980s-era critics.

More recently, the managerial transformation of state courts has only accelerated. Continuing caseload pressures and a mounting access-to-justice crisis, fueled by the docket-dominating presence of lawyerless litigants in millions of debt collections, evictions, and family-law matters, have motivated courts to rethink how they manage their dockets. Meanwhile, the advent of potent new technologies, particularly artificial intelligence (AI), has empowered courts to reshape their business operations. The resulting guidance, staffing models, procedural and case-management "pathways," and automation of analog processes often flow from duly promulgated rules or statutes. But they can also take less formal and even off-the-books and extralegal forms—a vast and mostly unexplored archipelago of internal court orders, policies, practices, processes, and techniques. And they often take the form of off-the-rack tools, many of them software-based "court tech," purchased from a burgeoning private industry that has developed to service the managerial turn.<sup>23</sup> It is a safe bet that AI's incorporation into American courts—a process already well underway in procurement pipelines and court skunkworks around the country<sup>24</sup>—will supercharge existing managerial efforts and fuel new ones.

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This Feature surfaces a tectonic but largely overlooked managerial turn that, once its many manifestations are corralled and brought into full view, constitutes a quiet revolution in the role and functioning of American courts, with profound

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22. See Paula L. Hannaford-Agor, *Civil Justice Initiative: A Guide to Building Civil Case Management Teams*, NAT'L CTR. FOR STATE CTS. 1 (2017), <https://ncsc.contentdm.oclc.org/digital/collection/civil/id/141> [<https://perma.cc/DB48-ZWNB>] (advocating a staffing model that "permits judges to focus on tasks that require uniquely judicial training and expertise"); *id.* at 6 (describing court staff's role as including "highlighting legal issues for judicial attention").

23. See *infra* notes 346-348 and accompanying text.

24. See David Freeman Engstrom & Nora Freeman Engstrom, *We Should Focus On—and Invest in—AI that Serves People Without Lawyers*, A.B.A. J. (Nov. 21, 2024, 2:17 PM CST), <https://www.abajournal.com/voice/article/we-should-focus-onand-invest-inai-that-serves-people-without-lawyers> [<https://perma.cc/LXP5-TMDB>] (arguing that "courthouse AI," in which courts deploy AI in internal, court-facing and external, litigant-facing ways is the main innovation frontier in expanding access to justice). See generally David Freeman Engstrom et al., *A Blueprint for Expanding Access in Los Angeles Superior Court's Eviction Docket*, STAN. L. SCH. (Apr. 2025), <https://law.stanford.edu/publications/a-blueprint-for-expanding-access-to-justice-in-los-angeles-superior-courts-eviction-docket> [<https://perma.cc/QK99-ALWJ>] (announcing a pair of AI incorporations into the Los Angeles Superior Court's work, including deployment of AI to automate the process of default-judgment review in which court staff attorneys review case materials to ensure that default judgments are procedurally and substantively warranted).

implications for fair and accurate adjudication, access to justice, due process, and the production of law. As a first comprehensive effort to describe and assess this new managerialism, we advance four broad claims, each one engaging, extending—and sometimes recasting—an existing line of scholarly inquiry.

*First*, the managerial turn in American courts is “internal law” and demands study as such. Just as administrative-law scholars have come to recognize the internal policies, procedures, and oversight mechanisms shaping how public agencies administer policies and programs as a form of law,<sup>25</sup> judicial management practices—from case-assignment protocols to staff training manuals to performance metrics—should also be viewed as fundamentally legal in nature. Managerial techniques constitute a body of rules that, while not always formally enacted or promulgated through conventional rulemaking or lawmaking channels, nonetheless meaningfully constrain and guide judicial behavior. Understanding managerial rules as a form of internal law highlights both their function as governance and adjudicatory tools and the need to subject them to systematic study and oversight. Framed this way, managerial courts also raise fundamental questions about the connection between the internal structure of legal institutions and legal method.<sup>26</sup> The new managerialism in the nation’s state courts demonstrates how the guts of adjudication—the nitty-gritty structure and process built into courts’ entire case-processing and adjudicatory apparatus—shapes case outcomes.

*Second*, the new managerial courts mark a transformation of the judicial function that rivals—and ultimately reframes—the longtime preoccupation

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25. See, e.g., Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–51 (2017); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 1-17, 213 (1983) [hereinafter MASHAW, BUREAUCRATIC JUSTICE]; Jerry L. Mashaw, *Conclusion: The Inside Out Perspective: A First-Person Account*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 501, 501-02 (Nicholas R. Parrillo ed., 2017) [hereinafter Mashaw, *The Inside Out Perspective*]; Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860-61 (2009); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 426-27 (2015); Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1230-32 (2020).
26. For scholarship showing how shifts in the judicial role, docket pressures, judicial demography, and courts’ institutional features can shape merits decision-making, see generally, for example, Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011), which examines docket pressure; Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241 (2019), which summarizes literature on the effects of judges’ race, ethnicity, gender, and other personal characteristics on case outcomes; RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996), which interrogates the costs and benefits of different mixes of generalist and specialized adjudicators; and LAWRENCE BAUM, SPECIALIZING THE COURTS (2011), which similarly examines the benefits and drawbacks associated with specialized adjudicators.

among procedure scholars with “managerial judges.”<sup>27</sup> Judith Resnik’s paradigm-shifting 1982 article critiqued growing judicial engagement in pretrial case development, particularly in complex litigation, as a departure from the “classical” judicial posture of “[d]isengagement and dispassion.”<sup>28</sup> The managerialist ethos we identify represents a different, competing model of court management.<sup>29</sup> Where managerial judges expanded judicial authority through active intervention in the minutiae of individual cases,<sup>30</sup> managerial courts often do the opposite: managerial courts adopt system-wide processes and practices that treat cases *in bulk*, raising very different risks – judicial estrangement from the adjudication of individual cases, and a diminution (rather than inflation) of judicial power. Nor is the new managerialism “ad hoc,” a label scholars extending Resnik’s iconic analysis have applied to innovative judicial practices, particularly in multidistrict litigation.<sup>31</sup> It is instead centralized, standardized, and bureaucratized. And very often, it is an effort to cabin judicial discretion rather than, as with managerial judges, a product of that discretion. Finally, while the literature on managerial judging has largely centered on federal courts, the phenomenon we describe has taken root most deeply in state courts. True, some work has traced how bureaucratic logics have shaped select corners of the federal judiciary, especially in the courts of appeals.<sup>32</sup> But the literature on managerialism in

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27. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77, 383-86 (1982) [hereinafter Resnik, *Managerial Judges*]; Judith Resnik, *Seeing “The Courts”: Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy from the 1980s to the 2020s*, 43 REV. LITIG. 193, 197 (2024) [hereinafter Resnik, *Seeing “The Courts”*]; D. Theodore Rave, *Management and Judging in Multidistrict Litigation*, 42 REV. LITIG. 291, 292 (2023); Samuel Issacharoff & Troy McKenzie, *Managerialism and Its Discontents*, 43 REV. LITIG. 1, 9 (2023); Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs’ Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 228 (2023); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1030 (2013); Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 355 (2015); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 7 (2019).
  28. See Resnik, *Managerial Judges*, *supra* note 27, at 376.
  29. See *infra* Section III.A.2.
  30. See Resnik, *Managerial Judges*, *supra* note 27, at 393.
  31. See, e.g., Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 767 (2017); Engstrom, *supra* note 27, at 72; Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1049 (2018); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1266 (2010); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 869 (2018); David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2245 (2021).
  32. A number of scholars have detailed the courts of appeals’ reliance on central staff attorneys. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 344-55 (2011); Merritt E. McAlister, *Rebuilding the Federal*

federal district courts continues to emphasize the phenomenon at the individual-judge level,<sup>33</sup> and the bureaucratic developments it describes are modest and fledgling compared to what state court systems have pioneered.<sup>34</sup> Given this federal focus, it is perhaps unsurprising that the last sustained scholarly engagement with court bureaucratization writ large dates back to the 1980s, when Resnik framed it as a potential alternative to managerial judging.<sup>35</sup> Seen side-by-side, the contrast between managerial judging and managerial courts reveals that American law has long featured multiple, overlapping *managerialisms*—led, respectively, by judges, litigants, and now courts. Seeing these as competing

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*Circuit Courts*, 116 NW. U. L. REV. 1137, 1154-59 (2022); Diane P. Wood & Zachary D. Clopton, *Managerial Judging in the Courts of Appeals*, 43 REV. LITIG. 87, 99-101, 102-04 (2023). Scholarship has also discussed the courts of appeals' creation of mediation programs. See Wood & Clopton, *supra*, at 108-09; Levy, *supra*, at 340-44. Other work has documented additional decisional shortcuts or forms of triage as a response to docket pressures. See Huang, *supra* note 26, at 1127-33. This work has primarily focused on the courts of appeals, whose reliance on parajudicial bureaucracy is sometimes explicitly contrasted with "hands-on" judicial managerialism in federal trial courts. See Merritt E. McAlister, *Managing Out the Federal Appellate Judge*, 42 REV. LITIG. 165, 166 (2023) ("If managing trial-level cases has required judges to be more hands on, managing appeals has required judges to be more hands off . . ."). For a description of quality-control practices in federal courts of appeals, see Jarrett B. Perlow, *Driving Efficiency and Public Confidence: Integrating Quality Management Practices in the Federal Appellate System*, 25 J. APP. PRAC. & PROCESS 113, 131-33 (2025), which discusses current quality-management practices in federal appellate courts.

33. See, e.g., Rave, *supra* note 27, at 301-08 (describing a judge's role governing pretrial proceedings in federal multidistrict litigation as managerial judging in its "pure form"); Baicker-McKee, *supra* note 27, at 359-60 (discussing criticism of managerial judging and proposing the Advisory Committee on Civil Rules adopt amendments that govern federal judges' roles in pretrial case management).
34. A notable exception at the district-court level is the Civil Justice Reform Act's "six-month list"—public reporting of motions and bench matters pending more than six months—which has become a focal point of scholarly attention and judicial pushback. See, e.g., Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORN. L. REV. 363, 375 (2020); Jonathan B. Petkun, *Nudges for Judges: An Empirical Analysis of the "Six-Month List"* 6-13 (Nov. 21, 2023) (unpublished manuscript), <https://ssrn.com/abstract=3205398> [<https://perma.cc/X8N8-693N>].
35. See Resnik, *Managerial Judges*, *supra* note 27, at 437-38; MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 16-17. In the decade before Resnik wrote, Jerry Mashaw laid a foundation for thinking about bureaucracy and adjudication in court settings through his work on mass adjudication in administrative agencies. See Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORN. L. REV. 772, 774-75 (1974). To be sure, there are other scholars who have noted, if only in passing, the risks of bureaucratization in state courts. See Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1527 (2022) (noting that state courts' creation of new institutions raises "questions about courts' rule as bureaucracies, with the attendant challenges of bureaucratic behavior").

modes underscores that managerialism is not merely a transient episode but an enduring and, in many respects, inevitable feature of American law.

*Third*, the managerial turn taps a rich vein of normative complexities. All adjudicatory systems implicate a fundamental tension between individuation of judgment, on the one hand, and the law's legitimate constraint on discretion, on the other.<sup>36</sup> On one side of this perennial tension, legal scholars have long argued that a principal cost of bureaucratization and diffusion of responsibility beyond the bench is a rigid, rule-bound decisional process that disables adjudicatory systems from the core task of rendering individualized justice.<sup>37</sup> Indeed, this was a chief concern of Justice Powell and the other bureaucratization critics.<sup>38</sup> On the other hand, managerial policies, processes, and techniques can respond to the pathologies of many mass-adjudication systems, where sharp inconsistencies among adjudicators suggest decision-making unbound by law.<sup>39</sup> State courts are

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36. The classic account is MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 25. For more recent explorations, see Daniel E. Ho & Sam Sherman, *Managing Street-Level Arbitrariness: The Evidence Base for Public Sector Quality Improvement*, 13 ANN. REV. L. & SOC. SCI. 251, 252 (2017); David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020); David Hausman & Jayashri Srikanthiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1825 (2016); and David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1179 (2016).
37. See Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 769 (1983); MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 25, at 25-34 (contrasting “bureaucratic rationality” with the “moral judgment model”); *cf.* Nash v. Califano, 613 F.2d 10, 17-18 (2d Cir. 1980) (expressing concern about the effects of various managerial interventions on the independence of administrative judge decision-making and their impact on “the demands of due process”); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 34-39 (1982) (describing the pathologies of rule-bound agency enforcement decisions).
38. See Powell, *supra* note 1, at 1370; Fiss, *supra* note 4, at 1454-58; see also Vining, *supra* note 6, at 256-57 (describing lawyers likely having a “striking loss of the sense of obligation” in a court that operated as “a little bureaucratic system”).
39. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007); Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1584-85 (2015); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 3 (2009); Hausman, *supra* note 36, at 1187-88; U.S. GOV'T ACCOUNTABILITY OFF., *GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES* 2, 17 (2016); Harold J. Krent & Scott Morris, *Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms*, ADMIN. CONF. U.S. 15-16 (2013), [https://www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Co](https://www.acus.gov/sites/default/files/documents/Achieving_Greater_Co)

institutions committed to individualized judgment by history, culture, and legal obligation. But they also now manage crushing volumes of cases, often involving lawyerless litigants, in which the promise of reasoned deliberation after full party presentation is largely illusory. In short, new managerial techniques depart from strict individuation even as they offer the promise of fairer and more accurate outcomes at scale. Exploring these tensions in the managerial turn brings valuable nuance to scholarly work at the intersection of adjudication and bureaucracy.

*Fourth*, and finally, the managerial turn holds immense and mostly unexplored implications for conceptions of the judicial role and the shape of constitutional due process. The cluster of managerial policies, processes, and techniques making up the managerial turn often involve bulk processing of cases and constraints on judicial discretion at odds with the individualized treatment of cases that due process demands – the “wholesale justice” concern Justice Powell articulated. Court managerialism also raises concerns where it delegates decision-making authority away from judges to quasi- and even nonjudicial officers or software. Finally, managerialism raises concerns where it results from internal processes that are not the product of democratically elected policymakers or court-supervised rulemaking, with its notice-and-comment-like measures for public ventilation.

Yet the managerial turn can also vindicate core due-process values where managerial techniques more fully realize decisional accuracy and protect rights than can traditional, individualized adversarial procedures.<sup>40</sup> In an American civil-justice system in which the majority of cases now pit an institutional plaintiff (a bank, debt buyer, corporate landlord, or the government), always with a lawyer, against an individual defendant without one,<sup>41</sup> unmediated

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nsistency\_Final\_Report\_4-3-2013\_clean.pdf [https://perma.cc/W2LS-5DFU]; JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 21 (1978); Nicole Maestas, Kathleen J. Mullen & Alexander Strand, *Does Disability Insurance Receipt Discourage Work? Using Examiner Assignment to Estimate Causal Effects of SSDI Receipt*, 103 AM. ECON. REV. 1797, 1800 (2013); David K. Hausman, *Reviewing Administrative Review*, 38 YALE J. ON REGUL. 1059, 1088-89 (2021); OFF. OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-11-01138, CONGRESSIONAL RESPONSE REPORT: OVERSIGHT OF ADMINISTRATIVE LAW JUDGE WORKLOAD TRENDS 8 (2012) (noting allowance rates varying from 9% to 95% within the same office).

40. For this claim in the administrative-adjudication context, see Ames et al., *supra* note 36, at 28-29.
41. See, e.g., PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 35 (2015) (noting that the majority of state-court cases feature an unrepresented party); PAULA HANNAFORD-AGOR, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES 3-4 (2019) (noting the prevalence of debt-

adversarialism may no longer satisfy any defensible theory of due process or procedural fairness. More than fifty years ago, the Supreme Court in *Goldberg v. Kelly* told administrative agencies to act more like courts.<sup>42</sup> Now, with courts choking on high-volume dockets featuring sharp asymmetries across the two sides of the “v.,” and with managerialism in full flower, due process may require courts, at least some of the time, to act more like agencies.

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This Feature proceeds in three parts. Part I traces the historical development of court managerialism from roughly the middle of the twentieth century to the present, examining the forces that drove state courts toward managerial approaches despite longstanding judicial anxieties about bureaucracy. We map that development across three eras—from its roots in the mid-twentieth-century professionalization of court administration, through the quantification and performance-measurement regimes of the late twentieth century, to a twenty-first-century phase marked by datafication, digitization, and, more recently, AI. Periodizing the managerial turn reveals that court managerialism did not arrive suddenly or by accident, but grew out of persistent docket pressures, new governance ambitions within the judiciary, and broader cultural currents that prized efficiency and measurement. By situating the modern managerial court in this longer arc, Part I offers a first-of-its-kind portrait of court managerialism’s steady rise. We recast the managerial turn not as an episodic or ad hoc response to crisis, but as a deeply entrenched institutional orientation that has steadily reshaped the structure and function of state courts.

Part II fast-forwards to the present day and provides an anatomy lesson. We begin with three modes of court managerialism, dividing a still-emerging array of procedural and case-management techniques into three overlapping categories: (1) personnel-focused measures, including “teaming,” delegations, and outsourcing arrangements, many of them designed to economize on the scarcest of court resources, judicial attention; (2) systemic processes that treat cases in bulk, such as triage systems routing new filings to distinct procedural- and case-management pathways based on case complexity or other case features; and (3) quality-assurance tools, including decisional aids, performance-appraisal measures, and review processes designed to shape decision-making and avoid or correct

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collection cases in which business plaintiffs sue individuals); Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146, 149 (2024) (noting that state-court dockets are dominated by “debt collection and landlord-tenant matters pitting institutional plaintiffs against individual defendants”); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1714-18 (2022) (describing “assembly-line litigation” brought by sophisticated plaintiffs against absent or unrepresented individual defendants).

42. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

errors outside of the conventional adjudicatory or appellate process.<sup>43</sup> Diving deeper, we then identify four features of the managerial turn that cut across these modes: (1) the redistribution of judicial functions to quasi- and nonjudicial actors; (2) the standardization and filtering of information flows, which channel how information is provided to and elicited from litigants and how it reaches judges and staff; (3) shifting bureaucratic authority and control, which redistributes power within courts' organizational structures and hierarchies; and (4) the development of an informal law of judicial administration via an evolving body of internal rules and practices that shape adjudication outside formal policymaking and rulemaking.<sup>44</sup> Together, these modes and features reveal a rich landscape of disparate policies, processes, and bureaucratic techniques that, when considered as a whole, represent a fundamental but underappreciated transformation in the functioning of the American judiciary.

Part III shifts into a normative gear and offers an initial reckoning with the managerial turn. Two realities are clear. First, mapping managerial approaches helps illuminate the irreducibility and inevitability of one or another form of managerialism – be it by litigants, judges, or courts – as a definitional feature of adjudication. Second, tradeoffs abound: delegating authority to staff may estrange judges from cases but advance the fair and accurate adjudication of controversies; quality-control mechanisms might impair judicial independence but also improve decisional accuracy; informally crafted practices or guidelines might raise accountability concerns but also offer considerable experimentalist promise; and so on. This normative ambiguity, when combined with the inevitability of some form of management, suggests that the proper normative question is not whether to accept or reject managerial courts in an up-or-down judgment. Rather, the question is how to optimize managerial courts' design and operation.

Yet optimization also poses a challenge of institutional compatibility: how can courts adopt bureaucratic processes, practices, and personnel without losing their distinctive institutional identity? Critics during Justice Powell's era denied that any such balance was possible.<sup>45</sup> But the modern litigation conditions that have driven courts toward managerialism – including high-volume dockets featuring pervasive and often sharp asymmetries in expertise, resources, and representation across the parties – have rendered these critics' shared conception of judging inadequate for protecting adjudication's core values. When properly designed, court managerialism can enable courts to wield authority legitimately while responding meaningfully to thorny docket challenges. Legitimacy requires

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43. See *infra* Section II.A.

44. See *infra* Section II.B.

45. See *infra* notes 409-410 and accompanying text.

governing principles that preserve an “adjudication core” for judges and properly manage the complex, sometimes paradoxical relationships between judges and other actors within the court bureaucracy. Part III advances such principles recognizing that managerial tools must also leave room for judges to exercise moral judgment and practice engaged neutrality, preserve judges’ ultimate responsibility for outcomes, and uphold the independence essential to judicial legitimacy. Among managerialism’s various modes, we highlight an array of quality-control efforts that safeguard the quality of a court’s decisional outputs but are performed outside the usual appellate-review process as a particularly vital tool in achieving fair and accurate adjudication of disputes.

We close by explaining how managerial courts require new engagements with fundamental assumptions about due process. *Goldberg*-era understandings conceived of constitutional protections solely in terms of adversarial procedures litigants can invoke. But the maturation of managerial courts suggests that sufficient capacity now exists to harness bureaucratic resources in the service of fair and accurate adjudication. In the current litigation landscape, bureaucratic structures may, in fact, outperform unmediated adversarialism on metrics of accuracy and efficiency. Bureaucracy’s justice-enhancing potential raises the possibility that the very managerial interventions questioned by Justice Powell, Fiss, Resnik, and others are now, several decades later, constitutionally *required*. Such a shift in thinking – which Jerry Mashaw anticipated for agency adjudication decades ago but has not until now been contemplated for court-based civil justice<sup>46</sup> – would not only carry radical implications for how courts operate in practice but could also unsettle the structure of due process itself. In the face of demands for accuracy and efficiency, managerial courts force a reckoning with the core content of due process and how far its current doctrinal commitments to dignity and judicial legitimacy can bend.

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46. See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 102 (1985); MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 25, at 25-31; Mashaw, *supra* note 35, at 779-80. Recent engagements with Mashaw’s due process work suggest little follow-up work to develop his ideas further. See, e.g., Charles F. Sabel & William H. Simon, *The Management Side of Due Process in the Service-Based Welfare State*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT*, *supra* note 25, at 63, 67-70 (describing Mashaw’s “right to good administration,” and not referencing any scholarship building upon Mashaw’s ideas); cf. Thomas W. Merrill, *Jerry L. Mashaw, the Due Process Revolution, and the Limits of Judicial Power*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT*, *supra* note 25, at 39, 45 (observing that “there have been no dramatic reversals of precedent” governing procedural due process since *Goldberg v. Kelly* and *Mathews v. Eldridge*). See generally Merrill, *supra* (referencing no scholarship expanding upon Mashaw’s ideas developed in the 1970s and 1980s).

## I. THE RISE OF MANAGERIAL COURTS

The dramatic transformation in how state courts conceive of and execute their institutional role did not emerge at once. Rather, a new managerialist ethos evolved in fits and starts over many decades. Courts and a growing professional network of court administrators, buffeted by a mix of political incentives, seismic docket shifts, and technological innovation, steadily built out a suite of bureaucratic tools, processes, and techniques. Along the way, state-court judges came to see administration as a core component of the judicial role.<sup>47</sup> Understanding this evolution—the preconditions to the present-day managerialist landscape mapped in Part II—requires situating the managerial turn within a longer history of court administration and examining the various forces that drove courts toward increasingly systematic approaches to the production of justice.

### A. Managerialism in the New Deal Order

In the early twentieth century, administrative responsibilities in state courts were typically divided between two actors: judges and elected court clerks. Judges developed courtroom procedure and oversaw case-specific decision-making, while court clerks functioned essentially as judicial housekeepers, handling budgeting, personnel, docketing, and recordkeeping functions.<sup>48</sup> Because court clerks generally were elected to their positions, they often operated free from judicial control.<sup>49</sup> As the Progressive reformer W.F. Willoughby complained at the time, elected clerks “occupy positions practically independent of the direction and control of the judges of the courts.”<sup>50</sup> Court-reform efforts at both the federal

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47. For an elaboration of this point, see ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM* (2004), especially Chapter Five, titled “Developing a Management Perspective in the Judiciary.”

48. See Steven W. Hays, *The Traditional Managers: Judges and Court Clerks*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT* 221, 230-31 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993). To be sure, there were instances in which clerks assisted in adjudicative tasks, especially where their incentives aligned with judges. For instance, in his study of nineteenth-century naturalization proceedings in New York, Nicholas R. Parrillo notes that clerks examined applicants and witnesses before the judge did, and he concludes that “[t]he degree to which judges relied on clerks’ recommendations is not entirely clear, but they probably relied heavily, given the press of business prior to elections.” See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 131 (2013).

49. CHARLES W. ELIOT, MOORFIELD STOREY, LOUIS D. BRANDEIS, ADOLPH J. RODENBECK & ROSCOE POUND, *PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE* 17 (1914).

50. W. F. WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 341 (1929).

and state levels, dating back to the establishment of the American Judicature Society in 1913, sought to vest administrative authority in a chief judge who could oversee court operations.<sup>51</sup> Chief Justice Taft, advocating for the creation of a Conference of Senior Circuit Judges, claimed that each federal judge “paddled his own canoe” and was “subject to little supervision, if any.”<sup>52</sup> As Willoughby recommended in an influential book on judicial administration, courts ought to establish “unity of command” by “vesting general administrative authority over the whole system in some organ or officer.”<sup>53</sup>

Under the leadership of the reformist lawyer Arthur Vanderbilt, beginning in 1937, the American Bar Association (ABA) turned its attention to court administration, especially in state courts.<sup>54</sup> The Association formed a Section on Judicial Administration, which released an influential report in 1938 proposing new standards for federal- and state-court management.<sup>55</sup> It endorsed calls for the centralization of administrative authority in a chief judge or “administrative judge,” who would be responsible for all the nonadjudicative operations of the judicial system.<sup>56</sup> The ABA also recommended that each court system hire a designated court administrator to provide the chief judge “with assistance in carrying out his administrative duties.”<sup>57</sup> At the ABA’s suggestion,<sup>58</sup> the Conference of Commissioners on Uniform State Laws in 1948 developed a model act to provide for an administrator for the state courts.<sup>59</sup>

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51. See, e.g., Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 327 (1913); *The State-Wide Judicature Act*, 1 J. AM. JUDICATURE SOC’Y 101, 101 (1917); ELIOT ET AL., *supra* note 49, at 15-17; WILLOUGHBY, *supra* note 50, at 339.
  52. See William Howard Taft, Chief Just., Sup. Ct. of the U.S., Informal Address by Honorable William Howard Taft (Sep. 1, 1921), *reprinted in* 2 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, 1875-1939, at 186, 186-87 (Daniel S. Holt ed., 2013); see also ROBERT C. POST, 1 THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930, at 450-51 (2024) (describing the purpose and functions of the proposed Conference of Senior Circuit Judges).
  53. WILLOUGHBY, *supra* note 50, at 339.
  54. Maynard E. Pirsig, *The Historical Role of the American Bar Association in Judicial Administration*, 16 WM. MITCHELL L. REV. 1195, 1203 (1990).
  55. See Arthur T. Vanderbilt, *Foreword to A.B.A., REPORTS OF THE SECTION OF JUDICIAL ADMINISTRATION* 5, 5-9 (1938).
  56. See A.B.A., *supra* note 55, at 18.
  57. See A.B.A., THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE: A HANDBOOK PREPARED BY THE SECTION OF JUDICIAL ADMINISTRATION 22 (1949). See generally SECTION OF JUD. ADMIN., A.B.A., REPORT OF THE COMMITTEE ON AN ADMINISTRATOR FOR THE STATE COURTS (1944) (discussing the role of a court administrator).
  58. See SECTION OF JUD. ADMIN., *supra* note 57, at 22-23.
  59. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS OF THE ANNUAL CONFERENCE MEETING IN ITS FIFTY-SEVENTH YEAR 167-69 (1948).

The ABA's reform efforts responded partially to the growth of administrative tribunals organized along rationalized, bureaucratic lines. When announcing the program of the Association's new Section on Judicial Administration in 1938, Vanderbilt warned that, absent reform, "[e]ither the laymen will do the job . . . or the work of the courts will gradually be taken over by administrative tribunals."<sup>60</sup> Yet, even as a critic of the administrative state,<sup>61</sup> Vanderbilt saw agencies' efficient operations as a model for judicial administration.<sup>62</sup> He argued that "properly organized" courts could "meet point by point the advantages claimed for administrative tribunals."<sup>63</sup> Thus, the expansion of agency adjudication created competitive pressure for courts to modernize their own administration.

In the federal system, judges began to see administrative control as an essential component of judicial independence. Between its creation in 1870 and 1939, the Department of Justice functioned as the administrator of the federal judicial system, controlling the budgetary and financial operations of the courts and compiling statistics related to the judicial system.<sup>64</sup> In the 1930s, though, federal judges sought greater independence from the Department, arguing in the aftermath of President Roosevelt's court-reorganization plan that administrative control was necessary to guarantee the independence of the judiciary as a coordinate branch of government.<sup>65</sup> In 1939, Congress created the Administrative Office of the United States Courts, "[t]ransferring the [Department of Justice]'s administrative functions to the judiciary."<sup>66</sup>

A more dramatic transformation began in state courts in the 1950s, as court administration emerged as a distinct profession. Along the lines recommended by the ABA's 1938 report, states began establishing administrative offices, led,

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60. Arthur T. Vanderbilt, *Section of Judicial Administration Launches Program on Wide Front*, 24 A.B.A. J. 5, 6 (1938).

61. For Vanderbilt's role in debates over the New Deal administrative state, see MARK V. TUSHNET, *THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930 TO 1941*, at 540-41 (2021); DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 121-23 (2014); and Lawrence J. Liu, *Independence Through Judicialization: The Politics Surrounding Administrative Adjudicators, 1929-1949*, 13 MICH. J. ENV'T & ADMIN. L. 522, 545-46 (2024).

62. Vanderbilt, *supra* note 60, at 6. This was also a recurring point in the writings of Jerome Frank. See generally JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949) (noting inadequacies of courthouse administration).

63. Vanderbilt, *supra* note 60, at 6.

64. See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 91-95 (1973).

65. See *id.* at 120; 2 DEBATES ON THE FEDERAL JUDICIARY, *supra* note 52, at 242-54 (compiling perspectives from various judges and attorneys in support of administrative control).

66. See FISH, *supra* note 64, at 125.

once again, by Arthur Vanderbilt.<sup>67</sup> After serving as the driving force behind a successful referendum campaign to adopt a new state constitution in New Jersey, which included the creation of a unified court system and an administrative office of the courts, Vanderbilt was appointed as the Chief Justice of the New Jersey Supreme Court.<sup>68</sup> The year 1947 saw the creation of the state's first court administrator,<sup>69</sup> who approached the judicial system as "another form of 'big business'" to be managed.<sup>70</sup> Other states quickly followed suit: eleven states established administrative offices in the 1950s.<sup>71</sup> Notably, California passed legislation in 1957 permitting the Los Angeles Superior Court – at that time the nation's largest state trial court, with 134 judges – to appoint a court executive with extensive managerial duties.<sup>72</sup> In the 1960s, fifteen more states established court administrative offices.<sup>73</sup>

By the early 1980s, "[w]hile every state court system had a state-level administrative director,"<sup>74</sup> a substantial amount of the growth in the managerial capacity and expertise of state-court administrative offices came in the 1970s – driven in large part by the War on Crime. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, investing hundreds of millions of dollars to

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67. DAVID C. STEELMAN, JOHN A. GOERDT & JAMES E. McMILLAN, *CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM*, at xii-xiii (2000).
68. See NELSON JOHNSON, *BATTLEGROUND NEW JERSEY: VANDERBILT, HAGUE, AND THEIR FIGHT FOR JUSTICE* 59, 198-99, 203-04 (2014).
69. See Cole Blease Graham, Jr., *Reshaping the Courts: Traditions, Management Theories, and Political Realities*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT*, *supra* note 48, at 3, 13.
70. Willard G. Woelper, *The Administrative Office of the Courts in New Jersey*, 25 N.Y.U. L. REV. 56, 56 (1950). Within the first year, Woelper centralized court budgeting, collected weekly statistics on judicial productivity and monthly statistics on case processing, and reformed the filing and docketing system. See *id.* at 60-62, 64; see also Willard G. Woelper, *Work of the Modern Administrator of Courts*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. 147, 150-53 (1953) (describing his work as court administrator between 1948-1952).
71. STEELMAN et al., *supra* note 67, at xiii. Connecticut was arguably the first state to create a statewide court administration, establishing the position of Executive Secretary of the Judicial Department in 1937. See Edward B. McConnell, *The Administrative Office of the Courts of New Jersey*, 14 RUTGERS L. REV. 290, 290 n.2 (1960).
72. STEELMAN et al., *supra* note 67, at xiv; see also David J. Saari, Michael D. Planet & Marcus W. Reinkensmeyer, *The Modern Court Managers: Who They Are and What They Do in the United States*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT*, *supra* note 48, at 237, 237 ("The first genuinely managerial position was the one created in the late 1950s in Los Angeles. While other positions called court manager existed about the same time, . . . the managerial content of those jobs was minimal compared with court executives in Los Angeles.").
73. STEELMAN et al., *supra* note 67, at xiii.
74. *Id.* at xv.

help the states modernize their law-enforcement and criminal-justice apparatuses, and establishing the Law Enforcement Assistance Administration (LEAA) to disburse these funds.<sup>75</sup> During the War on Crime, LEAA was “the fastest-growing federal agency in the 1970s,” significantly expanding America’s carceral state in the process.<sup>76</sup> While federal aid initially focused on improving the capacity of local law-enforcement personnel to control crime, LEAA also became a singularly powerful funder of court-administration reforms, assisting many courts in hiring professional managers and supporting research and demonstration projects that deployed new managerial techniques.<sup>77</sup> In its second year, for instance, LEAA funded a nationwide study on a “little known area” – the “science of court management” – which the agency described as “one of the most promising areas for progress in improving the court system.”<sup>78</sup>

LEAA’s influence on court administration grew over time. Initially, courts were not specifically authorized as grant recipients, but millions of dollars of LEAA funds nonetheless were directed towards court projects.<sup>79</sup> In 1971, for instance, almost nine percent of LEAA block-grant spending was allocated for court-related projects.<sup>80</sup> This changed with a 1976 amendment to the Safe Streets Act. Organized under the leadership of the Conferences of Chief Justices and State Court Administrators, state judiciaries secured an amendment requiring each state planning agency to include “at a minimum” three representatives

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75. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 2 (2016).
76. *Id.* The Law Enforcement Assistance Administration (LEAA) was also one of the major funders of indigent defense during this period. See *Federal Funding for State and Local Public Defenders—Some Historical Context*, SARA MAYEUX (Mar. 19, 2016), <https://www.saramayeux.org/2016/03/federal-funding-for-state-and-local-public-defenders-some-historical-context> [<https://perma.cc/82Y4-ZG5H>].
77. See, e.g., Graham, *supra* note 69, at 16 (explaining how LEAA funds helped courts hire managers); Harry O. Lawson & Dennis E. Howard, *Development of the Profession of Court Management: A History with Commentary*, 15 JUST. SYS. J. 580, 588 (1991) (highlighting how LEAA funded court staffs and technology); TOBIN, *supra* note 47, at 110 (describing the “millions of dollars” spent on the development of court-planning processes during “the glory days of the Law Enforcement Assistance Administration”).
78. See LAW ENF’T ASSISTANCE ADMIN., LEAA 1970: LEAA ACTIVITIES JULY 1, 1969 TO JUNE 30, 1970, at 35 (1970).
79. See *id.* at 34 (describing “almost \$1.4 million spent to finance grants in the area of court programs”); John C. Ruhnka, Terrence R. Donnelly, Richard Ross & Kenneth Selby, *Federal Funding Assistance for State Courts*, NAT’L CTR. FOR STATE CTS. 6 (1973), <https://www.ojp.gov/pdffiles1/Digitization/25022NCJRS.pdf> [<https://perma.cc/8LBQ-693Z>] (reporting the results of a 1973 survey finding that “[a]ll but eight state court systems reported the use of funds from their state’s LEAA block grants”).
80. See Edward J. Clynych, *The Spending of Law Enforcement Assistance Administration Block Grants by the States: A Report*, 2 JUST. SYS. J. 157, 165 (1976).

of the judiciary: the chief justice or other member of the state's apex court; the state court administrator; and a local trial court judge.<sup>81</sup> As the National Center for State Courts's Washington Liaison reported in 1977, "No other group fared as well in its efforts to amend the Crime Control Act and thus affect the direction and funding priorities of the Law Enforcement Assistance Administration."<sup>82</sup> Other court-administration professionals put it more succinctly: "What was a trickle has become a flood."<sup>83</sup>

Over the course of the 1970s, LEAA funding played a profound role in developing the managerial capacity of state courts. LEAA spent millions on encouraging court planning and on programs to develop and implement strategies for reducing delay through the establishment of docket-control centers, performance standards, court intake officers, and caseload-management operations.<sup>84</sup> LEAA money also funded pioneering efforts to create statewide information-management systems.<sup>85</sup> And the agency played a pivotal role in the creation of the National Center for State Courts in 1971.<sup>86</sup> The 1976 amendment thus institutionalized the role of court administrators in criminal-justice planning and funding decisions. At the same time, LEAA's broader mission of expanding "supervision and control in low-income urban communities"<sup>87</sup> created pressure for courts to develop more efficient and systematic approaches to case processing—especially in criminal cases. The result was a curious hybrid: state-court administration developed as a profession dedicated to judicial independence while simultaneously being shaped by the criminal-justice priorities of other branches.

Alongside this growth of resources to fund the modernization of state-court administration, the changing nature of adjudication also placed pressure on state courts to develop administrative capacity. Between 1972 and 1976 alone, there was a thirty-two percent increase in the number of civil cases filed in state trial

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81. See Crime Control Act of 1976, Pub. L. No. 94-503, § 105(a)(2), 90 Stat. 2407, 2408 (codified as amended at 42 U.S.C. § 3723).

82. Harry W. Swegle, *Washington Perspective*, STATE CT. J., Spring 1977, at 28, 28.

83. C. Mae Kuykendall & William H. Popp, *Computers and the Courts*, STATE CT. J., Summer 1977, at 6, 6.

84. See LAW ENF'T ASSISTANCE ADMIN., LEAA TENTH ANNUAL REPORT FISCAL YEAR 1978, at 6 (1979); LAW ENF'T ASSISTANCE ADMIN., LEAA ELEVENTH ANNUAL REPORT FISCAL YEAR 1979, at 5 (1980).

85. See Larry Polansky, *The Courts and Project SEARCH*, 1 JUST. SYS. J. 54, 54, 56 (1975); Larry Polansky, *SJIS: Where Has It Been and Where Is It Going?*, 12 STATE & LOC. GOV'T REV. 12, 12 (1980).

86. Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 283 (1980).

87. HINTON, *supra* note 75, at 3.

courts, and a thirty-three percent increase in juvenile cases.<sup>88</sup> Constitutional requirements related to indigent defense, the treatment of juveniles, and protections for individuals with intellectual disabilities all created “large and volatile expenditures” for state courts.<sup>89</sup> As family disputes and juvenile delinquencies were increasing in number and percentage of all cases in state courts, states made large expenditures on parajudicial functions like counseling, juvenile detention, and child-support services.<sup>90</sup>

This expansion of state-court dockets, and the functions that state courts were being asked to perform, created demand for court managerialism. To take one example, the cost of providing indigent-defense services in state courts more than tripled between 1976 and 1982, leading a number of jurisdictions to explore “administrative approaches” to improve the efficiency of indigent-defense programs.<sup>91</sup> Growth in “social need” dockets, including dramatic increases in lawsuits against consumer debtors, likewise fueled demands for the development of bureaucratic infrastructure to ensure the fair adjudication of cases involving overmatched self-represented litigants.<sup>92</sup>

In parallel to this institutional growth, court administrators developed an increasingly sophisticated professional infrastructure. State-court administrators formed their first national organization in 1956, which included administrators from fourteen states.<sup>93</sup> In the following decades, administrators established additional professional organizations, including the National Association of Trial Court Administrators and the Conference of State Court Administrators.<sup>94</sup> At

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88. *State Court Caseload Statistics: Annual Report, 1976*, NAT’L CTR. FOR STATE CTS. 132 (Dec. 1, 1980), <https://bjs.ojp.gov/content/pub/pdf/scs76.pdf> [<https://perma.cc/FZ87-9BLQ>]. During this period, criminal filings increased by only 9%. *Id.* Between 1977 and 1981, the number of civil case filings increased by 22% while criminal case filings increased by 31%. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., 1977 TO 1981: STATE COURT CASELOAD STATISTICS 1 (1983).

89. TOBIN, *supra* note 47, at 141.

90. *Id.*

91. ROBERT L. SPANGENBERG, RICHARD J. WILSON, PATRICIA A. SMITH & BEVERLY N.W. LEE, U.S. DEP’T OF JUST., CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 1 (1986).

92. See, e.g., Leonard S. Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48, 82 (1976) (proposing that courts should “have the capacity for investigating claims through an adjunct agency connected to the court”). On the dramatic postwar growth of consumer debt, see David Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROBS. 641, 641, 643 (1968). On the problems posed by consumer-debt litigation, see, for example, David Caplovitz, *Breakdowns in the Consumer Credit Marketplace*, 26 BUS. LAW. 795, 798 (1971).

93. Lawson & Howard, *supra* note 77, at 589.

94. See STEELMAN ET AL., *supra* note 67, at xiv-xv.

the First National Conference on the Judiciary in 1971, funded by a grant from LEAA, Chief Justice Burger called for the creation of a “National Center for State Courts” that would “make available all information necessary for comprehensive examination of the problems of the judiciary in the fifty states.”<sup>95</sup> An Institute for Court Management was also established to train court managers.<sup>96</sup> Educational programs for court managers proliferated, with strong LEAA support for judicial education.<sup>97</sup> Membership in professional organizations grew substantially—from approximately 350 members in the National Association of Trial Court Administrators in 1980 to nearly 2,500 members in its successor organization by the end of the 1990s.<sup>98</sup>

The rise of court administration by judicial-branch officials was often justified and promoted in the language of separation of powers as a necessary component of judicial independence. In the main, as discussed above, American courts historically lacked administrative and financial independence from other branches,<sup>99</sup> on the assumption that judges could maintain adjudicative independence without administrative control.<sup>100</sup> However, after the federal courts gained administrative and budgetary independence in 1939,<sup>101</sup> state courts

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95. See Warren E. Burger, Chief Just., U.S. Sup. Ct., *Deferred Maintenance of Judicial Machinery: Address by Chief Justice Warren E. Burger at the First National Conference on the Judiciary (May 1971)*, in LEAA NEWSL. (U.S. Dep’t of Just., D.C.), May 1971, at 7, 11; Jesse Rutledge & Charles F. Campbell, *The NCSC Marks 50 Years of Service to State Courts*, 105 JUDICATURE 2, 2-3 (2021).
96. See Lawson & Howard, *supra* note 77, at 591-92.
97. See TOBIN, *supra* note 47, at 130.
98. See Geoff Gallas & Edward C. Gallas, *Court Management Past, Present, and Future: A Comment on Lawson and Howard*, 15 JUST. SYS. J. 605, 613 (1991) (noting membership of “about 350 members by 1980”); STEELMAN et al., *supra* note 67, at xv (documenting membership of “almost 2,500 [people] in 1999”).
99. See Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 122 (1996) (“For most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support.”). The Administrative Office of the U.S. Courts was established in 1939, when the judicial branch became financially and administratively independent from the Department of Justice. *Id.* At the state level, “[j]udicial independence and separation of powers remained legal concepts devoid of administrative reality, because state trial courts were only nominally part of the state judicial branch. They were so intertwined with local government that they took on the characteristics of their environment . . . .” TOBIN, *supra* note 47, at vii. See generally CARL BAAR, *SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES* (1975) (discussing the historical development of state judicial funding).
100. TOBIN, *supra* note 47, at 146 (“The underlying assumption was that judges could preserve their independence in matters of adjudication without control of the administrative aspects of court operations.”).
101. See Burbank, *supra* note 99, at 122; FISH, *supra* note 64, at 125-65 (describing the history surrounding the reorganization).

followed suit. Judges sought independence by assuming administrative control, which became a central goal of court administration. The ABA's 1974 Standards, for instance, identified dual aims: to "administer cases fairly and efficiently," and "to maintain the independence of the judicial branch by developing its administrative capacity."<sup>102</sup>

Stakeholders deployed separation-of-powers arguments to gain greater control over personnel and funding. As the practical beneficiaries of control wrested from other branches, court administrators led many of these efforts. The Los Angeles Superior Court (LASC) exemplifies this dynamic: previously reliant on county departments for most administrative functions and personnel,<sup>103</sup> the LASC's newly appointed administrator quickly identified his primary goal as "the reassertion of the traditional separation of powers and the re-establishment of the Superior Court's independence from other political bodies in personnel and financial administration."<sup>104</sup> This manifested in conflicts over personnel and spending, pitting the court administrator against the county clerk.<sup>105</sup> Funding needs were similarly articulated as separation-of-powers issues. Growing resource demands in the 1970s led to calls for state financing,<sup>106</sup> with judges asserting "inherent equity powers" to compel judicial funding for additional personnel, facilities, and services.<sup>107</sup> The ABA's 1974 revised Standards endorsed the judiciary calculating its own budget needs and administering its own funds,<sup>108</sup> reflecting the view that judicial independence required administrative control and operational autonomy.

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102. Cole Blease Graham, Jr., *The American Bar Association's Standards Relating to Court Organization: A General Review*, in HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT, *supra* note 48, at 101, 103.

103. See Richard W. Gable, *Modernizing Court Administration: The Case of the Los Angeles Superior Court*, 31 PUB. ADMIN. REV. 133, 136-37 (1971).

104. *Id.* at 135.

105. *Id.* at 140.

106. TOBIN, *supra* note 47, at 139; see also ROBERT W. TOBIN, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES* 34-39 (1996) (describing the trend toward state financing since the 1970s).

107. On the idea of inherent powers, see ARTHUR T. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 110 (1963), which quotes James M. Beck, Rep., House of Representatives, Address in the House (Mar. 8, 1932), in *Editorial*, 18 A.B.A. J. 248, 249 (1932); BAAR, *supra* note 99, at 143-49 (1975), which discusses "inherent powers lawsuits," which are "are designed to limit the discretion of other branches of government to define how much money the judicial branch may have from the public purse"; and FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* 47-59 (1994), which collects cases. On uses of inherent powers, see STUMPF, *supra*, at 47-59.

108. See STANDARDS RELATING TO CT. ORG. §§ 1.50-53 (A.B.A. 1974).

By the end of the 1970s, a new professional – the court administrator – occupied almost every state-court system. Driven by the pressures of growing dockets, the availability of federal funding, and a desire to fend off micromanagement by other branches, most state courts had supplanted the bifurcated governance of chief judges and elected clerks with administration by professionally organized court administrators sitting atop a growing judicial bureaucracy.

*B. Managerialism in a Neoliberal Era*

If professionalization and separation-of-powers politics defined the first era of court managerialism, then a more pedestrian process of quantification, measurement, and standardization defined its second. With the New Deal order clearly crumbling throughout the 1970s,<sup>109</sup> ballooning dockets and a sharpening critique of public-sector sclerosis spurred new and more narrowly bureaucratic forms of court managerialism as a neoliberal consensus came to dominate American political and legal culture.<sup>110</sup>

Soon after courts developed a bureaucratic presence and carved out a measure of independence from legislatures and local governments, a new threat arose: docket backlogs, born of chaotic and lawyer-driven scheduling, overly lenient continuance practices, limited information on case progression, and judicial inattention to case dispositions. “Caseflow management” was born and became the heart of the embryonic science of court management.<sup>111</sup> But to realize its potential, courts first had to reclaim control of the docket from the patchwork of practitioners and officials who managed it. Lawyers and local bar associations had long controlled civil calendars; prosecutors dictated criminal schedules; and a cadre of elected clerks, sheriffs, probation officers, and law-enforcement agencies all had some degree of control over case processing.<sup>112</sup> To a large extent,

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109. See generally THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989) (analyzing the fissures that led to the disintegration of the New Deal coalition); GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER (2022) (describing how, beginning in the 1970s, neoliberalism began to dominate American politics); DANIEL T. RODGERS, AGE OF FRACTURE (2011) (explaining how collective institutions gave way to a more individualized human nature in the 1980s).

110. On the ascent of neoliberalism during this period, see, for example GERSTLE, *supra* note 109, at 107-40, which explains that the neoliberal order “had enjoyed a remarkable decade of advance” during the 1970s.

111. See TOBIN, *supra* note 47, at 97-98. “Caseflow management” has lots of meanings, but it is often used to refer to a core set of techniques focused on “the scheduling of cases, the deployment of judicial resources, and the development and implementation of procedures for processing cases through a court until the point of disposition.” *Id.* at 187. The term first came into use in the late 1960s. *Id.*

112. See *id.* at 152, 187-88.

caseload management came to mean not just a set of techniques but also “a euphemism for assertion of judicial control over the process of dispute resolution.”<sup>113</sup>

Another key development—though its timing is hard to pinpoint—was a gathering consensus among court leaders that, with court dockets undergoing seismic shifts, procedures alone had grown insufficient to ensure fair and accurate decision-making.<sup>114</sup> Those docket shifts were slow-moving but powerful. In the three decades spanning roughly 1980 to 2010, state-court dockets came to be dominated by cases that, though smaller-scale and arguably less complex than other types of civil litigation, were decidedly high-stakes for many litigants: debt collections, evictions, mortgage-foreclosure actions, domestic-violence protection-order petitions, and child-support actions.<sup>115</sup> Basic docket descriptions help capture the shift and provide some further context. In 1980, contract and tort cases were neck-and-neck on state-court dockets. But just twenty-five years later, contract cases—most of them smaller debt and eviction matters<sup>116</sup>—dominated rapidly disappearing torts cases, accounting for nearly two-thirds of the total civil caseload.<sup>117</sup> Accompanying this seismic shift in the composition of court dockets was an equally stunning uptick in the share of cases in which at least one side was pro se—by 2015, in roughly three-quarters of all filed civil cases in state courts, at least one side lacked a lawyer<sup>118</sup>—and a related and similarly sharp increase in the share of cases ending in default judgment.<sup>119</sup>

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113. *Id.* at 188.

114. See Hannaford-Agor, *supra* note 14, at 4-6 (describing the development of court performance measures that addressed “[q]uality, accuracy, fairness, transparency, accessibility, and cost-effectiveness”).

115. See, e.g., Engstrom & Engstrom, *supra* note 41, at 149; HANNAFORD-AGOR et al., *supra* note 41, at 7, 17.

116. Median judgments in the contracts cases that now dominate state-court dockets dropped substantially from three decades ago. See, e.g., *How Debt Collection Works in Philadelphia’s Municipal Court*, PEW CHARITABLE TRS. 1 (Oct. 2022), <https://www.pew.org/-/media/assets/2022/10/how-debt-collection-works-in-philadelphias-municipal-court.pdf> [<https://perma.cc/BC7A-UBBL>] (finding that the median total judgment amount of debt-collection cases filed as small-claims cases in Philadelphia Municipal Court from 2013 to 2018 was \$2,182).

117. See HANNAFORD-AGOR et al., *supra* note 41, at iii.

118. See *id.* at iv; see also *Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts*, NAT’L CTR. FOR STATE CTS., at i-ii (2018), <https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf> [<https://perma.cc/CL7K-T5JH>] (reporting that, in domestic-relations cases, seventy-two percent of cases “involved at least one self-represented party”).

119. See Engstrom & Engstrom, *supra* note 41, at 149-50 (reviewing the empirics of these claims).

Many explanations have been offered for these dramatic docket developments, among them stagnant legal-aid funding,<sup>120</sup> rising rights consciousness,<sup>121</sup> and increasing economic precarity from decades of wage stagnation and the more recent fallout from the Great Recession and COVID pandemic.<sup>122</sup> Part of it, too, was a pre-AI digital revolution, as a new class of institutional plaintiffs—including corporate landlords and debt buyers in a securitized-consumer-credit industry—leveraged new technologies, much of it basic robotic-process automation, to assembly-line cases through the courts at lower and lower cost, and built sustainable business models around high-volume filing practices.<sup>123</sup> Whatever the precise contribution of these or other dynamics,<sup>124</sup> the double whammy of surging caseloads and a growing pro se crisis was, by the late 1990s, taxing already scarce court resources and setting off fire alarms among court leaders.<sup>125</sup> Lawyers could no longer be relied upon to tee up issues for a passive,

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120. See, e.g., David Reich, *Additional Funding Needed for Legal Service Corporation*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 1, 2021, 2:15 PM), <https://www.cbpp.org/blog/additional-funding-needed-for-legal-service-corporation> [<https://perma.cc/FZJ4-8UNK>] (explaining that the Legal Services Corporation received \$465 million in 2021 and, in inflation-adjusted dollars, received roughly \$1 billion in 1979). Legal-aid funding cannot, for a variety of reasons, explain what many see as a crisis in court and counsel access. See Engstrom & Engstrom, *supra* note 41, at 152–53.
121. See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 43, 147 (1994) (discussing Americans' shifting expectations regarding a legal entitlement to recompense for harms).
122. See generally JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2d ed. 2019) (using several measures to describe dramatic increases in Americans' short-term income volatility). On the effects of the COVID-19 pandemic on courts, see generally David Freeman Engstrom, *Post-COVID Courts*, 68 *UCLA L. REV. DISCOURSE* 246 (2020); and Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *COVID, Crisis, and Courts*, 99 *TEX. L. REV. ONLINE* 10 (2020).
123. See Wilf-Townsend, *supra* note 41, at 1708, 1719–20. In earlier work, one of us, reviewing the empirical evidence, concluded that technology has been an important and even central cause of growing access problems by fueling the “miniaturization of disputes,” making it less rational to defend. See Engstrom & Engstrom, *supra* note 41, at 161.
124. The availability of alternate fora may help explain the near disappearance of torts. Tort cases and more complex litigation, but not small-value contracts cases, are flowing to federal courts, while many other cases have been channeled away from courts via mediation, arbitration, and private online dispute resolution (ODR). See Hannaford-Agor, *supra* note 14, at 3, 13.
125. See JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON & JOAN GREEN, *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* 3 (1998). Worse, the globalization of commerce was placing increasing demands on courts, both federal and state. See Hannaford-Agor, *supra* note 14, at 3. Moreover, rapid advances in science and technology, from the biosciences to energy, spurred increases in both the quantity and complexity of cases, stretching court resources even thinner. See Hannaford-Agor, *supra* note 14, at 3.

neutral judge. And, in a civil-justice system awash in lawyerless litigants, complex court rules and procedures were more the problem than the solution.

Just as important to the growing managerial leanings of court leaders was a sharpening critique of public-sector lassitude and, relatedly, the ascendance of private-sector management techniques as a way to squeeze more value from public organizations.<sup>126</sup> Though far more modest than current cries to “starve the beast” of government or undo the administrative state, calls to “reinvent government” from both sides of the aisle reflected a gathering consensus that even the public sector should be run like a business.<sup>127</sup> As that consensus took hold, court leaders began to look to a wider array of techniques and controls, including “court rules, business practices, culture and governance, and staffing and technology infrastructure,” to address mounting challenges.<sup>128</sup>

At the federal level, as we have already seen, the creeping threat of a bureaucratized judiciary that extended from this new managerial zeitgeist spurred a response from Justice Powell and a chorus of other critics. Indeed, soon after Powell published his essay in the *ABA Journal*, then-Associate Justice Rehnquist delivered, in a dinner speech at the University of Kentucky, a clarion call to rid the federal courts of a proliferating “corps of law clerks, staff attorneys, settlement counsel, and screening and pro se clerks.”<sup>129</sup> If dramatic action were not taken, Rehnquist warned, the federal courts could soon come to resemble the “opinion writing bureaus’ which many major federal agencies rely upon.”<sup>130</sup>

Yet, even as this federal-level debate raged, state courts had already begun to develop an array of new managerial techniques to deal with their own mounting docket and other pressures. Drawing on new paradigms in management

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126. For a good overview, see generally Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152 (2015), which reviews PARRILLO, *supra* note 48.

127. See, e.g., DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 198-203 (1992) (suggesting that the profit motive may motivate better government); Charles S. Clark, *Reinventing Government—Two Decades Later*, GOV’T EXEC. (Apr. 26, 2013), <https://www.govexec.com/management/2013/04/what-reinvention-wrought/62836> [<https://perma.cc/46L8-WQZV>] (discussing the Clinton Administration’s National Performance Review).

128. Hannaford-Agor, *supra* note 14, at 3. In the early 1990s, those challenges included shrinking court budgets. See, e.g., Larry Polansky, *The Latest Budget Crisis: A Window of Opportunity*, 6 CT. MANAGER 27, 27 (1991).

129. William H. Rehnquist, Assoc. Just., Sup. Ct. of the U.S., Mac Swinford Lecture, University of Kentucky: “Are the True Old Times Dead?” 27 (Sep. 23, 1982) (on file with Hoover Inst. Archives, William H. Rehnquist Papers, Box 210, Folder 1).

130. *Id.*

studies,<sup>131</sup> leading court-administration groups began to turn from organizational reform and, in particular, the establishment and expansion of court administrative offices, to a focus on measuring and achieving outcomes. As “quality standards” and performance-measurement techniques long used in the private sector began to take hold in the public sector,<sup>132</sup> court administrators followed suit.<sup>133</sup>

A crucial early development in that progression came just one year after Justice Powell’s 1982 essay in *ABA Journal* with the creation of the first time standards for civil-case dispositions, as promulgated by the influential Conference of State Court Administrators.<sup>134</sup> More specific time standards from the ABA followed soon after.<sup>135</sup> Within a decade, those initial time standards had given way to broader “performance standards” that covered a much wider swath of case processing and court functioning, including judicial performance.<sup>136</sup> Responding to calls for more detailed and holistic evaluation frameworks, the National Center for State Courts and DOJ’s Bureau of Justice Assistance worked between 1987 and 1990 to develop “measurable performance standards for the nation’s general jurisdiction state trial courts.”<sup>137</sup> The resulting *Trial Court Performance*

131. See, e.g., David J. Saari, *Modern Court Management: Trends in Court Organization Concepts – 1976*, 2 JUST. SYS. J. 19, 19-20 (1976) (arguing that the 1974 ABA standards “show[ed] little understanding of modern management concepts often labeled ‘the open system perspective’” and remained wedded to “[t]he bureaucratic model or closed system perspective”); Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35, 42-50 (1976).
132. See Jarrett B. Perlow, *Courting Quality: A Survey of Quality Management Practices in American Courts*, 108 JUDICATURE 52, 57-58 (2024); OSBORNE & GAEBLER, *supra* note 127, at 138-42; Richard Y. Schauffler, *Judicial Accountability in the U.S. State Courts: Measuring Court Performance*, 3 UTRECHT L. REV. 112, 118 (2007).
133. See, e.g., ALEXANDER B. AIKMAN, TOTAL QUALITY MANAGEMENT IN THE COURTS 51 (1994); Alexander B. Aikman, *Total Quality Management in the Courts: The Time is Now*, STATE CT. J., Spring 1993, at 3, 5-6; Adam L. Fleischman & Alexander B. Aikman, *Total Quality Management: Where the Courts Are Now*, STATE CT. J., Summer/Fall 1993, at 17, 19 fig. 2; see also Russell R. Wheeler, *Roscoe Pound and the Evolution of Judicial Administration*, 48 S. TEX. L. REV. 943, 962-63 (2006) (describing the difference between organizational standards and performance standards); NAT’L CTR. FOR STATE CTS. & BUREAU OF JUST. ASSISTANCE, TENTATIVE TRIAL COURT PERFORMANCE STANDARDS 1 (1989) (“Until very recently, court reform has focused on the structures and machinery of the courts, not their performance . . .”).
134. See RICHARD VAN DUIZEND, DAVID C. STEELMAN & LEE SUSKIN, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 1, 3 (2011). More specifically, the Conference of State Court Administrators guidelines specified that nonjury civil cases should be disposed of within twelve months and jury trials should conclude within eighteen months. *Id.* at 3.
135. See STANDARDS RELATING TO CT. DELAY REDUCTION § 2.52 (A.B.A. 1985).
136. See GUIDELINES FOR THE EVALUATION OF JUD. PERFORMANCE (A.B.A. 1985).
137. See NAT’L CTR. FOR STATE CTS. & BUREAU OF JUST. ASSISTANCE, *supra* note 133, at v, 1.

*Standards* – the first large-scale effort to equip judicial policymakers with performance-measurement tools – contained twenty-two performance standards clustered in five areas: “access to justice,” “expedition and timeliness,” “equality, fairness, and integrity,” “independence and accountability,” and “public trust and confidence.”<sup>138</sup> The project also developed and field-tested measurement tools for self-assessment by state trial courts.<sup>139</sup> To overcome widespread concern among court leaders about the abuse of data-driven performance evaluations by court critics or political opponents, the new standards contained an explicit disclaimer that they were only to be used for “internal management.”<sup>140</sup>

The main barrier to adoption of these more complex performance measures, however, was not necessarily concern about politicization. A further problem was that few courts had sufficiently sophisticated technology or data infrastructures to collect and analyze the data needed to complete them.<sup>141</sup> Such was the guiding theory of CourTools, a set of ten simple-to-test performance measures focused on core court functions, including time to disposition, the collective age of the active pending caseload, the satisfaction of court employees, and the average cost of processing a single case.<sup>142</sup> Elements of the CourTools framework have, since its promulgation in 2005, been implemented in nearly every U.S. state.<sup>143</sup> In turn, court administrators have been encouraged to incorporate system-wide performance measurements into the daily operations of the courts.<sup>144</sup>

If anemic data infrastructure was part of the problem, then two further developments offered a partial solution. The first was a gradual upgrading of public-sector technology, as many courts replaced paper recordkeeping and clunky

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138. *Id.* at 1.

139. See George F. Cole, *Performance Measures for the Trial Courts, Prosecution, and Public Defense*, in BJS-PRINCETON PROJECT, NCJ 143505, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 86, 97 (Oct. 1993).

140. Schauffler, *supra* note 132, at 119.

141. See Hannaford-Agor, *supra* note 14, at 5.

142. See *CourTools*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/our-centers-projects/courtools> [<https://perma.cc/5QAG-8FY7>].

143. See Daniel J. Hall, *The Road to Court Excellence: Performance Measures to Performance Management*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 283, 288 (Peter M. Kelling ed., 8th ed. 2016).

144. Thomas M. Clarke, Richard Y. Schauffler, Brian J. Ostrom, Charles Ostrom & Roger A. Hanson, *A Unifying Framework for Court Performance Measurement*, NAT'L CTR. FOR STATE CTS. 3-5 (May 2008), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1079> [<https://perma.cc/ACL9-TZAH>].

databases with more advanced systems.<sup>145</sup> For instance, a 1984 study of the LASC concluded that because the “register of actions in each case is kept by hand in voluminous log books,” “[s]ystematic individual case tracking is not possible in Los Angeles.”<sup>146</sup> By contrast, new digital case-management systems – applications that allowed for the viewing of case metadata, case processing, and calendaring in a single place – could enable active case management and efficient calendaring.<sup>147</sup> Although “rudimentary case-management systems” had existed since the 1970s,<sup>148</sup> a new generation of technology, combined with a private industry offering off-the-shelf management systems and e-filing platforms, began to give courts a synoptic view of operations and output.<sup>149</sup> By 2005, most major court systems also had IT departments that, while hardly Silicon Valley operations, at least boasted dedicated personnel focused on the collection and analysis of data.<sup>150</sup> Many case-management systems now include dashboards that allow

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145. David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DEPAUL L. REV. 171, 173 (2023). To be sure, there was (and is) variation in the technological sophistication of state courts. See James Pauli, *Technology and Case-Management Systems*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, *supra* note 143, at 345, 353-54 (“Many courts are still developing electronic [case-management] environments with electronic documents.”).
146. See MOLLY SELVIN & PATRICIA A. EBENER, *MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* 119 (1984).
147. See, e.g., *Court Technology Reports, 1990*, NAT’L CTR. FOR STATE CTS., at vii-viii (1991), <https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/201> [<https://perma.cc/8FX8-SQ33>] (describing nine automated management systems in use in various state courts by 1990); Kristina Valez, *Developing a Case Management System: What You Need to Know*, CT. MANAGER, Winter 2013-2014, at 27, 28 (describing how CMSs allow for active management and measurement).
148. See Pauli, *supra* note 145, at 353.
149. See, e.g., J. Michael Greenwood & Gary Bockweg, *Insights to Building a Successful E-Filing Case Management Service: U.S. Federal Court Experience*, 4 INT’L J. CT. ADMIN. 1, 2 (2012) (describing how an early case-management and e-filing prototype was created for the federal courts in 1995, and noting that eighty percent of federal courts had fully implemented e-filing and digital case management by 2005); *Case Study: E-filing Transforming Colorado Courts*, LEXISNEXIS (2005), [https://www.courts.state.co.us/userfiles/File/Administration/JBITS/Colorado\\_Case\\_Study\\_070605.pdf](https://www.courts.state.co.us/userfiles/File/Administration/JBITS/Colorado_Case_Study_070605.pdf) [<https://perma.cc/9DDT-D9FM>] (describing Colorado’s “public-private partnership” to adopt LexisNexis’s e-filing system statewide in 2005).
150. To be sure, the current landscape of disjointed and antiquated technology systems and decentralized governance means that some courts still lack a comprehensive view of even their own operations and outputs, limiting their ability to self-scrutinize and improve policies and practices. But technical capacity is growing rapidly. Many major court systems had dedicated IT personnel by the mid-2000s. See, e.g., *A HISTORY OF THE CONFERENCE OF STATE COURT ADMINISTRATORS, 1955-2005*, at 57 (Nov. 2005) (noting that court IT officers formed a national organization in 2005, made up of state-level IT directors and trial-court IT managers); Ronald G. Overholt, Christine M. Hansen, Stephen H. Nash & Ruben Gomez, *Annual Report*

court executives to track performance measures in real time, including “clearance rates, age of active pending caseload, . . . collection of monetary penalties, and cost per case.”<sup>151</sup> As we note repeatedly below, this access to knowledge has over time “shifted power away from individual jurists toward court executives and other staff members,” who exercise control over new management technology.<sup>152</sup>

The other key development was just as important, but easy to overlook. The 1990s saw a radical shift in the ways that courts elicit information from litigants. Under the classical model of adversarialism, litigants enjoy wide latitude in the construction and content of pleadings and papers, so long as those filings comply with applicable pleading or formatting rules. However, as the pro se crisis mounted, courts increasingly adopted “forms” – that is, standardized, fillable documents that a litigant need only populate – for pleadings and papers, particularly in high-volume litigation areas featuring large numbers of self-represented litigants.<sup>153</sup> Cheered by access-to-justice advocates, and also sharply critiqued for draining the adversarial process of its flexibility and compromising norms of court impartiality and neutrality, courts’ widespread adoption of forms marked a watershed moment for court managerialism.<sup>154</sup> With forms came

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of *Trial Court Expenditures for Fiscal Year 2004-2005*, JUD. COUNCIL CAL. attach. 1 (Dec. 1, 2006), <https://courts.ca.gov/sites/default/files/courts/default/2024-12/120106item6.pdf> [<https://perma.cc/WYU6-K2WQ>] (noting expenditures on a chief information officer and support personnel); Performance Audit Div., *Arizona Supreme Court Administrative Office of the Courts – Information Technology and Fare Program*, ARIZ. OFF. AUDITOR GEN. 3 (Aug. 2006), [https://www.azauditor.gov/sites/default/files/2023-11/06-o8\\_o.pdf](https://www.azauditor.gov/sites/default/files/2023-11/06-o8_o.pdf) [<https://perma.cc/SKH8-GABN>] (noting positions within Arizona’s Administrative Office of the Courts Information Technology Division); *Florida State Courts Annual Report 2005-2006*, FLA. STATE CTS. 34-35 (2006), [https://flcourts-media.flcourts.gov/content/download/218134/file/annual\\_report0506.pdf](https://flcourts-media.flcourts.gov/content/download/218134/file/annual_report0506.pdf) [<https://perma.cc/VC7R-PSZG>] (describing activity of the Information Systems Services division of the Florida Office of State Courts Administrator).

151. James E. McMillan, John T. Matthias & Matt Kleiman, *Court Case Management Systems Part 17: Dashboards*, NAT’L CTR. FOR STATE CTS. CT. TECH. BULL. (May 25, 2015), <https://court-techbulletin.blogspot.com/2015/05/court-case-management-systems-part-17.html> [<https://perma.cc/9L2U-R26E>]; see Pauli, *supra* note 145, at 357; Interview with Daniel Sturtevant, Data Officer, Div. of Rsch. & Stat., Admin. Off. of the Cts., State of Ky. (June 25, 2025) (describing a statewide dashboard system for judges and court staff that features “pending case” statistics).
152. See James A. Gazell, *The Current Status of State Court Reform: A National Perspective*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT*, *supra* note 48, at 79, 94.
153. Civ. Just. Improvements Comm., *Call to Action: Achieving Justice for All*, NAT’L CTR. FOR STATE CTS. 34, 37 (2016), <https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf> [<https://perma.cc/D8WT-EZ9E>] (calling for “[s]tandardized forms,” including “online ‘intelligent forms’”); Daniel W. Bernal, *Pleadings in a Pandemic: The Role, Regulation, and Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 635-40 (2021) (highlighting judicial and legislative reforms).
154. Hannaford-Agor, *supra* note 14, at 8-10 (recounting initial adoption of forms and arguments for and against their adoption).

standardization of case information, bringing data analytics within closer reach for courts lacking the technical capacity to perform substantial data manipulations on their own. By standardizing the information in pleadings and papers and making data capture far easier, the “forms” revolution that swept through a large swath of the civil-justice system, particularly high-volume dockets like eviction, debt, and certain areas of family law, helped to power a quantum leap in the data transparency that, while not a form of managerialism in itself, is a precondition of its practice.<sup>155</sup>

Alongside growing court data and data-analytic capacity came a final and powerful shift in mindset and approach. As court leaders were pressed into an ever more systemic and synoptic mindset, a rough consensus began to form around a new set of managerial approaches that treated cases in bulk. Chief among them was “differentiated case management,” or DCM, rooted in the notion that not all cases require the same procedural treatment and that justice can be administered more efficiently by tailoring court resources by case type or case features.<sup>156</sup> Rather than having judges make management decisions case by case, cases could and should be assigned to different tracks based on readily determinable features, with different timelines, procedures, and levels of judicial involvement.<sup>157</sup> In 1988, Connecticut became the first jurisdiction to adopt DCM

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155. This standardization had other practical effects as well. As the use of forms, combined with e-filing, effectively automated clerks’ traditional data entry and case-file manipulation tasks, court staff were freed to pursue managerial efforts. See, e.g., Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, in *FUTURE TRENDS IN STATE COURTS 2011: SPECIAL FOCUS ON ACCESS TO JUSTICE* 146, 149 (Carol R. Flango, Amy M. McDowell, Charles F. Campbell & Neal B. Kauder eds., 2011) (describing the revision of job descriptions for clerk staff in Utah to emphasize case management and litigant support, and describing the reorganization of clerks into “cross-trained teams” to “move cases forward”).
156. See, e.g., SELVIN & EBENER, *supra* note 146, at 119 (recommending establishing a civil-litigation case-tracking system); Holly Bakke & Maureen Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 *JUDICATURE* 17, 18-19 (1990); Caroline S. Cooper, Maureen Solomon, Holly Bakke & Thomas Lane, *BJA Differentiated Case Management (DCM) Demonstration Program: Overview and Program Summaries*, *AM. UNIV.* 4 (Feb. 1992) [hereinafter Cooper et al., *Program Summaries*], <https://www.ojp.gov/pdffiles1/Digitization/150071NCJRS.pdf> [<https://perma.cc/T3FA-46ZW>]; Caroline Cooper, Maureen Solomon & Holly Bakke, *Differentiated Case Management: Implementation Manual*, *BUREAU OF JUST. ASSISTANCE* 3 (June 1993) [hereinafter Cooper et al., *Implementation Manual*], <https://www.ojp.gov/pdffiles1/Digitization/142416NCJRS.pdf> [<https://perma.cc/F9CD-MMWJ>]; James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, *RAND* 11-12 (1996), [https://www.rand.org/pubs/monograph\\_reports/MR800.html](https://www.rand.org/pubs/monograph_reports/MR800.html) [<https://perma.cc/5XKZ-JQLM>].
157. See Leonidas Ralph Mecham, *The Civil Justice Reform Act of 1990: Final Report*, 175 *F.R.D.* 62, 90-91 (1997); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the One Size Fits All Assumption*, 87 *DENV. U. L. REV.* 377, 394 (2010); Kakalik et al., *supra* note 156, at 11.

statewide, but it was not the last.<sup>158</sup> As increasingly “datafied” courts have gained a synoptic view of their throughput and a systems-engineering mindset to match, differentiated case treatment has become conventional wisdom among court administrators and reform advocates.<sup>159</sup> As detailed in Part II’s present-day survey of court managerialism, many American courts now run complex, technology-enabled traffic-control operations to route cases to an increasingly elaborate set of procedural and case management “pathways.”<sup>160</sup>

By 2010, when the National Center for State Courts published its *High Performance Court Framework*, many courts were already in the regular business of conducting self-assessments, identifying systemic strategies for improvement, and deploying data to support court budget requests or parry legislative concerns about performance. With growing court data capacities serving the dual purpose of measuring and managing performance and also making possible a growing array of tailored and “differentiated” processing and adjudicative techniques,<sup>161</sup> managerialism was officially in full flower.

### C. Managerialism’s Current Frontier

A quarter of the way into the twenty-first century, two powerful forces are bearing down on American courts, inaugurating what may well be a third distinct era of court managerialism. First, concern about access to justice has roared onto legal and political radars as the statistical fruits of courts’ increasing data transparency over their own operations have filtered out into the world. With access-to-justice issues no longer only the stuff of conferences of legal-aid

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158. See Gazell, *supra* note 152, at 95; Erick B. Low, *State of the Judiciary*, in 27 COUNCIL OF STATE GOVS., THE BOOK OF THE STATES 146, 149 (1988); see also Cooper et al., *Program Summaries*, *supra* note 156, at 1, 25-26 (describing DCM’s origins in experiments in New Jersey and DCM pilot projects in various jurisdictions from 1988 to 1991).

159. In 2016, the Conference of Chief Justices’ Call to Action formalized the pathways approach as a foundational element of modern civil-justice reform. See Civ. Just. Improvements Comm., *supra* note 153, at 18-29; see also Mecham, *supra* note 157, at 92 (“The DCM concept may provide its greatest benefits by offering standardized case management procedures to those plaintiffs whose claims are the least amenable to more formal adversarial procedures and whose litigation dollars are most limited.”); Inst. for the Advancement of the Am. Legal Sys., *21st Century Civil Justice System: A Roadmap for Reform*, UNIV. DENV. 6 (2009), <https://www.uscourts.gov/file/document/iaals-roadmap-reform-civil-caseflow-management-guidelines> [<https://perma.cc/6NXQ-9YYU>] (“Differentiated case management (DCM) is one of the basic methods used by those courts identified as having successful caseflow management programs.”); Carolyn B. Kuhl & William F. Highberger, *A Unified Theory of Civil Case Management*, 107 JUDICATURE 35, 38 (2023) (noting that adoption of DCM has been “strongly reiterated in more recent civil justice reform efforts”).

160. See *infra* notes 205-217 and accompanying text.

161. See Hall, *supra* note 143, at 285, 291-92.

lawyers and clinical law professors or peripheral, court-created “Justice for All” commissions and committees, even the crusty American Law Institute has entered the fray.<sup>162</sup>

The second potent force is stunning and continuing advances in AI. For many advocates, generative AI holds enormous access-widening potential because of its ability to perform two critical tasks that are necessary to serve self-represented litigants directly. First is *translation*: generative AI tools can be a leap forward in converting legalese into plain language<sup>163</sup> – an essential ingredient of any litigant-facing system. Just as important, generative AI can potentially perform *mapping*: parsing lay narratives – a plain-language explanation of a legal problem – and then mapping them to legal ontologies<sup>164</sup> and procedural steps. Given the rate at which generative AI technologies are advancing, it is prudent to consider the potential for these tools to offer millions of self-represented litigants, in an unmediated, “direct-to-consumer” way, actionable advice on options and outcomes – the core of what lawyers do.<sup>165</sup>

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162. See *Principles of the Law, High-Volume Civil Adjudication*, A.L.I., <https://www.ali.org/project/high-volume-civil-adjudication> [<https://perma.cc/38YU-9RZW>]. In addition, the past decade has seen high-profile projects at the American Academy of Arts and Sciences and the Conference of Chief Justices. See *Justice: Legal Services for the 21st Century*, AM. ACAD. ARTS & SCIS. (2024), <https://www.amacad.org/project/making-justice-accessible> [<https://perma.cc/B66R-KXLP>]; Civ. Just. Improvements Comm., *supra* note 153. Additional high-profile projects include the ongoing spadework of the Legal Services Corporation, the Self-Represented Litigant Network, Pew’s Courts and Communities Project, and (for now) a revitalized Office for Access to Justice at the United States Department of Justice. See SELF-REPRESENTED LITIG. NETWORK, <https://www.srln.org> [<https://perma.cc/2KHA-YXUP>]; *Courts & Communities*, PEW, <https://www.pew.org/en/projects/courts-and-communities> [<https://perma.cc/2ASR-6FH4>]; *Office for Access to Justice*, U.S. DEP’T JUST., <https://www.justice.gov/atj> [<https://perma.cc/AQ87-JABR>].
163. Colleen V. Chien & Miriam Kim, *Generative AI and Legal Aid: Results from a Field Study and 100 Use Cases to Bridge the Access to Justice Gap*, 57 LOY. L.A. L. REV. 903, 910, 943 (2024); Aubrie Souza & Zach Zarnow, *Court Chatbots*, NAT’L CTR. FOR STATE CTS. 4-7 (2024), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0032/97187/Court-Chatbots.pdf](https://www.ncsc.org/__data/assets/pdf_file/0032/97187/Court-Chatbots.pdf) [<https://perma.cc/FZ8A-WSRD>].
164. Hannah Westermann et al., *Bridging the Gap: Mapping Layperson Narratives to Legal Issues with Language Models*, 2023 PROCS. 6TH WORKSHOP ON AUTOMATED SEMANTIC ANALYSIS INFO. LEGAL TEXT 37, 38-39.
165. One account of what is currently taking place within American courts is the digitization of a wide range of analog, bricks-and-mortar self-help programs and policies, such as self-help centers, court “navigators,” and paper “forms” that were first set into place by pioneering courts in the 1990s to address a mounting pro se problem. See David Freeman Engstrom, Ayelet Sela & Natalie Knowlton, *Courthouse AI and Access to Justice in the United States*, in DIGITAL COURTS: INTEGRATING HUMAN AND ARTIFICIAL INTELLIGENCE 361, 379 (Fernando Esteban de la Rosa, Nuria Marchal Escalona & Pablo Cortes eds., 2025) (noting the process of “transitioning courts’ analogue self-help services into new digitised forms”); see also A.L.I.,

Easy to overlook, however, is how litigant-facing AI—from chatbots to increasingly sophisticated digital interfaces that assist self-represented litigants in the construction and filing of pleadings and papers—will also add to the mountains of data on which many courts already sit. After all, litigant-facing AI tools both *provide* information to parties and also *elicit* it—a point that has been made well in the context of “online courts,” particularly increasingly sophisticated online dispute-resolution (ODR) platforms.<sup>166</sup>

Also easily overlooked is AI’s immense power to drive internal, court-facing applications.<sup>167</sup> A prime example, and an especially unsung one, is that courts have begun to adopt document-analysis AI tools, or “document AI,” to classify e-filed documents, extract information from tagged fields, and docket the information in the case-management system with a lower error rate than human clerks.<sup>168</sup> Here and elsewhere, AI may have the potential to improve data quality by identifying and correcting errors. Perhaps more important, and one of the most important features of LLMs, is AI’s ability to exploit what was previously low-value data—the unstructured, text-heavy records that courts generate but cannot analyze at scale—by imposing structure on this sea of words.<sup>169</sup>

Other frontier examples of courthouse AI sit closer to the managerial turn. Indeed, AI is already being deployed to automate some core managerial techniques that, as already noted, have become a focus among court leaders. For

*High-Volume Civil Adjudication Program, 2025 Annual Meeting*, at 17:30 (Vimeo, May 20, 2025), <https://media.ali.org/annual-meeting/high-volume-civil-adjudication-program-2025-annual-meeting> [<https://perma.cc/DJH5-F3WZ>] (address of David Freeman Engstrom, Professor, Stan. L. Sch.) (“Back in the 1990s when judges and court administrators began to notice a substantial uptick in the number of pro se litigants in state courts, courts began to build out a suite of self-help programs. This included self-help centers, court navigator programs, . . . and standardized forms for pleadings and papers. But now we’re in the age of AI, and so courts are in the process of digitizing all of those analog, bricks-and-mortar, and paper offerings.”). For a more skeptical view of the ability of third-party “legal tech” providers to build scalable business models serving self-represented litigants, see David Freeman Engstrom & Jess X. Lu, *The Puzzle of Anemic “Legal Tech” and the Future of Legal Services*, in *RETHINKING THE LAWYERS’ MONOPOLY: ACCESS TO JUSTICE AND THE FUTURE OF LEGAL SERVICES* 173, 175 (David Freeman Engstrom & Nora Freeman Engstrom eds., 2025).

166. ODR platforms, where disputants can gather and asynchronously attempt to bargain their way to a settlement, may increase the *systemic* transparency of courts even if they reduce case-level transparency. See RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* 198–200 (2019); see also Engstrom, *supra* note 31, at 2280–81 (elaborating on this idea); *infra* Section II.B.2 (same).
167. See Engstrom et al., *supra* note 165, at 361, 364–67.
168. Andrea L. Miller et al., *AI Readiness for the State Courts*, NAT’L CTR. FOR STATE CTS. 75–78 (Sep. 2025), [https://www.ncsc.org/sites/default/files/media/document/AI\\_Readiness\\_for\\_the\\_State\\_Courts\\_2025.pdf](https://www.ncsc.org/sites/default/files/media/document/AI_Readiness_for_the_State_Courts_2025.pdf) [<https://perma.cc/BJ77-637R>].
169. See Karen Yeung, *Algorithmic Regulation: A Critical Interrogation*, 12 *REGUL. & GOVERNANCE* 505, 505 (2018).

instance, numerous courts have begun to pilot AI tools that can assist in allocating cases to distinct procedural and case-management “pathways” based on identifiable features such as case complexity, litigant characteristics, and remedies sought—a use case profiled in Section II.A.2.<sup>170</sup> Similarly, a number of pioneering courts have begun to prototype AI tools that can assist courts in reviewing pleadings to detect noncompliance with procedural and substantive requirements, a development described in Section II.A.3.

To be sure, challenges will arise as courts enter the AI age. Fully leveraging AI’s potential will depend on better data infrastructure than most courts currently have, even after the leap forward described in Section II.B.<sup>171</sup> As detailed elsewhere, looking across the roughly 16,000 local-court jurisdictions in the United States reveals a checkerboard of different (and often antiquated) technology systems and data infrastructures. Importantly, this checkerboard also takes *intra*jurisdictional forms, with multiple and disconnected case-management and data systems, born of the ad hoc, incremental, and procurement-driven nature of much recent court digitization, making it difficult or even impossible for courts to pursue system-level managerial projects. The result is that court data in many jurisdictions are notoriously “incomplete, inaccurate, dirty, and disorganized,” rendering courts a data- and information-poor environment.<sup>172</sup>

Even so, it seems impossible to conclude that accelerating efforts to incorporate AI into court operations will not quicken the managerial turn.<sup>173</sup> The far

170. See Email from David Yamasaki, Ct. Exec. Officer, Super. Ct. of Cal., Cnty. of Orange, to David Freeman Engstrom, LSVF Professor of Law, Stan. L. Sch. (May 29, 2025) (on file with authors); *AI Software Gives Boost to Diversion Programs*, NAT’L CTR. FOR STATE CTS. (June 25, 2025), <https://www.ncsc.org/resources-courts/ai-software-gives-boost-diversion-programs> [<https://perma.cc/HAJ7-3NHC>]; *NCSC and AAA® Launch AI-Enhanced Court Diversion Platform*, AM. ARB. ASS’N (June 30, 2025), <https://www.adr.org/press-releases/ncsc-and-aaa-launch-ai-enhanced-court-diversion-platform> [<https://perma.cc/L6EJ-SG29>]; Clarke & Flango, *supra* note 155, at 146; Kuhl & Highberger, *supra* note 159, at 35; see also Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859, 878-86 (2011) (theorizing a “tech-enabled gateway” to triage cases and litigants and refer each to appropriate services).
171. Charlotte S. Alexander & Lauren Sudeall, *Creating a People-First Court Data Framework*, 58 HARV. C.R.-C.L. L. REV. 731, 737 (2023).
172. Tanina Rostain & Amy O’Hara, *The Civil Justice Data Gap*, in *LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* 368, 370 (David Freeman Engstrom ed., 2023).
173. One court-administration group, for instance, warns that, because self-represented litigants’ use of generative AI tools will inundate courts with AI-suggested legal citations, courts will need to further grow the judicial bureaucracy “to assist judges in evaluating legal citations for their relevance and weight.” *Generative AI and the Future of the Courts: Responsibilities and Possibilities*, CONF. STATE CT. ADM’RS 9 (Aug. 2024), <https://cosca.ncsc.org/resources-courts/>

more likely outcome is that the coming of AI to American courthouses may embolden and accelerate the managerialist ethos apparent in the first two eras.

## II. THE NEW MANAGERIALISM: AN ANATOMY

Only a decades-long mix of political, economic, and cultural forces could induce a tectonic shift in the organization and operation of American courts on the scale of the managerial turn. However, at the close of the first quarter of the twenty-first century, court managerialism is gaining new momentum and has begun to crystallize into discrete managerial techniques, tools, and processes. This Part is situated in the present and maps this new and still-emerging managerial landscape. Section II.A defines and briefly illustrates three categories of court action within the current managerial turn: (1) managerialism as personnel management, (2) managerialism as systemic administration, and (3) managerialism as quality control. Section II.B then steps back and, armed with Section II.A's taxonomy and concrete examples, sketches four cross-cutting features of the new managerialism to fill out its contours. These include (1) the standardization and filtering of information flows, (2) shifts in bureaucratic authority and control, (3) a new internal separation of powers, and (4) the development of an informal, internal law of judicial administration. Section II.C offers some preliminary observations in advance of Part III's normative analysis.

### A. Modes

Dictionary definitions frame “managerialism” as any effort to manage a problem through bureaucratic means.<sup>174</sup> Academics go deeper, equating managerialism with a growing ideological faith in a set of domain-spanning professional knowledges, practices, and techniques that took shape in the 1970s and 1980s. Strategic planning to set organizational objectives, human-resource management to secure employee commitment, and data-based performance metrics to track inputs and outputs were all held up as the best way to optimize the performance of *any* organization, private or public.<sup>175</sup>

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generative-ai-and-future-courts-responsibilities-and-possibilities-august-2024 [https://perma.cc/X46Q-WX2V].

174. See, e.g., *Managerialism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/managerialism> [https://perma.cc/X29D-NG44].

175. See Eugene McLaughlin & Karim Murji, *Lost Connections and New Directions: Neo-liberalism, New Public Managerialism and the 'Modernization' of the British Police*, in *CRIME, RISK AND JUSTICE* 104, 109 (Kevin Stenson & Robert R. Sullivan eds., 2001) (defining managerialism as “a complex, often contradictory set of post-bureaucratic professional knowledges, practices

Applied to courts, either of these high-level definitions can usefully distinguish techniques, tools, and processes overseen by court administrators applying management expertise from judge-centered, case-by-case, individuated adjudication at the heart of the “classical” conception of the judicial role.<sup>176</sup> But high-level definitions provide little traction beyond drawing that judge-versus-bureaucracy contrast, as they tend to encompass virtually any effort by modern courts to conduct the business of processing and adjudicating cases.

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and techniques drawn from a wide variety of sources (reinventing government, new public administration, new wave management, human resource management, postmodern organizational theory)”; Thomas Klikauer, *What Is Managerialism?*, 41 *CRITICAL SOCIO.* 1103, 1103-04 (2013) (describing “managerialism” as a “deeply ideological project” and defining it as “a belief that organizations have more similarities than differences and thus the performance of all organizations can be optimized by the application of generic management skills and theory” (quoting *Managerialism*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Managerialism> [<https://perma.cc/WWS6-MUE3>])). See generally WILLARD F. ENTEMAN, *MANAGERIALISM: THE EMERGENCE OF A NEW IDEOLOGY* (1993) (tracking the growth of “managerialism” in the 1970s and 1980s).

176. See *infra* Part III.

**TABLE 1. THREE MODES OF COURT MANAGERIALISM**

<b>Managerial Mode</b>	<b>Overview</b>	<b>Examples</b>
<b>Personnel Management</b>	Assignment of court personnel, or combinations of court personnel, to tasks to optimize the processing, management, and adjudication of cases.	Civil case-management teams and other “teaming” approaches; delegation of tasks to nonjudicial actors – e.g., “civil case managers,” “judges pro tempore,” clerk-issued default judgments, and default “prove-ups.”
<b>Systemic Administration</b>	Coordinated, standardized, and/or “bulk” management, movement, and processing of cases to set priorities, allocate court resources (particularly judicial attention), and achieve desired policy goals, such as efficiency, access, and equity.	Tailored procedure and case-management “pathways” to match process and court resources to case needs; form-based pleadings; and case calendaring and clustering, such as “just-in-time” assignment of judges to trials.
<b>Quality Control</b>	Techniques, structures, and programs conducted outside the traditional appellate process designed to ensure that adjudicated outcomes are accurate, consistent, and aligned with legal requirements.	Nonappellate review processes (e.g., default “prove-ups”); performance monitoring (e.g., judge performance evaluations, court audits) and decision-making support tools (e.g., “bench cards,” decision templates, trainings, dashboards); and settlement oversight and governance.

As reflected in Table 1, this Section takes a different and more concrete definitional tack, mapping the managerial turn among American courts to three overlapping categories of action: (1) managerialism as personnel management; (2) managerialism as systemic administration; and (3) managerialism as quality control. Each is elaborated in turn.

### 1. *Managerialism as Personnel Management*

A central pillar of the current managerial turn entails shuffling and reshuffling court personnel to leverage and, in many instances, combine the talents of judges, administrators, technologists, and clerks (including the in-chambers “elbow” sort and the more generalist “clerk-office” sort). This is done to optimize the processing, management, and adjudication of cases.

A signature example is “teaming,” in which judges and court staff are organized into “civil case-management teams”—or CCMTs in the acronym-rich world of court administration—to monitor and control case progress from filing to disposition.<sup>177</sup> An early version came in the 1990s when the Philadelphia Court of Common Pleas, in response to mounting public concern and pressure from the Pennsylvania Supreme Court about case backlogs that were some of the worst among major municipal courts, implemented, by way of court order, a “[j]udicial [t]eam” structure as the centerpiece of a major restructuring of its operations.<sup>178</sup> At the heart of this reform package sat teams of judges, with one judge designated a “team leader” and vested with exclusive authority to manage case progress, hold mandatory scheduling conferences, hear pretrial motions, and assign cases to rank-and-file judges in a “just-in-time” manner when they failed to settle or otherwise resolve in the run-up to trial.<sup>179</sup> Another key

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177. See Hannaford-Agor, *supra* note 22, at 1 (referring to civil case-management teams (CCMTs) as “a radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff supported by effective case technology”); see also Brittany K.T. Kauffman & Natalie Anne Knowlton, *Redefining Case Management*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 20 (Apr. 2018), [https://iaals.du.edu/sites/default/files/documents/publications/redefining\\_case\\_management.pdf](https://iaals.du.edu/sites/default/files/documents/publications/redefining_case_management.pdf) [<https://perma.cc/UV3G-RKGX>] (describing case management as a “team sport”).
178. See General Court Regulation No. 95-2, at 2, (Phila. Ct. C.P. Dec. 15, 1995), reprinted in Lisa M. Rau, *The Philadelphia Experiment in Civil Case Management: Journey from Disaster to Model Court* 180, 182 (2019) (M.J.S. dissertation, University of Nevada) (ProQuest). By some measures, Philadelphia was second to last in terms of efficiency among the largest urban state courts. See John Goerdt, Brian J. Ostrom, David B. Rollman, Robert C. LaFountain & Neal B. Kauder, *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 STATE CT. J., no. 1, 1995, at 45 app. 8 (presenting a table of time to disposition for jury-trial cases); Rau, *supra*, at ii n.1 (“In Philadelphia, civil jury cases had a median time to disposition of 5.2 years, with 88.5% taking more than two years; 71.1% taking more than four years; and 25% taking 7.8 years or longer.” (citing Goerdt et al., *supra*, at 45 app. 8)).
179. Hannaford-Agor, *supra* note 14, at 10 (quoting David Steelman, *Civil Programs in the Philadelphia Court of Common Pleas*, NAT’L CTR. FOR STATE CTS. 58 (Sep. 2004), <https://courts.phila.gov/pdf/report/NSCS-Civil-Final-Report.pdf> [<https://perma.cc/EKC5-X6XX>]); see also Rau, *supra* note 178, at 34-35 (“The Team Leader was the only judge with authority to manage the schedule of trials and to manage case progress.”). Team-leader judges were assigned for all major civil jury cases filed in a particular year, all nonjury cases and arbitration

component of Philadelphia's judicial-team structure was a corps of newly minted "civil case managers," who worked alongside judicial team leaders and performed numerous critical tasks, such as triaging cases upon intake by assigning them to procedural and case-management tracks (part of the "pathways" approach elaborated in Sections II.A.2 and II.B.1), presiding over case-management conferences, and entering case-management orders.<sup>180</sup> Rounding out the new judicial teams were "judges pro tempore," "temporary" judges drawn from the ranks of experienced lawyers within the local bar and authorized to hold settlement conferences. Upon stipulation of the parties, they preside over trials, including hearing arguments, ruling on pretrial and trial motions, and issuing sanctions.<sup>181</sup> Under this teaming approach, a case without dispositive motions or discovery disputes might not come before an actual judicial officer until many months into the litigation, first at a pretrial conference, presided over by the judicial team leader, and then at trial itself, presided over by a *different* judge selected by the judicial team leader from a pool just before the trial date.

Many teaming efforts do not embrace a full judicial "team leader" structure of the Philadelphia sort but instead build teams of court staff around each individual judge, often leveraged with technology. As an example, in the years following the foreclosure-focused docket-clearing efforts profiled previously,<sup>182</sup> Florida's Eleventh Judicial Circuit launched an effort to design, implement, and

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appeals, and all mass tort cases. Rau, *supra* note 178, at 40-41, 199 app. F (organizational chart of team leaders). Judge team leaders must also make a critical determination as to whether a case receives a definite trial date or a designated month, within which an attorney must be prepared to try a case with one day's notice. *Id.* at 48-49.

180. See General Court Regulation No. 95-2, *supra* note 178, at 2 ("The Case Management Conference shall be conducted by a Civil Case Manager designated by the Court, acting on behalf of the Day Forward Judicial Team Leader."); Rau, *supra* note 178, at 39 (noting that civil case managers "preside[]" over case-management conferences and "discuss[]" with all counsel the type of case, its unique features, and any early steps that are incomplete such as service or joinder"). By the 2000s, each judicial team leader was assigned at least one civil case manager and a court administrative officer to perform pretrial tasks. See David Steelman, *Civil Programs in the Philadelphia Court of Common Pleas*, NAT'L CTR. FOR STATE CTS. 20 (Sep. 2004), <https://courts.phila.gov/pdf/report/NSCS-Civil-Final-Report.pdf> [<https://perma.cc/EKC5-X6XX>].
181. See Judge Pro Tempore Program, No. 02 of 1993, at 1-3 (Phila. Ct. C.P. Aug. 26, 1993), *reprinted in* Rau, *supra* note 178, at 201-03 (describing the authority of judges pro tempore); see also Milo Geyelin, *Lawyers Serve Time on Bench in Philadelphia*, WALL ST. J., Apr. 8, 1993, at B1 (commenting on Philadelphia's program); Rau, *supra* note 178, at 35 (describing judges pro tempore as "[e]xperienced lawyers from the bar"); Rau, *supra* note 178, at 47, 63 (noting that judges pro tempore must "have at least 10 years of experience" and are selected "only if [judicial leaders] considered them talented, experienced, and respected"). According to Rau, judges pro tempore resolved approximately thirty percent of cases that came before them. Rau, *supra* note 178, at 47.
182. See *supra* notes 10-17 and accompanying text.

institutionalize a “teaming” approach across its entire civil division. At the heart of that effort were CCMTs with four distinct tiers of processing and oversight, including a judge, one or more civil case managers, a judicial assistant, and a bailiff. Each of the nonjudicial staff tiers had defined roles and tasks proportional to their skill and training, such as performing case intake and assigning cases to procedural and case-management tracks, reviewing substantive and dispositive motions, recommending rulings, drafting case-management plans, and preparing and monitoring compliance with court orders.<sup>183</sup> Major courts across at least a dozen more states have adopted similar teaming approaches, with an announced goal of reserving “judicial attention” for only those tasks requiring a judge’s unique training and expertise.<sup>184</sup>

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183. See Hamblin & Hannaford-Agor, *supra* note 12, at 2; Hannaford-Agor, *supra* note 14, at 10 (describing the team structure as “four distinct tiers of processing and oversight: technology, clerical staff, skilled (professional) staff, and judicial staff”).
184. An incomplete list of states with teaming approaches featuring case managers and other nonjudicial staff in the general civil context includes: Alaska, Arizona, California, Georgia, Illinois, Kansas, Maryland, New Hampshire, New Jersey, Ohio, Oregon, Texas, Utah, and Vermont. See, e.g., *Annual Report to the Chief Justice, Governor, and Legislature*, UTAH JUD. COUNCIL 9 (2025), <https://www.utcourts.gov/content/dam/court-records-publications/publications/court-publications/court-reports/2025-CourtsAnnualReport.pdf> [<https://perma.cc/9EAK-E52L>] (noting use of case managers and team managers); CONN. SUPER. CT. R. § 25-50A (2025) (setting forth the Resolution Plan Date for dissolution cases and the role of the Family Relations Counselor); N.H. CIR. CT. FAM. DIV. R. 2.12 (2025) (setting forth the role of the case manager in family cases involving at least one self-represented litigant); KAN. DISP. RESOL. R. 910 (2020) (setting forth the procedure for appointing case managers and their role); Christine Holmes, *Attorneys, Advocates Collaborate to Address Family Needs Before Cases Reach Courts*, CT. NEWS OHIO (Dec. 12, 2024), [https://www.courtnewsOhio.gov/happening/2024/MDRPilotProgram\\_121224.asp](https://www.courtnewsOhio.gov/happening/2024/MDRPilotProgram_121224.asp) [<https://perma.cc/JBN5-GFHN>] (describing the Multi-Disciplinary Representation pilot program which leverages a support team of attorneys, a licensed social worker, and a parent advocate to assist litigants in child-welfare cases); Courtney Broschius & Shelley Spacek Miller, *Civil Justice Initiative: Evaluation of the Civil Justice Initiative Project (CJIP), Implemented by the 22nd Judicial Circuit Court, McHenry County, Illinois*, NAT’L CTR. FOR STATE CTS. 5-6 (2019), [https://web.archive.org/web/20230728192646/https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0018/26604/civil-justice-initiative-evaluation-book-2.pdf](https://web.archive.org/web/20230728192646/https://www.ncsc.org/__data/assets/pdf_file/0018/26604/civil-justice-initiative-evaluation-book-2.pdf) [<https://perma.cc/FFM7-J4EF>] (evaluating implementation of civil case-management teams, among other reforms, in McHenry County); Civ. Just. Improvements Task Force, *Report to the Chief Justice*, OR. JUD. DEP’T 37-38 (June 20, 2018), [https://www.osbar.org/\\_docs/resources/CJI-Task-Force-Final-Report\\_1.0\\_2018-06-20.pdf](https://www.osbar.org/_docs/resources/CJI-Task-Force-Final-Report_1.0_2018-06-20.pdf) [<https://perma.cc/7TVL-EEAJ>] (declining to adopt a one-size-fits-all civil case-management team approach but acknowledging that “[c]ourt staff who assist the judges in tracking cases vary in the courts, but can include teams or designated individuals in the court’s records office, the judge’s clerk, and the judge’s judicial assistant”); see also Hamblin & Hannaford-Agor, *supra* note 12, at 23 (noting that delegations “free[] judges to focus time and attention on tasks requiring unique judicial skills and expertise”); Steelman, *supra* note 180, at 40 (“We believe that it is more appropriate for judge pro tem, masters, or hearing officers to deal with the multitude of day-to-day disputes under the guidance of a judge, and a better use of the Court’s most precious resource – judicial time and energy – to hear the exceptional cases.”).

But teaming structures hardly capture the pervasive shuffling of personnel that has accompanied the managerial turn. A substantial proportion of personnel-focused managerialism entails simpler delegations of tasks to quasi- and nonjudicial actors. A key example is the wide use of “commissioners” to perform administrative and even core adjudicatory tasks across a variety of legal domains, particularly in high-volume dockets like housing, domestic violence, juvenile, family, tax, probate, and small claims.<sup>185</sup> In many housing courts, for instance, “commissioners” preside over the cattle call of cases, announcing each case, then ordering the litigants into the hallway outside the courtroom to explore settlement possibilities, and then entering a consent judgment upon their return if agreement is reached.<sup>186</sup> In some courts, a judge is summoned to take the bench only when landlord and tenant cannot reach mutually agreeable terms and fact-finding, conducted by way of a “trial” often lasting only minutes, is needed.

Commissioners in many jurisdictions exercise a fuller set of powers, presiding over the full proceeding and making rulings that are only nominally subject

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185. See, e.g., *Philadelphia Fair Housing Commission*, CITY PHILA., <https://www.phila.gov/departments/fair-housing-commission> [<https://perma.cc/283B-HZKK>] (describing the responsibilities of the five-member housing commission); LA. STAT. ANN. § 13:713 (2024) (listing the duties of commissioners including “hearing and recommendation of disposition, when necessary, of any civil, criminal, or domestic violence matter”); N.M. STAT. ANN. § 40-13-9 (2024) (creating the position of domestic-violence special commissioner); WIS. STAT. § 757.69(1)(g) (2024) (describing what a circuit-court commissioner may do when assigned to juvenile matters); ARK. CODE ANN. § 26-18-1106 (2024) (detailing the Tax Appeals Commission); OHIO REV. CODE ANN. § 2101.06 (LexisNexis 2024) (describing special-master commissioners in probate court); *Superior Courts*, WASH. CTS., [https://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo\\_jury.display&altMenu=Citi&folderID=jury\\_guide&fileID=superior](https://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.display&altMenu=Citi&folderID=jury_guide&fileID=superior) [<https://perma.cc/EE7E-RLKB>] (“Matters heard by the court commissioner include probate, uncontested marriage dissolutions, the signing of court orders for uncontested matters, and other judicial duties as required by the judge.”); *Connecticut’s Courts*, CT. JUD. BRANCH 8 (2024), <https://www.jud.ct.gov/publications/es201.pdf> [<https://perma.cc/ZS27-P3PK>] (listing small-claims commissioners as nonjudicial officers who hear legal disputes). Louisiana has devoted particular effort to publicizing and evaluating its use of commissioners for family-law matters. See generally *Efficiency Study of Court Commissioners: How Can the Court Serve the Public Through the Use of Commissioners?*, 24TH JUD. DIST. CT. FOR PAR. OF JEFFERSON (July 31, 2002), <https://static1.squarespace.com/static/5e61dfe5b8db3c2802a78cf8/t/63179c4525290157e6f9a2ba/1662491719151/2002-Harges-Report.pdf> [<https://perma.cc/5PRA-T985>] (commissioning a report to gather data about the evolution of commissioner courts and make recommendations to improve their efficiency to better serve the public); Bobby Marzine Harges, *Efficiency Study of Court Commissioners and Domestic Hearing Officers: An Analysis of the Domestic Early Intervention Triage Program*, 24TH JUD. DIST. CT. FOR PAR. OF JEFFERSON (July 31, 2006), <https://static1.squarespace.com/static/5e61dfe5b8db3c2802a78cf8/t/63179b7c14df2439378aaff/1662491516180/2006-Harges-Report.pdf> [<https://perma.cc/PXC8-TJGC>] (same).

186. For an example of a court order granting authority to delegate eviction cases to a commissioner, see *In re Civ. Assignments and Additional Duties of the Super. Ct. Comm’rs/Judge Pro Tems*, No. 2009-75, at 2 (Ariz. Super. Ct. Aug. 14, 2009).

to review by a judge.<sup>187</sup> In Utah, to give a representative example, commissioners are “quasi-judicial” officers authorized to conduct hearings, recommend orders, and oversee various civil matters, often with only cursory judge review.<sup>188</sup> Similarly, Indiana grants commissioners the same powers as magistrates, including powers to preside over hearings,<sup>189</sup> and, in the probate context, commissioners can execute bonds and take testimony.<sup>190</sup> In some courts in Louisiana, civil-court commissioners oversee the pretrial process, hear motions, punish parties for contempt, and even try cases with party consent.<sup>191</sup> And in Arizona, commissioners exercise full judicial powers, and their decisions are appealable directly to the state’s appellate courts.<sup>192</sup>

Teaming and delegation to nonjudicial staff are especially robust in the family-law context.<sup>193</sup> In recent decades, many tasks are performed by a growing array of quasi- and nonjudicial officers variously called commissioners, divorce masters, special masters, family-law referees, general magistrates, hearing officers, case managers, and family-relations counselors. They render and sign default judgments; grant uncontested divorces; establish, modify, and enforce child-support obligations; implement custody orders; approve consent judgments; make discovery rulings; and enter domestic-violence restraining

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187. See, e.g., *Job Class Specification: Court Case Manager*, ALASKA CT. SYS. 1, <https://courts.alaska.gov/hr/classspecs/0128.pdf> [<https://perma.cc/UD4W-DVWS>] (describing the role as “requir[ing] the use of independent judgment to determine sufficiency or appropriateness of filings”); WASH. REV. CODE § 2.24.040 (2021) (describing the power, authority, and jurisdiction of court commissioners).
188. UTAH CODE ANN. § 78A-5-107 (West 2024); see also *Buck v. Robinson*, 177 P.3d 648, 655 (Utah Ct. App. 2008) (confirming that commissioners can constitutionally “conduct evidentiary hearings, enter proposed findings, and make recommendations”); UTAH CODE JUD. ADMIN. R. 6-401(2)(D) (authorizing commissioners to recommend modifications to court orders); *Begum v. Begum*, 347 P.3d 25, 29 (Utah Ct. App. 2015) (noting that the commissioners’ recommendation is not a final order or adjudication, which the district-court judge issues).
189. IND. CODE § 33-33-49-15 (2022).
190. See, e.g., OHIO REV. CODE ANN. § 2101.06 (LexisNexis 2025).
191. See LA. STAT. ANN. § 13:713(B), (D), (E)(1)-(2) (2025). The Philadelphia courts are also empowered to conduct hearings. See *Philadelphia Fair Housing Commission*, *supra* note 185.
192. Interview with Samuel Anderson Thumma, Judge, Ariz. Ct. of Appeals (June 25, 2025) (“So I see from time to time commissioner decisions, commissioner judgments that come straight up to us. They do not sieve through a superior court judge. And that’s fairly typical.”).
193. A good example of teaming is “Better For Families,” a typically voluntary problem-solving approach centered around “judge-led, multidisciplinary teams.” See *BFF: Better For Families*, NY CTS., <https://ww2.nycourts.gov/bff-better-families-home-36746> [<https://perma.cc/J3CM-AAJ2>]; see also Interview with Serpil Ergun, Adm’r of Ct. Servs. & Chief Mag. Judge, Cuyahoga Cnty. Domestic Rels. Ct., Ohio (June 25, 2025) (describing teams of magistrates and nonjudicial personnel built around each judge and stating that “[w]e have five judges with all these other people underneath them”).

orders.<sup>194</sup> Many of these tasks are performed with only thin – and, according to some accounts, mostly theoretical – judge review at the back end.<sup>195</sup> In fact, in some family courts, the overwhelming majority of cases – as many as ninety percent, by some accounts<sup>196</sup> – are resolved without direct judge involvement.<sup>197</sup>

Beyond the roles played by commissioners, other pervasive sites of delegation to nonjudicial staff include: “tracking” coordinators who perform case triage and then route cases to procedural and case-management pathways, thus determining what will govern each case;<sup>198</sup> “court disability coordinators,” who

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194. See, e.g., ARIZ. REV. STAT. ANN. § 12-298 (2025) (family-law referee); OHIO REV. CODE ANN. § 3125.60 (LexisNexis 2025) (magistrate in child-support cases); UTAH R. CIV. P. 53 (master); UTAH JUD. COUNCIL R. JUD. ADMIN. 6-401 (domestic-relations court commissioner); IDAHO R. CIV. P. 53 (special master); LA. STAT. ANN. § 13:717 (2024) (domestic commissioner); LA. STAT. ANN. § 46:236.5(C)(1) (2024) (hearing officer); PA. R. CIV. P. 1920.51 (divorce master); COLO. R. CIV. P. 16.2 (family-court facilitators). For a succinct description of an “early resolution conference” program in a large municipal court (Maricopa County), see *Early Resolution Conference*, SUPERIOR CT. MARICOPA CNTY., <https://superiorcourt.maricopa.gov/departments/superior-court/family/early-resolution-conference> [<https://perma.cc/U6PJ-TU3X>]. For a concrete example of nonjudicial officers performing adjudicatory or adjudication-adjacent tasks, see Interview with Serpil Ergun, *supra* note 193, which notes that staff attorneys “conduct case management conferences or even pre-trials for the judge,” typically via remote proceedings.
195. See Interview with Serpil Ergun, *supra* note 193 (speculating that the judges reviewing decisions by magistrate judges will “99.9 percent of the time . . . adopt it or maybe make a change here or there”); *id.* (noting that in jurisdictions without a dedicated family-law court, a magistrate “does all of their divorce, every single thing, pre-decree, post-decree, everything, and [the judges] barely touch it other than a rule on objections or signed orders”). See generally Bobby Marzine Harges, *Appropriate Dispute Resolution Inside the State Courts – A Closer Look at the Power, Duties, and Responsibilities of Court Commissioners and Hearing Officers in Domestic Cases*, 9 LOY. J. PUB. INT. L. 1 (2007) (discussing how judicial alternatives are applied in a Louisiana state district court).
196. Harges, *supra* note 195, at 16 (“While the procedures may differ from district to district, domestic hearing officers, who are lawyers with many years of experience in domestic relations cases, are being used to process a large number of these cases.”); *id.* at 25 & n.128, 26 & n.129.
197. *Id.* at 33-36 (summarizing debates over commissioners’ assumption of judicial tasks). See generally Richard D. Hicks, *The Power, Removal, and Revision of Superior Court Commissioners*, 32 GONZ. L. REV. 1 (1996) (discussing “the sources of a superior court commissioner’s power and its early parameters”).
198. See, e.g., Alicia Davis, Conor Geiger, Michael Saini & Miguel Trujillo, *Implications of Domestic Violence Within the Triage Pathways Approach in Connecticut*, NAT’L CTR. FOR STATE CTS. 3-4 (May 23, 2023), <https://nationalcenterforstatecourts.app.box.com/s/nwkfofi68u4ncocii6uo8yqfl4ajotuh> [<https://perma.cc/DEG4-YX6E>] (noting use of Family Relations Counselors (FRCs) to triage cases and make routing recommendations); see also *The Pathways Process in Your Divorce, Custody or Visitation Case*, CONN. JUD. BRANCH, <https://jud.ct.gov/family/pathwaysprocess.htm> [<https://perma.cc/V3VL-BW2V>] (describing the role of FRCs in triaging and allocating cases to pathways); Interview with Robert Glaves, Exec. Dir., Chi. Bar

process disability-accommodation requests determining many litigants' access to (or avoidance of) in-person versus remote hearings;<sup>199</sup> and staff who oversee a growing variety of “diversion” programs that pair payment assistance or social services with alternative dispute resolution.<sup>200</sup> Still other delegations have begun to crop up in a growing set of “quality-control” programs, policies, and techniques focused on shaping court outputs. For instance, numerous jurisdictions now vest nonjudicial staff with authority to enter default judgments, and some courts have begun to task those clerks with scrutinizing case filings and materials to ensure that default judgment is legally warranted – a noteworthy, frontier example of court managerialism profiled below.<sup>201</sup>

## 2. Managerialism as Systemic Administration

A second pillar of the managerial turn is best captured under the heading “systemic administration,” defined in Table 1 as the coordinated, standardized, “bulk” management, movement, and processing of cases with the aim of setting priorities, allocating court resources, and achieving desired policy goals, such as efficiency, access, or equity.<sup>202</sup> If personnel-based managerialism focuses on

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Found. (June 23, 2025) (noting use of civil case managers and, in lower-volume courts, court clerks to perform case triage); Interview with Stacey Marz, Admin. Dir., Alaska State Ct. Sys. (June 5, 2025) (noting performance of triage tasks by “lawyer staff with family law backgrounds and experience who can determine the appropriate pathway a case should take so that judges get cases more efficiently packaged up for them”).

199. See *Illinois Supreme Court Policy on Access for People with Disabilities*, ILL. CTS. 3-4 (Jan. 1, 2024), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/74935f83-7a11-4b9a-bdc5-713e4db91343/Supreme%20Court%20Policy%20on%20Access%20for%20Persons%20with%20Disabilities.pdf> [<https://perma.cc/2NTQ-MRX6>].
200. See *infra* note 363 and accompanying text (examining diversion programs). For instance, the Allen Superior Court in Fort Wayne, Indiana, established a new eviction protocol by judicial memorandum that required a new initial hearing date for all eviction actions to be conducted in person by a diversion facilitator before the case is scheduled for trial before a magistrate, and with the option for parties to opt in to the diversion program. See *New Eviction Protocol*, ALLEN SUPERIOR CT. (Oct. 10, 2022), <https://allencountyclerk.in.gov/wp-content/uploads/2022/10/New-Eviction-Protocol-Memo-10.10.22.pdf> [<https://perma.cc/EAD9-RCZ3>]. Also, the Las Vegas Justice Court amended its local rules of practice to require landlords and tenants to use certain pleading forms – an innovation described in more detail in Section II.B.2 – and the court then deploys court staff to triage cases by screening answers and automatically setting some cases for diversion intake based on program eligibility criteria. See L.V. JUST. CT. LOC. R. PRAC. 6.2(f)(1)(A), (f)(2), (f)(3) (2020).
201. This complex and heavily delegated system of default-judgment oversight is discussed *infra* Section II.A.3.
202. See *supra* Table 1. As defined here, systemic administration encompasses any effort focused on coordinated management of cases and caseflows, with a focus on structures and institutional

moving people, then systemic administration focuses on moving cases—and information about those cases—in standardized ways around court systems. Among the primary vehicles for doing so are sophisticated caseflow-management systems, new formal and informal approaches to calendaring and clustering cases, and mandated use of court-created forms and digital interfaces for the assertion of claims and the exchange of information.<sup>203</sup>

Though systemic administration takes many forms, a conceptual cornerstone is “right-sized case management,” based in a broad proportionality principle that cases receive only the court resources and attention necessary—not more and not less—for efficient and just resolution.<sup>204</sup> A key example is the allocation of cases to different procedural and case-management tracks, or “pathways,” upon filing based on case features.<sup>205</sup> Now adopted in numerous states and in many of the larger court systems around the country,<sup>206</sup> these new pathways systems differ from earlier caseflow-management approaches in several ways.

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performance rather than on individual cases or judges. As set forth in the definition, it involves courts acting not just as neutral fora for dispute resolution but as administrative systems.

203. Caseflow management and calendaring are discussed in this Section, while court-created forms are discussed *infra* Section II.B.2.
204. See *Court Technology Reports, 1990*, *supra* note 147, at 16; *id.* at 18 (“Right sizing aligns rules, procedures, and court personnel with the needs and characteristics of similarly situated cases.”). For a wider literature on “right-sizing,” see generally VICTOR E. FLANGO & THOMAS M. CLARKE, *REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY* (2015); Am. Coll. of Trial Laws. & Inst. for Advancement of the Am. Legal Sys., *Reforming Our Civil Justice System: A Report on Progress and Promise*, UNIV. DENV. (Apr. 2015), [https://iaals.du.edu/sites/default/files/documents/publications/report\\_on\\_progress\\_and\\_promise.pdf](https://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf) [<https://perma.cc/H7BR-52GX>]; and Brian Ostrom & Roger Hanson, *Achieving High Performance: A Framework for Courts*, NAT’L CTR. FOR STATE CTS. (Apr. 2010), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1874> [<https://perma.cc/EJM2-43JR>].
205. See, e.g., Kauffman & Knowlton, *supra* note 177, at 23 (contrasting “traditional differentiated case management” and “pathways”). For a growing evaluation literature, see generally Stacey Marz, *Faster and As Satisfying: An Evaluation of Alaska’s Early Resolution Triage Program*, 57 FAM. CT. REV. 478 (2019); Marsha Kline Pruett & Megan Durrell, *Family Civil Intake Screen Services Evaluation: Final Outcomes Report*, CONN. JUD. BRANCH CT. SUPPORT SERVS. DIV. (May 2009), <https://www.afcnet.org/Portals/o/Committees/ConnecticutFinalReport.pdf> [<https://perma.cc/47VB-LLVW>]; Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007); and Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 37 (2009).
206. For examples of statewide pathways programs, see *Civil Case Management*, 9TH JUD. CIR. CT. FLA., <https://ninthcircuit.org/civil-case-management> [<https://perma.cc/4SWL-Y2EJ>]; *What are DCM Tracks?*, MONTGOMERY CNTY. MD. CIR. CT., <https://www.montgomerycountymd.gov/cct/dcm-tracks.html> [<https://perma.cc/2VDC-23BS>]; *In re Comprehensive COVID-19 Emergency Measures for Fla. Trial Cts.*, No. AOSC20-23 (Fla. Apr. 13, 2021) (COVID-era authorization); and *In re Civ. Case Mgmt. & Implementation of Civ. Differentiated*

First, current pathways systems entail far more synoptic and aggressive efforts to achieve proportionality between court resources and case needs.<sup>207</sup> As Part I noted, early differentiated case-management systems routed cases based on blunt case features, such as the type of case or the amount in controversy.<sup>208</sup> Present-day pathways programs instead assign procedures and case-management techniques to cases based on a more granular, ex ante assessment of a case's core features and trajectory, including the likely issues to be adjudicated.<sup>209</sup> A common routing "matrix," in place in dozens of jurisdictions, denominates cases as "simple" (slip and falls, motor-vehicle accidents), "standard" (simple, but with more parties), and "complex" (professional negligence, product liability, cases with serious injuries or death, and cases with multiple parties and claims), with a rigidly defined set of timelines, discovery limits, and settlement conference and mediation requirements attached to each.<sup>210</sup> Other routings depend on more granular case assessments. As just one example, in the family-law context, cases are allocated to distinct procedural and case-management tracks based on the anticipated degree of conflict, the presence of domestic violence, the presence of children, the representation status of the parties, and the projected need for services, such as mediation or parenting classes.<sup>211</sup> Even motions practice is

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*Case Mgmt.*, No. 25-08 (Fla. 18th Cir. Ct. Jan. 23, 2025) (local administrative order implementing pathways).

207. Clarke & Flango, *supra* note 155, at 146, 147-49.

208. See *supra* notes 156-159 and accompanying text.

209. See Civ. Just. Improvements Comm., *supra* note 153, at 13 (describing the shift from DCM to "pathways" as based, at least in part, on the recognition that amount-in-controversy and case type are not reliable "predictors" and "do not reliably forecast the amount of judicial management that each case demands").

210. See Rau, *supra* note 178, at 41 (noting a "matrix developed by Court leaders" that sets forth three main categories of "major civil cases": expedited, standard, and complex); see also *In re Civ. Case Mgmt. and Implementation of Civ. Differentiated Case Mgmt.*, No. 3-42.2, at 3 (Fla. 10th Cir. Ct. Mar. 10, 2025) (establishing case-management tracks – "streamlined," "general," and "complex" – and deadlines for civil cases).

211. See *Pathways Case Management Initiative in the Probate and Family Court*, COMMONWEALTH MASS. (Apr. 25, 2023), <https://www.mass.gov/info-details/pathways-case-management-initiative-in-the-probate-and-family-court> [<https://perma.cc/SR5V-ZFYR>] (statewide case-management pathways); *Early Resolution Conference*, JUD. BRANCH ARIZ. MARICOPA CNTY., <https://superiorcourt.maricopa.gov/departments/superior-court/family/early-resolution-conference> [<https://perma.cc/U6PJ-TU3X>] (early-resolution conference for self-represented litigants); Alicia Davis, Rachel Buck, Jeff Hall, Yanitza Madrigal & Miguel Trujillo, *Triage and Case Management Improvements: A Preliminary Look at Impacts in the Family Division of the Eleventh Judicial Circuit Court of Florida (Miami-Dade)*, NAT'L CTR. FOR STATE CTS. 10-11 (2023), <https://ncsc.contentdm.oclc.org/digital/collection/famct/id/1884> [<https://perma.cc/VZ9C-PS3Q>]; Alicia Davis & Michael Saini, *Pathways Through the Pandemic: An Application of Family Justice Pathways in Three Courts*, NAT'L CTR. FOR STATE CTS. 32-33 (2021), <https://ncsc.cont>

subjected to pathways-like triage in some jurisdictions, with motions routed to different court divisions or to judges or nonjudicial staff based on an assessment of whether the motion in question is substantive or can be addressed more summarily.<sup>212</sup>

Second, the new pathways systems rely on early, staff-based, and, increasingly, technology-based “triage” to perform case routings at the time of filing and to monitor case progress thereafter. In many early differentiated case-management systems, by contrast, judges oversaw case routings, usually at an initial scheduling conference held well after case filing. The newer pathways systems thus overlap with personnel-based managerialism and its new staffing models. After all, a tailored approach that assigns different procedures or case-management techniques to a case based on its apparent complexity is not self-executing. In many courts, a “business process” – presided over by a growing corps of “civil case managers” and “tracking” coordinators and leavened by new digital technologies, including online intake forms to elicit case information from the litigants and structured decision tools – performs the actual sorting of cases.<sup>213</sup>

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entdm.oclc.org/digital/api/collection/famct/id/1695/download [https://perma.cc/RXM9-ZBD2] (pathways program in Marion County, Indiana); Alicia Davis, Staci Pratt & Joi Hollis, *Triage Implementation Blueprint*, NAT’L CTR. FOR STATE CTS. 9-10 (Jan. 2025) [hereinafter Davis et al., *Triage Implementation Blueprint*], https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2657 [https://perma.cc/B4QW-XH3M] (discussing Nevada’s online divorce portal); Davis et al., *supra* note 198, at 7 (describing the state’s Pathways to Resolution Approach, combined with a Resolution Plan Date process, which allocates cases to one of “three distinct paths”); Yanitza Madrigal, Rachel Buck, Alicia Davis & Sarah Vandenberg Van Zee, *How to Improve Caseflow Management in Family Court*, CT. MANAGER (Aug. 2023), https://thecourtmanager.org/articles/how-to-improve-caseflow-management-in-family-court [https://perma.cc/CR4F-M5ZN].

212. See Steelman, *supra* note 180, at 39, 42-43, 46 (discussing systems in which civil case managers review and route all filed motions and recommending that courts increase the responsibilities of court staff to include “the provision of a ‘triage’ function to differentiate not only motions that need only a signature or can be decided ‘on the papers,’ but also to distinguish more substantive motions from those that can be addressed more summarily”).
213. Examples include Johnson County District Court in Olathe, Kansas, and the Twenty-Second Judicial Circuit Court in McHenry County, Illinois. See, e.g., *Family Court Pathway Assignment Portal.*, REDCAP, https://redcap.asu.edu/surveys/?s=D78RP77M4EPJK8LR [https://perma.cc/3VKF-GFCA] (hosting the online-triage tool); Staci Pratt, *The Johnson County Family Law Triage Tool: Usability Evaluation and Recommendations* 1 (Univ. of Colo. L. Legal Stud. Rsch. Paper, No. 24-24, 2024), https://ssrn.com/abstract=4891358 [https://perma.cc/93A6-DS6D]; Hannaford-Agor, *supra* note 14, at 8-12; Interview with Keven M.P. O’Grady, Dist. Ct. Judge, Kan. 10th Jud. Dist. (June 7, 2025) (describing an online survey with simple, binary questions to determine pathways routings while blinding judges and lawyers from the answers so “that nobody feels like they’re getting prejudged” or information is being considered “outside the rules of evidence”); see also *Automating Family Triage: Business Process, MindMap, and Visualization*, NAT’L CTR. FOR STATE CTS., https://www.ncsc.org/\_\_data/assets/

Third, the new pathways systems feature proactive oversight and flexibility, including “offramps” that facilitate the transfer of a case from one track to another when case features change. In contrast to earlier efforts, the newer pathways systems are not just static guidelines. They also include automated case monitoring, with tripped alarms when time expectations for case progress are not met, or when a case no longer fits a given pathway’s criteria.<sup>214</sup> Many procedure codes now provide for motions for exceptions to a particular routing, demanding more court time and further fueling arguments for pervasive delegations of responsibility of systemic administration to nonjudicial staff.<sup>215</sup>

Finally, the new pathways approaches increasingly incorporate alternative approaches to dispute resolution and dispute avoidance, whether mediation, early neutral evaluation, arbitration, or, more recently, “diversion” programs and online dispute resolution.<sup>216</sup> Many of these fora also require new “traffic rules” for moving litigants into them.<sup>217</sup> Pathways are thus part of the wider reshaping of the landscape and practices of dispute resolution that has characterized the managerial turn.

A second broad example of systemic administration appears in scheduling and calendaring systems for moving cases through the system, both to propel cases forward and economize on scarce judicial attention. A pivotal example—though overlapping substantially with personnel-based management—is a shift among many larger court jurisdictions from an “individual calendar” case-

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pdf\_file/0029/91775/Automating-Family-Triage-Business-Process,-MindMap,-and-Visualization.pdf [https://perma.cc/F3DL-AM2F]; Bakke & Solomon, *supra* note 156, at 19 (describing the role of “track coordinators”); Cooper et al., *Implementation Manual*, *supra* note 156, at 20–21 (recommending that administrators make case track assignments and monitor cases); Civ. Just. Improvements Comm., *supra* note 153, at 15 (“Teams of judges, court attorneys, and professional trained staff manage the case from filing to disposition.”); Interview with Stephanie Hess, Chief Deputy Clerk, Joseph P. Kinneary U.S. Courthouse, Former Admin. Dir. of the Sup. Ct. of Ohio (June 6, 2025) (noting trainings for differentiated case management for both judges and court staff).

214. See Pratt, *supra* note 213, at 1; Hannaford-Agor, *supra* note 14, at 8.

215. See, e.g., KY. R. CIV. P. 89, 90; FLA. R. CIV. P. 1.200(c)(1)-(2); COLO. R. CIV. P. 16.1(l); N.J. CT. R. 4:5A-2(b).

216. For leading examples, see *Online Medical Debt Resolution*, HAMILTON CNTY. GEN. SESSIONS CT., <https://ciiz.courtinnovations.com/TNMEDDEBT> [https://perma.cc/23DZ-VLF8]; and Admin. Off. of the Cts., *Online Dispute Resolution: Pilot Program Phase 2*, TENN. CTS. (2024), <https://www.tncourts.gov/sites/default/files/docs/TN%20Medical%20Debt%20Online%20Debt%20Resolution%20Pilot%20%E2%80%93%20Phase%202%20Report.pdf> [https://perma.cc/G56L-ASQK]. See also Mich. State Ct. Admin. Off., *Michigan’s Community Dispute Resolution Program: 2023 Annual Report*, MICH. CTS. 2 (2023), [https://www.courts.michigan.gov/49c1a9/siteassets/reports/odr/2023\\_cdrp\\_annual\\_report.pdf](https://www.courts.michigan.gov/49c1a9/siteassets/reports/odr/2023_cdrp_annual_report.pdf) [https://perma.cc/78V9-ZKB4] (describing a partially court-funded network of centers that provide mediation services).

217. See Engstrom, *supra* note 31, at 2260–67.

assignment approach, in which judges are randomly assigned to cases and take responsibility for all litigation events from filing to disposition, to a “master calendar” approach, in which judges rotate through service focused on particular litigation stages—for instance, motions, discovery, and trial.<sup>218</sup> In a hybrid of this approach, the Philadelphia Court of Common Pleas created a separate “Motions Court” and “Discovery Court,” both presided over by a judicial team leader, for most civil matters, but the Commerce Court, created to handle business-on-business disputes, continued to operate on an “individual calendar[]” system.<sup>219</sup> More specialized calendars focused on particular case features—for instance, “pro se calendars,” which cluster together cases with one or more self-represented litigants, with special court staff and resources at the ready—are also proliferating.<sup>220</sup>

Calendaring systems further highlight the uses to which courts can put their maturing data-analytic capacities, including the use of predictive analytics to create and administer caseload-management systems. An early example is the trial-scheduling approach, noted above in connection with Philadelphia’s judicial team structure, whereby cases are “overscheduled” for trial based on a data-based prediction about how many will settle or otherwise fall away in the run-up to trial.<sup>221</sup> As already noted, this approach can, but need not, be paired with a flexible, team-based judicial structure, so that judges can be assigned in a just-in-time manner, ensuring that no judge sits fallow when a case settles on the eve of trial.<sup>222</sup> Courts are prototyping and deploying more sophisticated tools that

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218. See Hannaford-Agor, *supra* note 22, at 7.

219. E.g., Steelman, *supra* note 180, at 53; *The Pathways Process in Your Divorce, Custody or Visitation Case*, CONN. JUD. BRANCH, <https://jud.ct.gov/family/pathwaysprocess.htm> [<https://perma.cc/V3VL-BW2V>] (detailing the “Motion Dockets” in Connecticut’s family courts for pre-judgment motions in actions for dissolution, separation, custody, and visitation). Sitting beneath these examples of more formal case movements are some informal ones. For instance, in the Complex Litigation Center in the Philadelphia Court of Common Pleas, the court reportedly placed cases in “groupings” based on the law firm representing the plaintiff, among other things. See Steelman, *supra* note 180, at 49.

220. See *Finding Legal Help*, UTAH STATE CTS., <https://www.utcourts.gov/en/legal-help/legal-help/finding-legal-help/legal-assist.html> [<https://perma.cc/TAU6-QXML>] (directing litigants to “Utah Pro Se Calendars”); *Pro Se Hearings Calendar: Opportunities for Attorneys and Legal Professionals*, LEGAL AID SOC’Y SALT LAKE, <https://www.legalaidsocietyofsaltlake.org/prosecalendar> [<https://perma.cc/C2UD-J45Q>].

221. See *supra* note 179 and accompanying text.

222. See Rau, *supra* note 178, at 34-35.

forecast future pending caseloads for purposes of allocating judicial and court resources.<sup>223</sup>

If the first two components of systemic administration aim to optimally allocate court resources based on case needs, then a third and final component focuses on standardizing the way case information is generated and conveyed via mandatory court forms, digital interfaces, and template orders.<sup>224</sup> At the core of these efforts is a radical overhaul of the usual sequence of litigation, particularly in certain high-volume dockets, in which pleading and discovery are collapsed into a single litigation step: pleading is performed via standardized, court-provided forms, and automatic disclosure requirements are the primary way to assert claims and generate evidence, with presumptive limits on conventional discovery.<sup>225</sup> In the meantime, form-based pleading is already having an unsung effect on other court managerial efforts. By standardizing the information that pleadings and papers must contain, and by making it far easier for courts to capture that data, the “forms” revolution is reshaping court administration in a large swath of the civil-justice system, particularly in “high-volume” dockets like eviction, debt, and family law. These standardized forms are quietly fueling a quantum leap in the data transparency that court administrators have over their operations. We return to these developments below.

### 3. Managerialism as Quality Control

A third pillar of the managerial turn is quality-control measures, including an array of tools and techniques designed to guide, reinforce, and safeguard the quality of a court’s decisional outputs. Though the least-developed pillar of the managerial turn, quality-control efforts are gaining momentum because of a

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223. See Kelly Roberts Freeman & Rory Monaghan, *Measuring the Impacts of Strategies to Reduce Court Caseloads and Backlogs*, CT. MANAGER (May 2023), <https://thecourtmanager.org/articles/measuring-the-impacts-of-strategies-to-reduce-court-caseloads-and-backlogs> [<https://perma.cc/H3QN-ZQ3D>] (introducing the Court Backlog Reduction Simulator, which ingests court data to create “visualizations of historical trends in pending caseloads, clearance rates, filings, dispositions, and backlog and generate future forecasts of these measures”).

224. See *supra* notes 153-155 and accompanying text (describing widespread adoption of forms, including digital interfaces); see also Jud. Info. Servs., *Legislative Update*, MICH. STATE CT. ADMIN. OFF. 5 (Mar. 1, 2025), <https://www.courts.michigan.gov/4930db/siteassets/reports/jis/jis-legislative-report-2025.pdf> [<https://perma.cc/A62U-2DRZ>] (describing current efforts to move to electronic forms in Michigan).

225. For the fullest explanation, see *Principles of the Law, High-Volume Civil Adjudication*, *supra* note 162. For advocacy of such approaches dating back to at least the early 2000s, see Steelman, *supra* note 180, at 39, which advocates statewide rules “amending the current discovery process by requiring mandatory disclosure and limiting subsequent discovery at least in all but complex civil litigation.”

growing recognition—though the point is already well-established in administrative adjudication—that case-by-case, appellate-style review chronically fails to produce systemic accuracy within mass-adjudicatory systems.<sup>226</sup> One reason is that individual claimants often lack the resources or wherewithal to exercise available appeal rights, particularly in the large swaths of the civil-justice system in which most litigants lack lawyers.<sup>227</sup> Another reason is that individual appeals do not necessarily foster the systemic learning and feedback loops that are critical to system-level error correction and recalibration.<sup>228</sup>

As the managerial turn has quickened, quality-control efforts have tended to take one of two forms. First are “quality-assurance” measures: oversight measures and behavioral interventions designed to shape the performance of judges and court staff. The goal is to promote adjudicative integrity while supporting efficiency, accuracy, consistency, and accountability, particularly within high-volume or decentralized adjudication systems. Second are an array of more targeted interventions to identify and prevent decisional errors outside the conventional adjudicatory or appellate process. Courts, as we have written elsewhere, are becoming “compliance courts,” injecting new review and oversight processes into case-processing routines, particularly in the large swaths of the civil-justice system where the adversarial process has largely ceased to function.<sup>229</sup> We return to the implications of this more active and affirmative court role in an adversary system without adversaries in Part III’s normative and doctrinal inquiry.

Key guidance tools that exemplify the first, “quality-assurance” side of court quality-control efforts are bench cards—concise, quick-reference materials that judges and court staff vested with adjudicatory authority use while presiding

226. Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 STAN. L. REV. ONLINE 64, 66-67, 69 (2023). For the parallel insight but focused on the administrative context, see Daniel E. Ho, David Marcus & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication: Emerging Practices and Insights*, ADMIN. CONF. U.S. 8 (Nov. 30, 2021), [https://www.acus.gov/sites/default/files/documents/ACUS\\_QA\\_Report\\_Final\\_Nov30.pdf](https://www.acus.gov/sites/default/files/documents/ACUS_QA_Report_Final_Nov30.pdf) [<https://perma.cc/X5T6-LYCJ>], which notes that appeals “may correct errors in individual cases” but will often fail to achieve systemic accuracy because “institutional determinants unrelated to decisional quality may affect the composition of appellate dockets and produce a misleading sample of decisions for reviewing courts and tribunals to evaluate,” because “reliance on individuals to exercise particular rights will fail when these individuals lack the resources or wherewithal to avail themselves of available protections,” and because “decisions in individual appeals, without more, do not translate into systemic learning.”

227. Ames et al., *supra* note 36, at 22-23.

228. *Id.*

229. See David Freeman Engstrom, Daniel Bernal & Aviv Caspi, *Compliance Courts: Promoting Adjudicatory Accuracy in an Era of Adversary Breakdown* 3-5 (2025) (unpublished manuscript) (on file with authors).

over court proceedings<sup>230</sup>—and their more prolix cousins, bench guides and bench handbooks, which are more treatise-like summaries of statutes, rules, and policies.<sup>231</sup> Bench cards aim to promote uniformity and guard against misapplication of the law by summarizing key legal principles and procedural requirements.<sup>232</sup> Indeed, some bench cards explicitly characterize how to exercise judicial discretion in the application of statutes or rules.<sup>233</sup> However, a more recent trend is bench cards, guides, and handbooks that cover best practices and policies, making them a repository of court policymaking and a primary vehicle of an emerging informal law of court administration, as described below.<sup>234</sup> A good example is the Ohio Supreme Court’s recent bench card for judicial treatment of self-represented litigants, which sets forth best practices, rather than legal requirements, and also maps legal-aid providers around the state as a reference guide for judges.<sup>235</sup> Illinois’s extensive lineup of bench cards covers the

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230. See Michael Houlberg & Janet Drobinske, *Unbundled Legal Services: In the New Normal*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 15 (Sep. 2022), [https://iaals.du.edu/sites/default/files/documents/publications/unbundled\\_legal\\_services\\_new\\_normal.pdf](https://iaals.du.edu/sites/default/files/documents/publications/unbundled_legal_services_new_normal.pdf) [<https://perma.cc/MYW8-W78W>] (noting that bench cards are a resource for judges to assist self-represented litigants); Ryan Cooper, *Don't Look Now, but American Judges Are Attacking Debtor's Prison*, WEEK (Feb. 13, 2017), <https://theweek.com/articles/678870/dont-look-now-but-american-judges-are-attacking-debtors-prison> [<https://perma.cc/5EWX-4CEG>] (describing bench cards as “basically a cheat sheet for following the law”).
231. In California, bench guides are more treatise-like than a quick-reference checklist, with sections covering nearly every contingency in a proceeding and running a hundred or more pages. For a readily accessible compendium, see *California Judicial Council Benchguides and Bench Handbooks*, LAW LIBR. FOR SAN BERNARDINO CNTY., <https://www.sblawlibrary.org/benchguides.html> [<https://perma.cc/UGR5-36KQ>].
232. See Brittany Kauffman & Mark Staines, *Task Force Releases “Bench Card,” Additional Resources for Judges on Fines and Fees*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Feb. 24, 2017), <https://iaals.du.edu/blog/task-force-releases-bench-card-additional-resources-judges-fines-and-fees> [<https://perma.cc/U6YK-HEZF>] (describing bench cards as providing “a clear set of instructions for state judges to use when determining whether a person has the means to pay” court fines); see also Colleen M. Berryessa, Itiel E. Dror & Bridget McCormack, *Prosecuting from the Bench? Examining Sources of Pro-Prosecution Bias in Judges*, 28 LEGAL & CRIMINOLOGICAL PSYCH. 1, 9-10 (2022) (noting that bench cards could be behavioral nudges to interrupt bias).
233. See Access to Just. Div., *Bench Card: E-filing and Judicial Discretion*, ILL. JUD. BRANCH (Sep. 2020), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/1e3631b3-7054-4b39-9d43-a8cbc57fe293/Efiling\\_Benchcard.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/1e3631b3-7054-4b39-9d43-a8cbc57fe293/Efiling_Benchcard.pdf) [<https://perma.cc/V4LW-FYNG>].
234. We address this issue in Section II.B.4.
235. See *Ensuring the Right to Be Heard: Procedural Fairness for Self-Represented Litigants*, SUP. CT. OHIO 2-4, <https://www.supremecourt.ohio.gov/docs/JCS/courtSvcS/resources/ProceduralFairnessSelfRepLitigants.pdf> [<https://perma.cc/74K9-V7CT>].

waterfront of court policies, including those regarding self-represented litigants,<sup>236</sup> limited-scope representation,<sup>237</sup> disability accommodations,<sup>238</sup> remote hearings,<sup>239</sup> gender inclusivity,<sup>240</sup> transgender litigants,<sup>241</sup> and courtroom interpreting.<sup>242</sup> Another recent trend is bench cards directed at court staff.<sup>243</sup> As courts continue to digitize, bench cards may morph into “judicial bench software” – real-time decision-augmentation tools used during proceedings<sup>244</sup> – and internal, court-facing chatbots and retrieval-based question-and-answer systems that some courts have begun to develop for use by judges and court staff to answer queries regarding court rules and policies.<sup>245</sup>

Dashboards are another example of a guidance-based quality-control tool that state courts have come to use increasingly as the managerial turn has quickened. Taking a page from mass-adjudicatory agencies within the administrative

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236. *Bench Card: Self-Represented People in the Courtroom*, ILL. JUD. BRANCH (Sep. 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/od794610-2a83-453d-b5b8-144553962e3c/Self\\_Represented\\_Litigants.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/od794610-2a83-453d-b5b8-144553962e3c/Self_Represented_Litigants.pdf) [<https://perma.cc/2P9A-ZKVA>].
237. Access to Just. Div., *Bench Card: Limited Scope Representation*, ILL. JUD. BRANCH (Oct. 2025), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/60d983b7-128b-4f42-89c4-4b9e496692ef/Limited%20Scope%20Bench%20card.pdf> [<https://perma.cc/GK2S-CRL2>].
238. Access to Just. Div., *Desk Card: Access for People with Disabilities*, ILL. JUD. BRANCH (Jan. 2026), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/6db1bdf5-734-43ff-87c2-63350189c706/Access\\_Disabilities\\_Bench\\_Card.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/6db1bdf5-734-43ff-87c2-63350189c706/Access_Disabilities_Bench_Card.pdf) [<https://perma.cc/Q2W5-DYSY>].
239. Access to Just. Div., *Bench Card: Remote Appearances in Circuit Court*, ILL. JUD. BRANCH (Aug. 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/84416c67-f8f6-46fd-9cf2-fe1953aade41/BenchCard\\_BestPractice.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/84416c67-f8f6-46fd-9cf2-fe1953aade41/BenchCard_BestPractice.pdf) [<https://perma.cc/8F78-RRAS>].
240. Access to Just. Div., *Bench Card: Promoting Gender Inclusivity at Court*, ILL. JUD. BRANCH (July 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/a01f98cb-09f1-4214-b779-d2db81b65bbd/gender\\_inclusivity\\_bench\\_card.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/a01f98cb-09f1-4214-b779-d2db81b65bbd/gender_inclusivity_bench_card.pdf) [<https://perma.cc/54ZH-YBQ8>].
241. Access to Just. Div., *Bench Card: Transgender People at Court*, ILL. JUD. BRANCH (July 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/4c8c52b6-8b66-4e16-8e43-1faae1c43b67/transgender\\_people\\_in\\_court\\_bench\\_card.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/4c8c52b6-8b66-4e16-8e43-1faae1c43b67/transgender_people_in_court_bench_card.pdf) [<https://perma.cc/2ZTH-49G3>].
242. Access to Just. Div., *Bench Card: Courtroom Interpreting for In-Person and Virtual Proceedings*, ILL. JUD. BRANCH (July 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/bb582872-763e-446e-beb6-d1945e71023d/Interpreter\\_Benchcard.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/bb582872-763e-446e-beb6-d1945e71023d/Interpreter_Benchcard.pdf) [<https://perma.cc/38LC-PMVS>].
243. See, e.g., Access to Just. Div., *Court Personnel Desk Card: Limited English Proficient Individuals*, ILL. JUD. BRANCH (July 2025), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/a94f71b8-51b3-4cfd-b48e-da19a3a30949/Court\\_personnel\\_and\\_Clerks\\_interpreter\\_information\\_card.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/a94f71b8-51b3-4cfd-b48e-da19a3a30949/Court_personnel_and_Clerks_interpreter_information_card.pdf) [<https://perma.cc/YXQ9-2AZM>].
244. See Broschius & Miller, *supra* note 184, at 8.
245. See Email from David Yamasaki, *supra* note 170.

state,<sup>246</sup> many courts have developed dashboards with statistical summaries of court- and individual-level outputs that are viewable by chief judges, court administrators and staff, and even trial-level judges who, on the classical view of the judicial role, should engage in only individuated, case-by-case decision-making.<sup>247</sup> Dashboards have thus become more elaborate, real-time, digital versions of the “old case” reports – summaries of cases that have fallen out of compliance with time standards – disseminated to judges at the dawn of caseload management.<sup>248</sup> To that extent, dashboards may be another example of how the more recent managerial turn is, even if not different in kind, different in degree from earlier stages of development, and substantially so.

Judicial Performance Evaluation (JPE) programs are a third type of quality-control tool used to guide judging and judicial practices outside of the conventional adjudicatory process or appellate review. Currently implemented in sixteen states, Puerto Rico, and the District of Columbia, JPE programs vary substantially in their structure and purpose.<sup>249</sup> First deployed in the 1970s, JPE programs gathered steam in the 1990s and 2000s, particularly in jurisdictions with elected judges, amidst growing concern that voters did not possess the

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246. See, e.g., Joel Rose, *Justice Department Rolls out Quotas for Immigration Judges*, NAT'L PUB. RADIO (Apr. 3, 2018, 1:09 PM ET), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges> [<https://perma.cc/Q7DF-JTKK>].

247. E.g., *Interactive Court Data Dashboard*, MICH. CTS., <https://www.courts.michigan.gov/publications/statistics-and-reports/interactive-court-data-dashboard> [<https://perma.cc/WGB5-UA5T>]; *Maryland Judiciary Data Dashboard*, MD. CTS. (Nov. 4, 2025), <https://www.courts.state.md.us/dashboard> [<https://perma.cc/2E9M-K536>]; *Reports, Statistics, & Performance Measures*, OR. JUD. BRANCH, <https://www.courts.oregon.gov/about/Pages/reports-measures.aspx> [<https://perma.cc/8F4H-BJHH>]; Steering Comm. on Data-Based Ct. Performance & Data Standards, *Minutes*, ARIZ. JUD. BRANCH (Dec. 11, 2024), <https://www.azcourts.gov/Portals/0/74/DSSC/Approved%20DS%20SC%20Meeting%20Minutes%2012%2011%202024%20for%20posting.pdf> [<https://perma.cc/7ZPV-DHME>] (noting “several courts here in Arizona who have developed data dashboards”); see also Interview with Daniel Sturtevant, *supra* note 151 (noting that Kentucky’s “flagship internal dashboard is the pending case dashboard that every judge has” and features “a thermometer chart on it that’s a percentage and it has different colors for how old the cases are, and so you can see at a glance . . . : ‘I’ve got a bunch of red at the bottom. I’ve got stuff that’s over two years old.’”).

248. See Broschius & Miller, *supra* note 184, at 9. As early as the 1990s, court administrators in Philadelphia sent weekly statistical reports to all court actors, including judges, with data or data visualizations comparing present performance to previous periods. Rau, *supra* note 178, at 1, 76.

249. See Jordan M. Singer, *Judicial Performance Evaluation in the States: The IAALS JPE 2.0 Pre-Convening White Paper*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 5, 31-35 (May 2022), [https://iaals.du.edu/sites/default/files/documents/publications/jpe\\_20\\_whitepaper.pdf](https://iaals.du.edu/sites/default/files/documents/publications/jpe_20_whitepaper.pdf) [<https://perma.cc/68GE-UFXS>].

information they needed to participate meaningfully in retention elections.<sup>250</sup> In some states, JPE has been moved out of the courts entirely and assigned to independent commissions.<sup>251</sup> Massachusetts and Idaho have more recently shifted JPE programs onto a different footing, as an internal tool that the judicial branch can use to foster professional development and inform court administration.<sup>252</sup>

This newer posture is prompting a rethinking of some aspects of JPE programs. In their traditional form, JPE instruments cover qualitative and procedural performance criteria such as legal knowledge, impartiality, communication skills, judicial temperament, and administrative capacity, but scrupulously avoid any consideration of merits outcomes or productivity measures.<sup>253</sup> For such measures, surveys of court users, including litigants and counsel, and court staff have been the most common methodological tools.<sup>254</sup> Fewer states rely on case-management data, courtroom observation, or review of written orders and opinions.<sup>255</sup> But the shift toward internal, court-facing uses of JPE, say some commentators, may be moving evaluation criteria in more quantitative and substantive directions.<sup>256</sup> The Institute for the Advancement of the American Legal System's JPE 2.0 project exemplifies this shift. It recommends that evaluation programs incorporate more objective data (such as case-management data) to supplement subjective responses, and adapt criteria to reflect judges' evolving roles with self-represented litigants and specialized court dockets—a departure

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250. *Id.* at 3; Jennifer K. Elek & David B. Rottman, *Methodologies for Measuring Judicial Performance: The Problem of Bias*, 4 OÑATI SOCIO-LEGAL SERIES 863, 867 (2014).

251. See Singer, *supra* note 249, at 31-35.

252. *Id.* at 17. For a discussion of these evaluations' implications for judicial independence, see, for example, Danielle Kalil, Logan Cornett & James Swearingen, *JPE 2.0: National Perspectives on Judicial Performance Evaluation*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 6, 8 (July 2024), [https://iaals.du.edu/sites/default/files/documents/publications/jpe\\_national\\_perspectives.pdf](https://iaals.du.edu/sites/default/files/documents/publications/jpe_national_perspectives.pdf) [<https://perma.cc/LQ7P-SQM6>].

253. Singer, *supra* note 249, at 1, 5-8.

254. *Id.* at 8-9; see Danielle Kalil, *JPE 2.0: Recommendations for Modernizing Judicial Performance Evaluation*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 5 (May 2025), [https://iaals.du.edu/sites/default/files/documents/publications/jpe\\_recommendations.pdf](https://iaals.du.edu/sites/default/files/documents/publications/jpe_recommendations.pdf) [<https://perma.cc/9THB-6Z3L>]; see also Natalie Knowlton & Malia Reddick, *Leveling the Playing Field: Gender, Ethnicity, and Judicial Performance Evaluation*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 6-8 (July 20, 2012), [https://iaals.du.edu/sites/default/files/documents/publications/iaals\\_level\\_the\\_playing\\_field.pdf](https://iaals.du.edu/sites/default/files/documents/publications/iaals_level_the_playing_field.pdf) [<https://perma.cc/3C56-WRK6>] (assessing and critiquing these evaluation methodologies).

255. See Singer, *supra* note 249, at 10-13; Kalil et al., *supra* note 252, at 3.

256. See Singer, *supra* note 249, at 17, 22.

from the survey-centric approach that has dominated JPE for decades.<sup>257</sup> Shifting docket realities and a changing judicial role are prompting other reconsideration as well. Indeed, decades-old evaluation instruments designed for general-jurisdiction judges may no longer fit a civil-justice system in which most litigants are self-represented and most cases are routed to specific procedural and case-management “pathways” or specialized housing, debt, and family courts, with a carefully rationed or problem-solving role for judges.

The other side of quality-control efforts is a growing set of interventions aimed at identifying and avoiding decisional errors outside of conventional adjudicatory and appellate processes. An instructive example is growing court reliance on what might be termed “default checkups,” wherein court staff review case filings and materials to ensure that a motion seeking a default judgment against a no-show defendant has complied with substantive legal requirements as well as procedural rules governing notice, standing, and timeliness.<sup>258</sup> These checkups are thought to have particular warrant in the small-scale, high-stakes cases that have come to dominate civil state-court dockets, particularly debt collections and evictions.<sup>259</sup> Without a rigorous system for evaluating the accuracy of default judgments, many cases may be resolved inaccurately each year—for example, by entering defaults where plaintiffs failed to provide adequate notice, did not follow pleading requirements, or alleged excess attorneys’ fees—thus exposing defendants to unwarranted wage garnishments or evictions and excessive monetary judgments.<sup>260</sup>

As with other parts of the managerial turn, jurisdictions vary in their implementations. The rigor of the checkup process ranges widely—from rigorous, on-the-record reviews to a brief scan for completeness.<sup>261</sup> At least some of this may reflect doctrinal divisions on the propriety of “substantive” review. While some courts will reject complaints where it is facially apparent that a plaintiff has failed

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257. See Danielle Kalil, *The Future of Judicial Performance Evaluation: Reinvigorating a Cornerstone of Public Trust*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Nov. 30, 2023), <https://iaals.du.edu/blog/future-judicial-performance-evaluation-reinvigorating-cornerstone-public-trust> [<https://perma.cc/8XSR-U6CE>].

258. See Engstrom et al., *supra* note 229, at 37.

259. See *supra* notes 115-119 and accompanying text.

260. *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, HUM. RTS. WATCH 28, 38-49 (Jan. 2016), [https://www.hrw.org/sites/default/files/report\\_pdf/us0116\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf) [<https://perma.cc/FN3M-HAPU>] (documenting the prevalence of default judgments in legally deficient debt lawsuits); *id.* at 36-38 (inadequate notice); *id.* at 42-44 (pleading and evidentiary deficiencies); *id.* at 27 (attorneys’ fees); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1601-03 (2018) (describing robo-signing and sewer service).

261. See generally Engstrom et al., *supra* note 229 (canvassing procedural-compliance efforts around the country).

to comply with a statute of limitations, others deny they have authority to raise even facial deficiencies *sua sponte*.<sup>262</sup>

A project in the Los Angeles Superior Court (LASC), the nation's largest trial court, well illustrates the role that technology and, in particular, AI-based automation has begun to play as a managerialist ethos continues to spread among American courts. In Los Angeles, 57% of all writs of restitution ordering a tenant's eviction, constituting some 12,000 cases annually, are issued pursuant to a clerk or court default.<sup>263</sup> Moreover, the court routes 90% of the 50,000 debt cases filed each year in which the defendant defaults to research attorneys for review of compliance with California's heightened pleading requirements.<sup>264</sup> With such large caseflows, LASC clerks estimate that the process for eviction cases takes at least 6,000 clerk hours per year, not including judge time, making automation an attractive proposition.<sup>265</sup> A design prototype is already proving capable of flagging a plaintiff's noncompliance with heightened pleading and service-of-process requirements or the availability of an affirmative defense that is readily discernible from the face of filed documents, such as statute-of-limitations problems in debt-collection cases, failures to comply with a monetary threshold for nonpayment evictions, or allegations seeking attorneys' fees beyond what a lease agreement permits.<sup>266</sup> These calculations currently require research attorneys to

262. *Compare* Unifund CCR, LLC v. Francois, 817 S.E.2d 915, 916 (N.C. Ct. App. 2018) (finding that courts lack authority to raise statute-of-limitations problems *sua sponte*), and Townes v. Portfolio Recovery Assocs., 854 S.E.2d 146, 157 (N.C. Ct. App. 2020) (same), with DaimlerChrysler Servs. N. Am., LLC v. Ouimette, 830 A.2d 38, 41 (Vt. 2003) (holding that a trial court "has the authority to consider expiration of the statute of limitations if apparent on the face of plaintiff's complaint"), and Exeter Hosp. v. Hall, 629 A.2d 88, 89 (N.H. 1993) (finding that civil-procedure rules do not "specifically *forbid* a judge from raising such [an affirmative] defense *sua sponte*"), and Leonhard v. United States, 633 F.2d 599, 609 n.11 (2d Cir. 1980) ("The district court has the power to dismiss a complaint *sua sponte* for failure to state a claim. There appears to be no reason why the same rule should not apply to a dismissal on statute of limitations grounds . . ." (citations omitted)), and United States v. Page, 116 F.4th 822, 825 (9th Cir. 2024) ("Though the statute of limitations is an affirmative defense, a district court may *sua sponte* consider whether a complaint is barred by the statute of limitations.").

263. Engstrom et al., *supra* note 24, at 31.

264. *Id.*; see also CAL. CIV. CODE § 1788.60(a)-(c) (West 2014) (requiring a debt buyer to submit authenticated business records and a copy of the contract to the court before a default or other judgment can be entered against a debtor).

265. Engstrom et al., *supra* note 24, at 80; see also Theodora Worledge et al., AI Assistance for Court Review of Default Judgments 1 (Dec. 9, 2025) (unpublished manuscript) (on file with authors) (noting severe time constraints on staff attorneys tasked with performing default checkups).

266. See Worledge et al., *supra* note 265, at 3-10 (describing the development and technical specifications of a "default assistant" tool, and also reporting on a blinded simulation using actual case materials and conducted with nearly seventy law students, some provided with AI assistance and some not, that found significant improvements in accuracy and efficiency).

flip between scanned PDFs, a “multi-hop” process that is particularly time-consuming and prone to error in human hands but well within the current capabilities of generative AI.<sup>267</sup>

A final example of quality-control efforts—though one that, in fairness, straddles all three pillars of the managerial turn captured herein—is new managerial strategies for settlement governance, particularly in eviction matters. Reflecting settlement’s outsized role in and policy significance for housing cases, these new settlement-governance schemes seek to ensure that settlement agreements, particularly stipulated ones that enjoy the court’s imprimatur and, by extension, lower procedural barriers to enforcement upon breach, are legally compliant and not the product of coercive negotiation practices.<sup>268</sup>

New York City was an early mover, beginning with a 2007 order issued by the Administrative Judge of New York City’s Civil Court “strongly advis[ing]” judges to conduct an “allocution”—a brief, on-the-record questioning of the parties designed to confirm they understand and consent to the settlement’s terms—before accepting a settlement involving a pro se tenant.<sup>269</sup> The order also supplied a checklist of topics to be addressed and permission to use court attorneys to assist with the inquiry.<sup>270</sup> More recently, the New Jersey Supreme Court created a more extensive settlement-governance strategy, by way of a 2021 administrative order.<sup>271</sup> The order replaced ordinary pleading and discovery practices with standardized forms for landlords and tenants to complete, called “case information statements,” to elicit core factual information on the sorts of claims and defenses that routinely arise in eviction cases.<sup>272</sup> It also created a staff position called “Landlord Tenant Legal Specialist” (LTLS).<sup>273</sup> Serving under the

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267. *Id.*

268. For a full-dress doctrinal and policy analysis of new forms of settlement oversight, see PRINCIPLES OF THE L., HIGH-VOLUME CIV. ADJUDICATION §§ 6.01-.06 (A.L.I., Council Draft No. 4, Dec. 2025) (on file with authors).

269. Allocations of Stipulations in Landlord & Tenant Cases, Advisory Notice No. AN-1 (N.Y.C. Civ. Ct. Apr. 6, 2007) [hereinafter Fisher Initial Order]. For an updated directive, see Housing Court Attorney Conferences of Stipulations in Non-Payment and Holdover Cases, Directive No. DRP-195 (N.Y.C. Civ. Ct. Jan. 23, 2012) [hereinafter Fisher Updated Order].

270. Fisher Initial Order, *supra* note 269, at 1; Fisher Updated Order, *supra* note 269, at 2.

271. See Glenn A. Grant, *Notice to the Bar and Public: Landlord Tenant — Supreme Court Action*, N.J. CTS. (July 14, 2021), <https://www.njcourts.gov/sites/default/files/notices/2021/07/n210715b.pdf> [<https://perma.cc/U7DM-6RB2>].

272. See *id.* at 1-2; see also Glenn A. Grant, *Maintaining Our Communities: Report of the Judiciary Special Committee on Landlord Tenant*, N.J. CTS. 8, 34-36 (Apr. 2021), <https://www.njcourts.gov/sites/default/files/sccr/reports/landlordtenantcomm.pdf> [<https://perma.cc/QYF7-AGEG>].

273. Grant, *supra* note 271, at 12.

supervision of a deputy court administrator,<sup>274</sup> the LTLS reviews case-information statements, presides over settlement conferences, helps the parties memorialize settlements on standardized court forms, and prepares materials to support judicial review of any agreements that landlords and tenants reach.<sup>275</sup>

As with default checkups, new settlement-governance schemes in New York, New Jersey, and elsewhere<sup>276</sup> exemplify an ongoing search for innovative ways to promote the quality of court outputs that steer between the practical limits of conventional adjudication in an adversarial system – a system hamstrung by extreme asymmetries in expertise and representation, as well as policy- and norm-based limits on more direct, judge-targeted managerial interventions.

### B. Features

The above modes of court managerialism are hardly watertight categorizations. In fact, many of the more consequential components of the managerial turn straddle two of the managerial modes, and some straddle all three. Here we enrich the three modes by surfacing four cross-cutting features of the managerial turn in order to further illuminate its contours. They include: (1) redistribution of judicial functions; (2) standardization of information flows; (3) systematic shifts in bureaucratic authority, control, and discretion; and (4) an informal law of judicial administration. The aim is not to describe court managerialism in any comprehensive sense, but rather to identify and situate key features of the managerial turn in advance of Part III’s more normative analysis.

#### 1. Redistribution of Judicial Functions

While the pervasive personnel shuffling, case routings, and layered and differentiated task structures that have accompanied the managerial turn take many forms, they have an identifiable and critically important valence: many – or even most – involve delegation of adjudicatory and administrative tasks away from judges, the presumed centerpiece of courts, to an array of quasi-judicial and non-judicial personnel. From the commissioners, judges pro tempore, and settlement facilitators deployed in litigant-facing roles, to the civil case managers,

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274. An LTLS is supervised by a “Civil Division Manager.” *Id.* For this supervisor’s job description, see, for example, N.J. Cts., *Court Executive 2B - Civil Division Manager*, GOV’T JOBS (2022), <https://www.governmentjobs.com/careers/njjudiciary/jobs/newprint/3572484> [<https://perma.cc/Y95X-PZPQ>].

275. Grant, *supra* note 271, at 3, 13, 15-17.

276. See Continuation of Temporary Modifications for Summary Process Cases, Standing Order No. 1-23, at 3 (Bos. Mun. Ct. June 5, 2023) (requiring a judge or clerk to endorse after an allocation that a settlement involving a self-represented tenant is fair and voluntary).

“tracking” coordinators, and filing clerks who staff a growing back-office machinery focused on caseflow management, American courts now fairly embody the “many hands” concern that Owen Fiss raised decades ago.<sup>277</sup> As one chief state-court administrator put it, “I don’t need [judges] practicing under their license, [I] want them practicing at the top of their job.”<sup>278</sup> Gone are the days when every judicial officer was expected to carry out a large portion of case-processing tasks. Indeed, the bulk of the state-level caseload sees little to no judicial involvement at all.<sup>279</sup>

Quantifying this pervasive redistribution of judicial functions into a more layered and differentiated structure, however, is not an easy undertaking. Indeed, no empirical exercise has – or perhaps even *could*, given the many flavors of delegation and the lack of reliable retrospective data – rigorously capture the trend. Variations across jurisdictions, which include differing doctrinal limits and differences in court size, resources, and organizational culture, do not help.<sup>280</sup> Still, a pair of rough-and-ready sources show that delegations to quasi- and nonjudicial actors are both substantial and may have accelerated in many jurisdictions as the managerial turn has deepened.

First is case law resolving challenges to the vesting of quasi- and nonjudicial staff with judicial power. One comprehensive accounting of court challenges found virtually no such cases prior to 1960, a surge between 1960 and 2000, particularly in the 1990s as states enacted “referee acts” empowering

277. See Fiss, *supra* note 4, at 1456; see also Interview with Jennifer D. Bailey, Partner, Bailey Jud. Sols., LLC, Admin. Judge (ret.), Fla. Cir. Ct. (June 3, 2025) (noting “two categories” of delegations, including quasi-judicial officers to whom “ultimate judicial decision-making” is delegated, such as “magistrates, pro tems, special magistrates,” and case managers and other staff-level positions who are doing “checking” and “flagging” but do not make ultimate or recommended decisions).
278. Interview with Stacey Marz, *supra* note 198; see also *id.* (“I could pay a highly trained staff attorney who’s paid less than a judge to do the kind of supportive work that makes the system run more smoothly, more efficiently, and just elevate the work to the judge that only they can do which is what is needed to issue the decision.”); Interview with Serpil Ergun, *supra* note 193 (“Parenting coordinators, custody evaluators, early neutral evaluators, case managers, all these different people that are doing things within the court so that the judge doesn’t have to spend a ton of time trying a case, working a case.”).
279. See TOBIN, *supra* note 47, at 190 (“Many cases will never reach a judge and must be tracked to conclusion. Those cases that are dismissed, diverted, referred to an alternative form of dispute resolution, or settled with little or no court involvement constitute the bulk of the caseload.”).
280. It important to note here that the quasi- and nonjudicial trend may not be straight line; municipal courts and “mayor’s courts” have long relied upon judges pro tempore and non-J.D. lay judges to dispense justice – and may thus roughly resemble present-day managerial courts. See Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1296–1310 (2022) (surveying the history of nonlawyer judges); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 997–1002 (2021) (describing the history of nonlawyer judges in municipal courts).

commissioners in child-support cases in response to a federal law mandating expedited procedures,<sup>281</sup> and then a further surge after 2000.<sup>282</sup> Of particular note is the prominence in the more recent cases of internal delegations to nonjudicial court staff, including bailiffs, law clerks, court reporters, referees, special masters, and other administrative personnel. These are distinct from delegations to judicial and quasi-judicial officers (such as magistrates) or external delegations outside the judicial branch, such as to executive-branch officers, probation officers, or private entities (such as bar associations or banks).<sup>283</sup>

Court statistics and personnel data offer another imperfect empirical bead. An initial glimpse comes from the few courts for which historical staffing data is

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281. 42 U.S.C. § 666(a)(2) (1988) required states to establish expedited processes to obtain and enforce child-support orders. Expedited processes were defined by regulation as “administrative or expedited judicial processes or both which increases effectiveness . . . and under which the presiding officer is not a judge of the court.” 45 C.F.R. § 303.101(a) (1991). The federal government required that the expedited processes safeguard the due-process rights of the parties and ensure the opportunity for judicial review according to the state’s procedures. *Id.* § 303.101(c)(2), (6). The presiding officer took testimony and established a record. *Id.* § 303.101(d)(1).

282. From the Founding to the 1960s, American courts heard roughly three dozen challenges to delegations to judicial, quasi-judicial, and nonjudicial officers. This line begins in 1791 but hits its stride with an Illinois Supreme Court case in 1840 invalidating a judge’s grant of power to a clerk to sign off on a bill of exceptions. *See* *Schooley v. Thorne*, 1 N.J.L. 71 (1791); *Emerson v. Clark*, 3 Ill. (2 Scam.) 489, 490 (1840). Cases surged between 1960 and 2000 to roughly thirty per year across both federal and state courts, then surged again after 2000, rising to a peak of nearly sixty per year in 2021. *See* Jason Iuliano, *The Judicial Nondelegation Doctrine*, 75 ALA. L. REV. 51, 60, 61 & fig. 1 (2023).

283. *See* Iuliano, *supra* note 282, at 63–64. For instance, Professor Iuliano’s raw data shows that, since 2000, state courts have decided roughly thirty total cases involving delegations to court officers in civil matters but only four cases involving judicial officers. Among state-court civil cases involving claims of improper delegations to executive-branch officials, the majority involve child-custody matters—for instance, a claim of improper delegation to a social worker to determine visitation rights. *See* Jason Iuliano, *The Judicial Nondelegation Doctrine Datasheet* (2023) (on file with authors); *see also, e.g.,* *Salt Lake City v. Ohms*, 881 P.2d 844, 848 (Utah 1994) (stating that referees cannot “exercise th[e] judge’s ultimate judicial power, for such is a nondelegable core judicial function”); *Jovine v. FHP, Inc.*, 76 Cal. Rptr. 2d 322, 341 (Ct. App. 1998) (holding that deciding dispositive motions is beyond a referee’s authority); *Russell v. Thompson*, 619 P.2d 537, 539 (Nev. 1980) (explaining that giving a master the authority to decide substantially all issues in the case with only limited judge review resulted in “the trial court’s function [being] reduced to that of a reviewing court” and “this type of blanket delegation approaches an unallowable abdication by a jurist of his constitutional responsibilities and duties”); *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct.*, 892 N.W.2d 267, 287 (Wis. 2017) (rejecting a referral in which the referee’s written rulings would be entered as court rulings, automatically and without a hearing, with any challenges resolved under what amounted to an abuse-of-discretion standard).

both available and sufficiently granular in reporting “position designations.”<sup>284</sup> While there is substantial variation across jurisdictions, judge-staff ratios changed substantially within American courts from the 1980s, when data are first available, to 2010, but have stayed steady or even declined since, perhaps reflecting growing use of technology over humans. For example, in Washington State, total nonjudicial staff rose from 974 in 1989 to 1,485 in 2009 – a more than 50% increase – during a time when the number of judges increased by only 35%.<sup>285</sup> In a notable urban jurisdiction, King County (Seattle), the judge-staff ratio rose in the county’s general-jurisdiction courts from 1:6 to 1:8 over that same time period.<sup>286</sup> Since then, nonjudicial staff counts have declined slightly even as the number of judges has risen slightly.<sup>287</sup>

State statistics on the distribution of judicial and quasi-judicial positions, though hard to dislodge, likewise support the conclusion, though some interpretation is required. Data from Washington State once more tell a clean story: in the state’s general-jurisdiction courts, the addition of commissioners has substantially outpaced judges. In 1974, Washington’s superior courts had 99 judges

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284. Court budgets are often uncertain guides because many state courts have long used generic budgets to avoid politicization, including pork-barrel dynamics of legislators trying to win resources for their courts and the inflammation of rural-urban animosities. See TOBIN, *supra* note 47, at 45.

285. For statewide Superior Court judge and staff full-time equivalents (FTEs) in 1989, see OFF. OF THE ADM’R FOR THE CTS., STATE OF WASH., THE 1989 REPORT OF THE COURTS OF WASHINGTON tbl. 9-9 (1990) (reporting on statewide Superior Court staffing, which includes court-reporter FTEs, administrator and support staff FTEs, and clerk and support staff FTEs, as well as commissioners, which we included in nonjudicial staff counts). For 2009 figures, see *Superior Courts Staffing, 2009*, WASH. CTS., [https://www.courts.wa.gov/caseload/content/pdf/staffing/archive/Superior/2009\\_SuperiorCourtStaffing.pdf](https://www.courts.wa.gov/caseload/content/pdf/staffing/archive/Superior/2009_SuperiorCourtStaffing.pdf) [<https://perma.cc/3M7D-XHFW>]; and *County Clerks Staffing, 2009*, WASH. CTS., [https://www.courts.wa.gov/caseload/content/pdf/staffing/archive/Superior/2009\\_countyClerkStaffing.pdf](https://www.courts.wa.gov/caseload/content/pdf/staffing/archive/Superior/2009_countyClerkStaffing.pdf) [<https://perma.cc/49T5-DLEE>].

286. OFF. OF THE ADM’R FOR THE CTS., *supra* note 285, at tbl. 9-9 (reporting 43 judges and 277 nonjudicial staff in King County Superior Court, the latter of which includes commissioners); *Superior Courts Staffing, supra* note 285 (reporting 53 judges and 449 administrative staff and commissioners in King County Superior Courts); *County Clerks Staffing, supra* note 285 (reporting an additional 227 county clerk staffing in King County Superior Courts).

287. *Superior Court Staffing as of 12/31/2023*, WASH. CTS. 1, <https://www.courts.wa.gov/caseload/content/pdf/staffing/Annual/superiorCourtStaffing.pdf> [<https://perma.cc/X4K8-WDKF>] (reporting 54 judges and 209 administrative staff and commissioners in King County Superior Courts); *County Clerk Office 2023 Staffing Survey*, WASH. CTS. 1, <https://www.courts.wa.gov/caseload/content/pdf/staffing/Annual/countyClerkStaffing.pdf> [<https://perma.cc/72UV-YSYK>] (reporting an additional 211 county clerks staffed in King County Superior Courts).

and an unreported number of commissioners.<sup>288</sup> By 2004, the superior courts had reached 178 judges—an 80% increase over three decades—but were now complemented by 43 full-time commissioners.<sup>289</sup> Nearly two decades later, in 2023, the numbers had risen to 201 judges and 60 full-time commissioners.<sup>290</sup> Reliance on commissioners is particularly heavy in Spokane, where the number of superior-court judges has risen only slightly from 10 in 1979 to 13 in 2023, but the court has added 8 full-time commissioners over that same timespan, producing a roughly even split of judicial and quasi-judicial positions.<sup>291</sup>

The Arizona court system likewise embodies growing reliance on quasi-judicial officers, particularly in urban courts. In the Maricopa County municipal courts, use of hearing officers and judges pro tempore has ballooned, particularly the latter. In the mid-1990s, municipal court judges outnumbered judges pro tempore by as much as ten to one; by 2023, the ratio ran in the other direction, with judges pro tempore now outnumbering municipal court judges by nearly two to one.<sup>292</sup> A similar pattern appears in Pima County, where the number of municipal court judges fell by roughly half, from about 30 in the mid-1990s to 15 today, while the number of judges pro tempore grew from a single position to 18. These shifts are even more pronounced in Maricopa County's superior courts. There, the number of commissioners rose from fewer than 20 in the mid-1990s to a peak of 107 in 2018, before settling at 73 in 2023 and 2024. Over the same period, the court added fewer than 30 superior court judges, increasing from 70 to 98. As a result, the combined ranks of commissioners, commissioners-on-call, hearing officers, and judges pro tempore now easily exceed the number of sitting

288. The 1974 Annual Report alludes to the use of court commissioners at the superior-court level in the judicial-system organizational chart but does not report precise staffing numbers or days of time spent. OFF. OF THE ADM'R FOR THE CTS., STATE OF WASH., EIGHTEENTH ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS 1, 11-15 (1974). In 1979, however, the superior courts reported the use of over 2,400 days of court-commissioner time, equivalent to approximately 1,019 full-time judge days. OFF. OF THE ADM'R FOR THE CTS., JUDICIAL ADMINISTRATION IN THE COURTS, STATE OF WASHINGTON, 1979: TWENTY-THIRD ANNUAL REPORT 24 (1979).

289. *Superior Court 2004 Annual Caseload Report*, WASH. CTS. 30 (2004), <https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2004.pdf> [<https://perma.cc/78PP-TQ5N>].

290. *Trial Court Staffing and Judicial Needs Estimates: Superior Courts—2023 Staffing Levels*, WASH. CTS. (2023), <https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=x&freq=a&tab=&fileID=superiorCourtStaffing> [<https://perma.cc/MXA2-38GF>].

291. *Id.*

292. In 1995, the Maricopa County Municipal Courts reported 102 municipal court judges and only 11 judges pro tempore alongside 7 hearing officers and 2 court referees. Arizona Judicial Officers FY1990-FY2024 Data (2025) (on file with authors). By 2023, the same court reported just 59 municipal court judges as against 92 judges pro tempore, 4 hearing officers, and 5 commissioners. *Id.* In 2024, the number of judges pro tempore dropped to 63, still more than the court's 59 municipal-court judges. *Id.*

superior court judges — a stark illustration of how much adjudicatory authority has been redistributed within the court.<sup>293</sup>

The picture is more complicated in other states but still supports the general conclusion. In California, widespread use of commissioners dates to 1966, when a constitutional amendment empowered the state's legislature to assign "subordinate judicial duties" to commissioners.<sup>294</sup> The amendment replaced a more limited 1862 constitutional provision that restricted commissioners to "chamber business," the "tak[ing of] depositions," and "other business connected with the administration of justice as may be provided by law."<sup>295</sup> By 1978, the number of commissioners and referees across the state had reached 95, representing roughly 15% of judicial positions.<sup>296</sup> By 2008, that number had grown to 408 commissioners and referees, representing roughly 20% of judicial positions.<sup>297</sup> But that same year, the state's legislature enabled courts to convert some of their commissioners into judges to "restore an appropriate balance between subordinate judicial officers and judges in the trial courts . . . in order to ensure that critical case types, including family, probate, and juvenile law matters can be heard by judges."<sup>298</sup> After conversion, the statewide number of commissioners dropped

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293. According to Maricopa County court data, the 2024 tally was as follows: commissioners (73), commissioners-on-call (18), hearing officers (1), judges pro tempore (17), superior-court judges (98). *Id.*

294. *Rooney v. Vt. Inv. Corp.*, 515 P.2d 297, 304 (Cal. 1973) (recounting this history).

295. *Id.*

296. JUD. COUNCIL OF CAL., 1985 ANNUAL REPORT 103 (1985) (presenting the number of judicial positions and judicial-position equivalents for fiscal year 1974-75 through fiscal year 1983-84 and reporting the following data for 1978: 551 judicial positions, including 69 commissioners and 26 referees).

297. Jud. Council of Cal., 2009 *Court Statistics Report: Statewide Caseload Trends*, CAL. CTS. 140-41 (2009), <https://www4.courts.ca.gov/documents/csr2009.pdf> [<https://perma.cc/5LTD-454G>] (presenting authorized judicial positions and judicial-position equivalents for fiscal year 2007-08 and reporting the following data: 2,022 judicial positions, including 381 commissioners and 27 referees).

298. See Act of Oct. 14, 2007, 2007 Cal. Stat. 5988. Conversion arose out of several years of debate, reflected in a report of a Judicial Council working group that recommended that "subordinate judicial officers" (SJOs) of all types be hived off from, for example, "judicial duties that can result in imprisonment" and family-law matters other than child support, but recommended that SJOs continue to play a role in small-claims cases, uncontested civil matters, discovery motions, pretrial motions, and settlement conferences and mediation, thus carving out a substantial role for SJOs in pretrial litigation. Subordinate Jud. Officer Working Grp., *Subordinate Judicial Officers: Duties and Titles*, JUD. COUNCIL CAL. 5-7 (July 2002), <https://courts.ca.gov/sites/default/files/courts/default/2024-12/sjowgfinal.pdf> [<https://perma.cc/7S4A-JMV7>].

significantly, such that, by fiscal year 2022-23, commissioners and referees again represented roughly 13% of judicial positions.<sup>299</sup>

Further research could enrich these rudimentary empirical forays. In particular, court-specific exploration could provide more texture and a gut check.<sup>300</sup> It could also uncover the informal dynamics sitting beneath formal delegations of authority, particularly the mission creep that results when delegated authority expands beyond its initial authorization<sup>301</sup> or when doctrinally mandated

299. Jud. Council of Cal., *2024 Court Statistics Report: Statewide Caseload Trends, 2013-14 Through 2022-23*, CAL. CTS. 180-81 (2024), <https://www4.courts.ca.gov/documents/2024-Court-Statistics-Report.pdf> [<https://perma.cc/2TZG-DAQE>] (presenting authorized judicial positions and judicial position equivalents for fiscal year 2022-23, and reporting 2,010.6 judicial positions, including 250.7 commissioner positions and 4.9 referee positions). The trend lines in individual California court jurisdictions mostly reflect this up-and-down trend. Thus, the Los Angeles Superior Court saw rapid growth of commissioners from 54 in 1983 to 136 by 2008, but then the number declined with conversion and sat at 75 in 2023. Similarly, Orange County Superior Court saw a rise in the use of commissioners from 5 in 1983 to a high of 33 in 2008, then a fall to 17 in 2023. JUD. COUNCIL OF CAL., *supra* note 296, at 205 (presenting numbers of full-time judicial positions and judicial-position equivalents for FY 1982-83 and 1983-84); Jud. Council of Cal., *supra* note 297, at 140-41 (presenting authorized judicial positions and judicial-position equivalents, by county, for FY 2007-08); Jud. Council of Cal., *supra*, at 180 (presenting authorized judicial positions and judicial-position equivalents, by county, for FY 2022-23). As in California, other states have seen recent contractions in use of quasi-judicial officers. See Interview with Stephanie Hess, *supra* note 213 (noting that in Ohio, trial courts had long relied on “visiting judges” – retired and/or senior judges who can be deployed in response to case backlogs – but that following the change in the Chief Justice of the Ohio Supreme court, the “process was changed drastically, so [assignment of visiting judges] doesn’t occur very much anymore”); *Guidelines for Assignment of Judges 2023*, SUP. CT. OHIO 8-15 (2023), <https://www.supremecourt.ohio.gov/docs/JCS/judicialAssignment/judgeAssignGuide100223.pdf> [<https://perma.cc/DN99-A3AR>] (setting out guidelines governing requests for the assignment of judges); Interview with Stacey Marz, *supra* note 198 (noting that the total number of magistrates has declined in Alaska in recent years because of the closure of a cluster of smaller courts that “were all magistrate judge base[d]”).

300. As examples, a recent evaluation of Connecticut’s pathways program for family-law matters reported 30 full-time family-court judges across the state, as supported by 131 family-relations counselors – already a roughly 1:4 ratio for only one type of delegation. See Davis et al., *supra* note 198, at 11. Similarly, the Cuyahoga County Domestic Relations Court is composed of 5 constitutionally appointed judges and 19 magistrate judges, with some of the latter attached to specific judges and others “pooled” on specific tasks. See Interview with Serpil Ergun, *supra* note 193 (noting the 5:19 ratio, the existence of pooled magistrates for domestic-violence cases, and describing the many other personnel who perform adjudicatory or management tasks, including case managers, staff attorneys, schedulers, navigators, early neutral evaluators, and mediators).

301. Interview with Jennifer D. Bailey, *supra* note 277. As Bailey noted:

[B]ack in the aughts, there were rules for what you could send to [magistrate judges] . . . Well, fast-forward a couple of years, we had judges sending everything to them and just hearing whatever fell out because you could object to the

judicial oversight of subordinate judicial officers, initially robust, becomes nominal or nonexistent.<sup>302</sup> Finally, future inquiries could develop a causal account by working out the relative contributions of docket surges, policy changes, and other potential explanations for expanding delegation practices.<sup>303</sup> The use of these techniques seems to flourish where courts are facing challenges of sudden caseload increases, frequently of a specific type, trying to accommodate the new burden while still moving the existing and continuing caseload to resolution.

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magistrate. Well, who wants to object when you know the judge's practice is to send everything there and they're going to be ticked if you object and they have to hear you, right?

*Id.*

302. Case law governing delegations to quasi- and nonjudicial staff requires that courts maintain "ultimate decision-making responsibility." See, e.g., *Visser v. Visser*, 829 N.W.2d 242, 246 (Mich. Ct. App. 2012) (upholding the authority delegated to a referee to conduct evidentiary hearings and recommend findings of fact and observing that "[o]ur Supreme Court has held that judicial power is not improperly delegated as long as the ultimate decision-making responsibility remains with a judge"), *vacated in part*, 836 N.W.2d 693 (Mich. 2013); *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct.*, 892 N.W.2d 267, 287 (Wis. 2017) (striking down a delegation to a referee to decide all motions subject to review by the judge under the standard of "erroneous exercise of discretion"). However, it is possible and even likely that oversight will weaken over time given tendencies within large organizations for the official span of control and written procedures governing decision-making to yield to informal norms over time. See, e.g., John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOCIO. 340, 342-43 (1977) (explaining that organizations generally do not function according to their formal "blueprints," with gaps emerging between formal rules and the actual, informal practices of actors within the organizations).
303. For instance, one former presiding judge hypothesized that delegation to quasi- and nonjudicial personnel tracked exogenous shocks, whether budget woes or sudden docket surges, such as the home-foreclosure crisis profiled previously. See Interview with Jennifer D. Bailey, *supra* note 277 ("I think when you see escalations of commissioners and pro tems, magistrates, is in budget crises or following budget crises. Because permanent judges are really expensive and permanent judges have lots of expenses even beyond just them and their immediate staff and their light bulbs and their staplers."); *id.* ("So these pro tems and magistrates . . . became an easy way to supplement the workforce . . . in response to workloads without necessarily having the same financial commitment. First of all, it's really hard to get rid of judges once you get them. Decertifying seats is a major pain on every front. So this is a way for courts and legislatures to adapt to circumstances with more flexibility. And so, where there's a surge, you can bring in more help. . . . [T]hat was part of what happened with the foreclosure workload, we brought in supplemental senior judges."); *id.* ("[E]very jurisdiction in Florida got foreclosure money. Some used it to just hire magistrates and just tr[ie]d to slough off all the cases on their magistrates . . ."); *id.* (noting the use of pro tems and magistrates to "supplement your existing workforce," such as "after every major storm, [when] there's a raft of first party property insurance cases"); Interview with Stacey Marz, *supra* note 198 (noting a surge in civil-commitment cases following a significant population increase and the construction of a large hospital in a particular community that led to the creation of a new magistrate position to hear those cases).

For now, however, a pair of generalizations seems defensible. First, delegation to quasi- and nonjudicial personnel has been a slow burn, but appears to have accelerated over the past several decades. Moreover, it is different in kind from earlier moments in the managerial turn in its involvement of nonjudicial court staff. The resulting state-level pattern of delegation stands in sharp contrast to federal courts, where delegation has tended to come via legislative big bangs—such as the creation of magistrates (now called magistrate judges) in 1968<sup>304</sup> or bankruptcy judges in 1978<sup>305</sup>—quickly followed by a predictable set of constitutional challenges.<sup>306</sup> At the state level, by contrast, delegations target a wider array of court staff alongside a slow and steady accretion of bureaucracy, and state courts have increasingly deputized nonjudicial court staff in ways that the federal courts have not yet entertained to any significant extent.<sup>307</sup>

Second, the delegation away from judges that has figured centrally in the managerial turn appears to have clustered in high-volume dockets and particularly in those parts of the system that have seen substantial increases in docket flows in recent years: debt collection, eviction, home foreclosure, and certain types of family law.<sup>308</sup> As just one example, a 2002 report of the Judicial Council

304. See Federal Magistrates Act, Pub. L. No. 90-578, § 101, 82 Stat. 1107, 1107-14 (1968).

305. See 28 U.S.C. §§ 151-159 (2024) (originally enacted as Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1114-18 (2006) (recounting the creation of federal magistrate and bankruptcy judges).

306. Other federal-level examples, though more limited in scope, include bankruptcy trustees in Chapter 13 bankruptcy proceedings and special masters. See Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 876-78 (2015); *Mathews v. Weber*, 423 U.S. 261, 265 (1976) (upholding a district-court standing order referring Social Security cases to a magistrate for preliminary review, oral argument, and preparation of a recommended decision); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding that the broad grant of jurisdiction to bankruptcy judges under the Bankruptcy Act of 1978 violates Article III); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 250-51 (1956) (rejecting trial-judge referral, via standing order, of antitrust actions to a special master); *United States v. Microsoft Corp.*, 147 F.3d 935, 954-55 (D.C. Cir. 1998) (rejecting special-master oversight of the implementation of a consent decree).

307. *But see* Wood & Clopton, *supra* note 32, at 89 (noting the use of staff attorneys to perform certain gatekeeping and triage tasks in federal courts of appeals).

308. Suggestive evidence includes the many challenges to quasi- and nonjudicial delegations in the family-law context. See, e.g., *In re K.E.S.*, No. 11-20-00167-CV, 2021 WL 219668, at \*2 (Tex. App. Jan. 22, 2021); *Acosta v. Melendez*, 118 N.Y.S.3d 730, 733 (App. Div. 2020); *Zilkha v. Zilkha*, 183 A.3d 64, 79-81 (Conn. App. Ct. 2018); *In re Julie M.*, 81 Cal. Rptr. 2d 354, 358 (Ct. App. 1999); *State ex rel. Ryley G. v. Ryan G.*, 943 N.W.2d 709, 720-21 (Neb. 2020). Another example of suggestive evidence is the fact that so many “pro se calendars” are overseen by commissioners. See, e.g., *Utah Pro Se Calendars*, UTAH LEGAL HELP, <https://www.utahlegalhelp.org/utah-pro-se-calendars.html> [<https://perma.cc/R8DF-GCWD>] (noting that five of the six such calendars are presided over by commissioners rather than judges).

of California noted that “subordinate judicial officers” made up 43% of the state’s family-law bench – and, moreover, were spending 87% of their time as temporary judges exercising full decisional power, albeit with the consent of the parties.<sup>309</sup> While the precise reasons for the concentration of quasi-judicial officers in certain dockets are unclear, some explanations seem plausible and even likely. One former presiding judge observed that delegation to nonjudicial officers in her court tended to track zones of demoralization: “[Judges] can be unenthusiastic about child support cases as they tend to be repetitive and somewhat depressing. So child support is frequently handled by magistrates across the country.”<sup>310</sup> If true, then the shape and timing of delegation to quasi- and nonjudicial personnel fuels a wider critique that the managerial turn has yielded a two-tiered system of justice, with relatively more skilled, empowered, and sophisticated decision-makers for some disputes, and less skilled and empowered decision-makers for others. Whether this has resulted from a faithful operationalization of the “pathways” proportionality principle that aims to match court resources to case needs, a less reflective and political determination that some cases are less consequential or less deserving of careful individuated consideration, or a simple judicial desire to duck dispiriting cases, the overall pattern seems clear.

## 2. *Information Flows: Standardization and “Filtering”*

A second cross-cutting feature of the managerial turn, though even harder to corral, is fundamental changes in information flows, including a pronounced uptick in the *amount* of information generated by courts and, just as important, increasing *standardization* of information.

Perhaps the easiest way to capture these broader trends is to observe that many of the managerial turn’s subcomponents both *depend* on growing standardization of information and also *feed* that standardization.<sup>311</sup> For instance, caseflow-management techniques – and particularly the more sophisticated, differentiated case-management and “pathways” approaches – are not possible without a stream of standardized information about cases and the analytic

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309. Subordinate Jud. Officer Working Grp., *supra* note 298, at 22.

310. Interview with Jennifer D. Bailey, *supra* note 277; *see also id.* (noting that delegation tends to happen for cases that judges “don’t like” and that “for judges of a certain philosophy [a]nything that’s in their docket that they can get rid of, that’s the stuff that tends to go”).

311. A good indication of the symbiotic relationship between new case-management practices and standardized data collection is Illinois’s strategic plan for 2022 to 2025, which lists “[i]mplement, evaluate, and sustain effective case management standards and case management practices for timely resolution of cases” alongside “[i]mplement, evaluate, and sustain standardized data collection, analysis, and reporting.” *Strategic Agenda 2022-2025*, ILL. JUD. BRANCH 13 (Sep. 2022), [https://www.illinoiscourts.gov/report/strategic\\_agenda\\_22-25](https://www.illinoiscourts.gov/report/strategic_agenda_22-25) [<https://perma.cc/B7HY-ZQ8R>].

capacity to parse and deploy that information at scale.<sup>312</sup> And yet, those same caseflow-management approaches—particularly pathways’ use of litigant-facing “online worksheets” and “guided interviews” to elicit case-level information used by court-triage staff to make routing determinations<sup>313</sup>—also *add* to the growing mountains of data on which modern courts sit. Court-provided forms, achieved at first through paper-based templates that litigants could use to make needed court filings but now accomplished via digital interfaces and “form-filling” software built around “guided interviews” and drop-down menus, are another example of how standardized information flows have both fueled and been fueled by the managerial turn.<sup>314</sup> Add to this growing efforts to develop jurisdiction-spanning data standards<sup>315</sup> and the power of new technologies, particularly AI, to convert low-value data previously buried in an inaccessible sea of text into high-value data, and American courts are plainly in the midst of a revolution in informational capacity, with swelling streams of data that are either already structured, and thus usable, or that can be readily made so.<sup>316</sup>

Less clear are the net consequences of the rationalization of court information flows. On the one hand, standardized forms not only increase the usability of information by structuring data up front but also increase the flow of information by enabling litigants, particularly the millions who navigate the system without legal help, to meaningfully participate in their cases by filing pleadings and thus asserting claims, defenses, or counterclaims that might otherwise go unasserted. On the other hand, growing reliance on court forms channels information flows into predetermined grooves, thereby constraining the types of

312. See, e.g., Interview with Jennifer D. Bailey, *supra* note 277 (“[T]echnology gave us opportunities to do things with this pathway stuff that didn’t exist before. Because the only way to do it was to basically have a human sort it, so it just never happened. But now just on basic crappy Odyssey systems, you can sort cases by case type. And so that’s when it took off.”).

313. See, e.g., Davis et al., *supra* note 198, at 11 (describing the use of a Family Civil Intake Screen to elicit information from litigants prior to routing cases to procedural pathways). For the REDCap tool used to elicit litigant information, see *Family Court Pathway Assignment Portal*, *supra* note 213. See also Pratt, *supra* note 213, at 1, 4 (describing the court’s use of the REDCap tool to elicit information from litigants and make pathway assignments).

314. Hamblin & Hannaford-Agor, *supra* note 12, at 2. The same is true of template orders, which some commentators have noted help to support teaming approaches to caseflow management. *Id.* at 2, 25 (noting that CCMT reforms in Florida benefited from template orders to support a standardized process across teams).

315. See *National Open Court Data Standards*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/our-centers-projects/national-open-court-data-standards> [https://perma.cc/F9NV-UMJ6]; *Steering Committee on Data-Based Court Performance and Data Standards*, ARIZ. CTS. (Dec. 11, 2024), <https://www.azcourts.gov/Portals/0/74/DSSC/Approved%20DS%20SC%20Meeting%20Minutes%2012%2011%202024%20for%20posting.pdf> [https://perma.cc/XE6F-NGM5].

316. See Yeung, *supra* note 169, at 505.

information generated. Cases that do not fit neatly within a template featuring common claims and defenses may be excluded or left to a residual “Other” box. In other words, the risk is that information generated via standardized forms and digital interfaces can be too canalized and too fit-for-purpose, compressing legal reality into simplified, predetermined categories and thus flattening the types of information generated and the legal contestation that results.<sup>317</sup> By generating information that is amenable to commodification and comparison along quantifiable, efficiency-focused metrics, standardized information can also feed an undue court focus on efficiency over decisional quality or process values.<sup>318</sup>

Though the implications of information standardization are ambiguous, some useful generalizations are nonetheless possible. For starters, the standardization of information flows, and the data aggregation it makes possible, may go a long way toward explaining a broader shift in the mindset of judges and court staff toward a more systemic and synoptic perspective.<sup>319</sup> In particular, a steady stream of increasingly standardized information, distilled in dashboards and case reports and deployed in “bulk” processing of cases through the system, can work subtle changes in the judicial mind by helping them to see their role in systemic, rather than case-level, terms. In time, pathways systems can become more than just a way to assign procedures and case-management techniques to individual cases. They also become vehicles for strategically allocating court resources in macro ways—providing the necessary data and framework to allocate court personnel, time, and schedules to achieve a “balanced caseload . . . while

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317. A good example is the commonsense call for use of “plain language” in court materials. However, linguists working across multiple areas, including law, have long debated whether conversion of technical language to plain language can achieve understanding without information loss. See Zsolt Zódi, *The Limits of Plain Legal Language: Understanding the Comprehensible Style in Law*, 15 INT’L J.L. CONTEXT 246, 253–54 (2019); Eric Martínez, Francis Mollica & Edward Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 COGNITION art. no. 105070, at 1 (2022); Rabeea Assy, *Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language*, 38 J.L. & SOC’Y 376, 383 (2011). Put another way, simple “bad drafting” is often only part of the problem; irreducible complexity also matters.

318. See Donald T. Campbell, *Assessing the Impact of Planned Social Change*, 2 EVALUATION & PROGRAM PLAN. 67, 85 (1979) (“The more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.”); JERRY Z. MULLER, *THE TYRANNY OF METRICS* 23–25 (2018) (describing the tendency to measure what is most easily measurable and the inevitability of actors gaming the metrics). Similarly, *CourTools* heavily emphasizes efficiency and timeliness (“Cost per case”; “Clearance rates”; “Time to disposition”; “Age of active pending caseload”; “Trial date certainty”) over process values and decisional quality. *CourTools*, *supra* note 142.

319. Cf. TOBIN, *supra* note 47, at 108 (noting the traditional judicial mindset centers on “microcosmic” thinking, built around adjudicative facts and the “building . . . of principles from decisions rendered in concrete situations,” as opposed to systemic or engineering-based thinking).

preventing any single case or group of cases from disproportionately consuming court capacity.”<sup>320</sup>

A final generalization is that the managerial turn is generating court-information flows that are not “filtered” through evidentiary rules that aim to ensure their reliability. New “pathways” systems that elicit information from litigants to guide routing decisions provide an apt example. Pathways systems are not subject to evidentiary rules or other adjudicative filtering, and yet that information can have significant, even merits-shaping implications for a case by determining the amount and type of discovery that will be available. In *Managerial Judges*, Resnik worried that growing judge involvement in pretrial litigation would expose them to unfiltered and “untested” information, compromising the judicial detachment and public, on-the-record consideration central to fair and impartial adjudication.<sup>321</sup> In truth, more reflective managerial architects are aware of such concerns. For instance, the “pathways” approach pioneered in the family-law division of the Kansas City courts developed to include a fully automated system for eliciting case information. Kansas City’s court system allocates cases to procedural and case-management tracks at least in part to ensure that neither judges nor court staff are exposed to merits-related information except through the litigation process.<sup>322</sup> The automation necessary to hive off judges and staff from unfiltered case information is achieved only by flattening litigant inputs into simple, binary questions.<sup>323</sup> Here and elsewhere, standardized, unfiltered information flows fuel the “bulk” processing at the core of the managerial turn, but their use is not costless.

### 3. *Shifting Bureaucratic Authority and Control*

Closely related to the pervasive delegation and standardization of information at the heart of the managerial turn are substantial shifts in the distribution of authority and discretion within courts. As an imperfect but useful

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320. Davis et al., *Triage Implementation Blueprint*, *supra* note 211, at 2.

321. Resnik, *Managerial Judges*, *supra* note 27, at 378, 432; *see also id.* at 408 (“Informal judge-litigant contact provides judges with information beyond that traditionally within their ken.”); *id.* at 427 (“The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence.”).

322. *See* Interview with Keven M.P. O’Grady, *supra* note 213; *see also* Pratt, *supra* note 213, at 61 (reproducing an online interface including the note: “The only information shared with the judge assigned to your case is the case management pathway into which your case was assigned”).

323. *See* Interview with Keven M.P. O’Grady, *supra* note 213; *see also* Pratt, *supra* note 213, at 9-10 (reproducing an online interface with a binary questionnaire).

heuristic, the managerial turn has shifted discretion and authority “up, over, and out.”<sup>324</sup>

“Up” denotes the tendency of the techniques, programs, and policies at the core of the managerial turn to fortify the oversight and control capacities of court leaders, whether presiding judges or court administrators, over lower-level personnel, including rank-and-file judges.<sup>325</sup> Differentiated case management and pathways substitute a predetermined basket of procedures and case-management techniques for a judge’s bespoke case-management order. Bench cards cabin the decision-making of adjudicators by reducing many adjudicatory tasks to checklists or flowcharts.<sup>326</sup> And court-mandated pleading and template orders, which helpfully standardize information but also constrain its content, limit decisional options and outputs – whether directly or indirectly. All of these measures focus and compress legal reality into preset molds, serving to constrain the line-level discretion exercised by judges and court staff alike. To that extent, the managerial turn might be thought consistent with decades of organizational theory that posits that the ownership and control of information determines authority and power within complex organizations and, further, that datafication and digitization, including AI-based oversight tools, may effect particularly strong upward shifts in authority and control from line-level actors to organizational leaders.<sup>327</sup> Line-level pushback, while real, is apt to be less than fully effective.<sup>328</sup>

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324. David Freeman Engstrom & Amit Haim, *Regulating Government AI and the Challenge of Sociotechnical Design*, 19 ANN. REV. L. & SOC. SCI. 277, 283 (2023) (describing “AI’s incorporation into bureaucratic routines” as “shift[ing] discretion up, over, and out”).
325. See Robert M. Brutinel, *Choosing Leadership Judges by State Supreme Court Appointment: Analysis of a Court Reform*, 82 LAW & CONTEMP. PROBS. 1, 25 (2019) (“As court data systems improve and as courts adopt common standards for measuring performance, it will be easier to identify common performance indicators such as workloads, case weights, time standards, public opinion surveys, and staffing metrics.”). As already noted, court leaders, whether presiding judges or court administrators, now talk openly about building “business processes” under and around judges. See *supra* note 213 and accompanying text.
326. These decision-support systems are not purely decision augmentation. They are also designed to guide or even cabin decision-making, and they are also useful tools of oversight and control.
327. See Engstrom & Haim, *supra* note 324, at 283 (“AI will shift discretion up by improving managerial control over the ‘street-level bureaucrats’ who have long wielded discretion in complex policy spaces.” (citation omitted)).
328. See Katherine C. Kellogg, Melissa A. Valentine & Angèle Christin, *Algorithms at Work: The New Contested Terrain of Control*, 14 ACAD. MGMT. ANNALS 366, 386 (2020); see also MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 24 (1980) (noting that street-level bureaucrats’ discretion may be limited); Jennifer Raso, *Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-Making*

The managerial turn has also effected horizontal shifts of authority and discretion within American courts. “Over” comes in two main forms. First is a shift in authority from judges to court administrators and their staffs. As the historical separation between adjudication and administration has narrowed and court administrators have become more involved in the design, construction, and maintenance of caseload-management systems and other adjudication-adjacent “business processes,” court administrators have necessarily gained a degree of influence over the adjudicatory dimensions of courts’ work. Indeed, an internal separation of powers akin to that observed in other government institutions may be emerging between presiding judges and court administrators.<sup>329</sup> This phenomenon is particularly pronounced in local trial courts with elected court clerks who sit in the executive branch and enjoy separate constitutional authority, and in courts with collegial governance in which a chief court administrator is hired and overseen by all the court’s judges rather than serving at the pleasure of a single chief or presiding judge.<sup>330</sup> In fact, in many courts, the internal separation

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*in Ontario Works*, 32 CAN. J.L. & SOC’Y 75, 76, 92 (2017) (describing ways that front-line agency actors can, within limits, “manipulate the system” to evade accountability and control measures).

329. See Brutinel, *supra* note 325, at 1-4 (noting the power dynamics of differing “governance structure[s],” including the “conflict between management and [judicial] autonomy” as played out between a state’s chief justice, the “leadership judge” of each jurisdiction, the “line judges,” and court administrators); *id.* at 24 (“The relationships between the various judges, courts, administrators, and stakeholders are increasingly recognized as being as important for the function of the judicial branch, if not more so than the formal organizational structure.”). For an influential analysis of similar dynamics within the executive branch, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-19 (2006), which argues for an “internal separation of powers,” or internal checks and balances, within the executive branch.
330. See ALEXANDER B. AIKMAN, *THE ART AND PRACTICE OF COURT ADMINISTRATION* 139 (2007) (“Most administrators are hired by ‘the court,’ meaning at least a majority (it is hoped, all or a strong majority) of the judges. In some courts the chief judge alone is the hiring authority, but normally in these situations the chief judge seeks the endorsement of key judges, if not all of them.”). Court administrators enjoy particular power in courts with collegial governance—that is, those governed by all judges of the court—and short terms and frequent turnover of the chief or presiding judge. *Id.* at 138 (noting frequent turnover: “During an average tenure of seven years, the administrator might work with four to seven chief judges”). Under those conditions, the executive is not answerable to any particular judge and does not serve at anyone’s pleasure, including the presiding judge. The demands of collective action and information asymmetries in those systems yield a significant amount of informal power and authority even if formal lines of authority make those powers seem more limited. In states without any tradition of presiding or chief trial judges—Mississippi and Arkansas are examples, see TOBIN, *supra* note 47, at 174—court administrators may wield even greater power.

Of course, as with other shifts in authority and control, jurisdictional variation in governance structures will matter. Many court administrators at the state level are constitutional

of powers entails a three-way split between the presiding judge or other judicial leadership, an appointed chief court administrator, and an elected clerk, with some of the sharpest internal separation-of-powers tensions arising out of the tense relationships between the latter two, often around access to data.<sup>331</sup>

More generally, many court administrators that formally exercise only delegated, subsidiary power have learned to be effective “policy entrepreneurs.”<sup>332</sup> Aided by information asymmetries and long tenures relative to any particular presiding judge,<sup>333</sup> court administrators can—despite their formal subordination—shape and drive forward policy innovations by initiating and implementing pilot projects or programmatic initiatives.<sup>334</sup> “Leading from behind,” as the management-speak phrase puts it, they can become prime movers of policy

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officers: by the end of the twentieth century, twenty-one state constitutions referenced an administrative director of state courts. TOBIN, *supra* note 47, at 158. Trial-court administrators are not constitutional officers. State-level administrators wield more power in unified systems, particularly those with state financing, because they tend to be more involved with trial-court operations, whereas local-court administrators wield more power in decentralized and locally funded ones. *Id.* at 169. Even so, trial-court administrators have carved out a degree of independence from state-court administrators. *Id.* at 172. Large-municipal-court administrators might even “box[] out” state-court administrators in many states. *Id.* at 171.

331. See, e.g., Off. of Program Pol’y Analysis & Gov’t Accountability, *Little Duplication in Court-Related Services; Clerk/Court Cooperation Should Be Improved*, FLA. LEGISLATURE 5-6, 19 (2010), <https://oppaga.fl.gov/Documents/Reports/10-11.pdf> [<https://perma.cc/J4Q8-X2WD>] (noting “conflicts between courts and clerks,” particularly over “technology issues”); Interview with Stephanie Hess, *supra* note 213 (noting “the push and pull between the judges and the clerk of the court” and the availability of “government conflict resolution services” in order “to mediate between judges and county commissioners and clerks,” including disputes stemming from data ownership and the court’s case-management system).
332. On policy entrepreneurs, see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 21, 165-66 (1984), for a discussion of the role of jurisdictional competition and other factors in driving policy change. On bureaucratic autonomy, see DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 14-18 (2001).
333. See AIKMAN, *supra* note 330, at 138 (noting the long tenures of court administrators relative to chief judges). On the ability of bureaucrats to manipulate the policy agenda through information asymmetries, see generally EDWARD C. PAGE, *POLITICAL AUTHORITY AND BUREAUCRATIC POWER: A COMPARATIVE ANALYSIS* 10 (1985); and Robert D. Putnam, *The Political Attitudes of Senior Civil Servants in Western Europe: A Preliminary Report*, 3 BRIT. J. POL. SCI. 257 (1973).
334. See ROBERT W. TOBIN, *AN OVERVIEW OF COURT ADMINISTRATION IN THE UNITED STATES* 26 (1997) (noting that in courts where judges are primarily focused on the adjudication of cases, “court-related organizations,” including state-court administrative offices, will conceptualize and draft policies, with judges doing little more than “approv[ing] or disapprov[ing] the policy recommendations that are presented”).

change.<sup>335</sup> And yet, the valence of the policy changes resulting from an emerging internal separation of powers remains to be seen. In the executive branch, internal separation of powers is thought to be a salutary source of friction and a check on purely political decisions, thus helping to manage perennial tradeoffs between efficiency, democratic accountability, and the rule of law.<sup>336</sup> But an emerging separation-of-powers issue in American courts might push in the opposite direction: it is court administrators who, given their professional training and vantage, might value efficiency and standardization over process values.<sup>337</sup>

A second horizontal shift—though in truth more a subset of the first—is a shift in authority from judges to the technologists who build and maintain the technology and data infrastructures on which much of the managerial turn depends. Some observers laud the rise of “interdisciplinary collaboration” in designing and implementing new managerial systems.<sup>338</sup> Prior to the managerial turn, judges and court administrators had little occasion to work directly together.<sup>339</sup> “It was novel,” as one judge recalled, “to have IT personnel at meetings with judges and high-level administrators.”<sup>340</sup> As court digitization has deepened, however, court technologists play an increasingly central role by exercising discretion in the course of building and overseeing court technology systems that are only imperfectly subject to input and oversight by nontechnical court staff, including judicial officers, given wide information asymmetries.<sup>341</sup> In many

335. It is also notable that many court administrative offices have substantial legal responsibilities, including providing legal assistance to rulemaking committees, drafting opinions and legislative summaries for judges, and writing advisory opinions that do not arise from specific cases. TOBIN, *supra* note 47, at 167.

336. See, e.g., Katyal, *supra* note 329, at 2316–19; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–29 (2009); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1595–1601 (2007).

337. See, e.g., Interview with Serpil Ergun, *supra* note 193 (noting “constant friction [and] tension between judges who want as much freedom to do what they want when they want an[d] administration that wants rules”); *id.* (“You have juris[ts,] judges, magistrates or whatever, who feel very, very strongly that their job is a special job, and they exercise discretion, and they’re trying to do the right thing, and they’re trying to do individual justice in individual cases. And then there’s court administration that wants things to be consistent and standardized so that people can count on outcomes.”).

338. Rau, *supra* note 178, at 64–65.

339. See *id.* at 65 (“Many of these Court administrators had never sat at the same table with judges to discuss court operations or even been consulted in how to best design an efficient well-run court. Judges had been kept elevated and removed.”).

340. *Id.* at 68.

341. See Interview with Samuel Anderson Thumma, *supra* note 192 (“I think this sort of trinity, a judicial officer wants to change things, administrators willing to try, and then a technologist

organizational contexts, technologists hold significant gatekeeper power by virtue of their critically important role in making data and statistics legible to stakeholders.<sup>342</sup>

“Out” denotes the shifting of authority and discretion beyond courthouse walls. Here, too, there are two primary forms. First is a shift toward “court-adjacent” entities, as some commentators call them.<sup>343</sup> They include an array of mediation and arbitration centers and “diversion” programs, some of them funded and operated by local bar associations, and populated by early neutral evaluators, mediators, arbitrators, judges pro tempore, and neighborhood conciliators, among others. Outward shifts also include social-service agencies, both public and private, and, in some states, the nonpartisan commissions that conduct judicial performance evaluations. According to some observers, these innovations externalize some of the adjudicatory functions of the court, thereby putting judges in the position of “coordinator-in-chief”<sup>344</sup> and rendering them the “titular head”<sup>345</sup> of a coalition of support groups and court-related agencies.

Second is a shift in authority and discretion to external technology providers, particularly a growing cast of court-technology vendors. After all, courts face the same make-or-buy decision that any organization faces.<sup>346</sup> Outside all but the largest courts or highly unified court systems, in-house technical capacity is limited, so the more common choice is to buy, leaving courts heavily reliant on procurement to meet their technology needs. There is necessarily slippage in such situations, because contracting and monitoring are imperfect. A new and promising line of research has begun to interrogate the tradeoffs of having relatively few market-dominating vendors, including Tyler Technologies, which provides the case-management systems for a staggering one-half of state courts.<sup>347</sup> These

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who’s along as well, and any of those three can be out in the lead. But you[’ve] got to have that confluence. And that requires[,] sort of by definition, some delegation of authority or responsibility from a judicial officer to a non-judicial officer.”).

342. Rau, *supra* note 178, at 69 (“Reports had to be generated so all the stakeholders could read and understand patterns and problems.”).

343. Robin J. Efron, *The Pendulum Swings of Access to Justice*, JOTWELL (Apr. 4, 2024), <https://courtslaw.jotwell.com/the-pendulum-swings-of-access-to-justice> [https://perma.cc/37LE-J338]; Lauren Sudeall, *Justice Citizenship*, 76 S.C. L. REV. 857, 861 (2025); DEANNA PANTÍN PARRISH, *DESIGNING FOR HOUSING STABILITY: BEST PRACTICES FOR COURT-BASED AND COURT-ADJACENT EVICTION PREVENTION AND/OR DIVERSION PROGRAMS* 3 (2021).

344. TOBIN, *supra* note 47, at 189.

345. *Id.* at 70.

346. See Engstrom & Vogt, *supra* note 145, at 180.

347. See generally Todd Venook, *Enterprise Justice: Tyler Technologies and the Privatizing Court*, 135 YALE L.J. (forthcoming 2026) (detailing Tyler Technologies’ dominant role as the primary provider of case management and other digital infrastructure for state courts, and analyzing the resulting implications for access, accountability, and market concentration).

outward shifts in authority and discretion are particularly pronounced in medium to small courts in decentralized systems, which are uniquely dependent on procurement and contracting for their technology systems. Pushback has begun, though. Some states have moved to develop their own, homegrown case-management systems with the express aim of “full ownership of the source code,” thus “eliminating third-party vendors and licensing fees.”<sup>348</sup>

To be sure, “up,” “over,” and “out” are only heuristics; the precise dynamics in a jurisdiction will turn heavily on court-governance structures. There is a world of difference between large urban courts, with hundreds of judges periodically rotating among master and specialized calendars and overseen by a hierarchy of a chief judge and numerous, department-specific administrative judges, and medium and small courts, particularly those in nonunified, fragmented systems, some of which lack a presiding judge or court administrator at all.<sup>349</sup>

The shifts in authority and discretion that have accompanied the managerial turn may be more complicated in other ways as well. First, while the general trend may be upward shifts in authority and discretion via enhanced managerial control, in some instances, the managerial turn has shifted authority and discretion in a decisively downward direction. In significant swaths of the civil-justice system, including high-volume dockets that feature some of the most vulnerable litigants, the combination of pervasive delegations to quasi- and nonjudicial personnel and a lack of robust adversarial contestation creates pools of discretion without meaningful oversight or appellate review.<sup>350</sup> In many jurisdictions, the managerial turn might thus be best described as a checkerboard of tightened managerial control and extreme organizational slack.<sup>351</sup>

Second, pervasive delegation away from judges has both justified new forms of managerial oversight and made their adoption possible by end-running concerns about judicial independence. After all, the complex tasks that make up the managerial turn, from caseload management to new quality-control measures, require someone to perform them, and judges alone, absent a dramatic increase

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348. See, e.g., GA. CTS., <https://cms.georgiacourts.gov> [<https://perma.cc/J59G-FTWN>]; see also *Frequently Asked Questions*, GA. CTS., <https://cms.georgiacourts.gov/faq> [<https://perma.cc/MG39-HC56>] (“The new System will be owned by the Judiciary—not third-party vendors requiring licensing and subscription fees—allowing additional courts to be onboarded as needed and features and functionality to be added on the Judiciary’s timeline.”).

349. See, e.g., Lilia Alvarez, *Building Administrative Scaffolding in Small Courts: Experiences in the U.S. and Abroad*, 104 JUDICATURE 58, 59 (2020) (discussing the lack of administrative capacity in small courts).

350. See Shanahan et al., *supra* note 226, at 66–67 (noting that in lawyerless courts there is an absence of written opinions and appellate activity).

351. For a classic exposition of organizational “slack,” see RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 36–38 (1963).

in the size of the bench in most courts, lack sufficient capacity. While delegating these tasks to quasi- and nonjudicial personnel fills the capacity gap, it also shifts work to actors who, unlike judges, lack constitutional claims to independence and so may have their authority and competence questioned. Pervasive delegation of decision-making authority to quasi- and nonjudicial personnel thus enables levels of control and oversight that would not fly in a judge-centered system, given strongly held norms of judicial independence.<sup>352</sup> In Alaska, to provide one example of oversight of quasi-judicial staff, magistrate judges are subject to significant oversight, including a range of formal and informal methods to bring magistrates with outlier decisional patterns into line—controls that would be anathema if applied to judges.<sup>353</sup> Where adjudicatory tasks are delegated to nonjudicial staff, an even fuller panoply of oversight systems can operate, fueled by growing data transparency and the various “workplace surveillance” measures that digitization affords.<sup>354</sup> An interesting question going forward is whether

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352. As one former presiding judge put it, “Business processes in court administration need structure to work in a functional, due-process-respecting way, but court culture historically resists structure because every judge is an independent constitutional officer and can be treated as a unique snowflake—but too many snowflakes just creates a blizzard for those outside.” Interview with Jennifer D. Bailey, *supra* note 277; *see also id.* (noting, as to delegations to quasi-judicial officers, that “where they work is where there’s behavioral standards, or performance standards is a better way to put that, performance standards where there’s objectively measurable goals like, ‘I’m adding you, so I should be able to close cases out this much earlier.’”).

353. *See* Interview with Stacey Marz, *supra* note 198 (noting the court’s “internal evaluation system” for magistrate judges, including: an “internally created evaluation panel that the magistrate judges have go before at various intervals”; a pairing system of “training judges,” either judges or experienced magistrates, who review each magistrate’s work, do site visits, and/or virtually listen to digitally recorded hearings in a process that “ends up looking a little bit like peer review”; and a mandatory annual magistrate judge conference); *id.* (“I can pull data from different case types and hearing outcomes and look at the variations and identify if there is an unusual pattern or an outlier. And then we might dig in and say, oh, well, they grant only on the paper. They don’t have hearings for parties. And then we will reach out and say, I’m not sure what’s going on here, but you need to have hearings. And so we’re able to use data to look at anomalies.”); *id.* (“[W]e’re not going to intervene in an individual case that’s ongoing or that’s [within] judicial discretion on how they manage their individual case. With [a magistrate judge], if we saw something unusual or received complaints from either a litigant or a lawyer or a staff person, we would listen to hearings. . . . We would figure out whether they are doing something that needs additional training or mentoring. If so, we would reach out to the training judge and give them information about the situation and specific information about the concern, including the hearing at issue for example. We’re concerned about X, Y, and Z. . . . We try to work a plan for how do we bring everybody onto the same page. If it was a problem, depending on the seriousness or whether corrective action was warranted and did not resolve the concern, then the evaluation panel could recommend non-retention.”).

354. *See* IFEOMA AJUNWA, *THE QUANTIFIED WORKER: LAW AND TECHNOLOGY IN THE MODERN WORKPLACE* 172-77 (2023); Kellogg et al., *supra* note 328, at 370-72, 376-77. Without the

pervasive delegations of decision-making authority to quasi- and nonjudicial personnel will make quality-control measures, including direct decisional oversight, more readily available to court leaders, bringing large portions of the civil-justice system closer to the set of managerial controls that exist in mass adjudication in administrative agencies.

#### 4. *An Informal Law of Judicial Administration*

A fourth feature that cuts across managerial courts is the growing prevalence of *informal* forms of managerialism, defined as managerial techniques, processes, and programs that are not specified in legislation or court-supervised rulemaking, but instead result from court administrative orders or other, less formal and less ventilated forms of internal policymaking. Yet even managerial measures brought into being without formal process or public ventilation may nonetheless enjoy the core attributes of law. As one former Philadelphia judge noted, a leadership-generated case-management order that specified time-to-disposition standards and set bounds around discovery “felt like the ‘law’ that judges, court employees, and lawyers were expected to follow.”<sup>355</sup> In effect, managerialism has produced a shadow corpus of “law” within the courts – norms and directives that govern with legal force but without the procedural legitimacy of legislation or rulemaking.

In developing informal and internal procedures and policies for mass adjudication, managerial courts are not alone. Indeed, administrative agencies have long governed through “internal administrative law,” or what Jerry L. Mashaw defines as “internal rules and procedures, bureaucratic systems, and internal techniques of instruction, oversight and control of agency personnel.”<sup>356</sup> As Gillian E. Metzger and Kevin M. Stack explain, this corpus, generated by and imposed on agencies themselves,

includes internal procedures for agency action, structures of internal agency organization and allocation of authority, specifications for how

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sensitivities that attend judge oversight, many court staff are already evaluated, with performance improvement “discussed and expected” and raises and bonuses provided as rewards. Rau, *supra* note 178, at 59. As part of Philadelphia’s sweeping case-management reforms throughout the 1990s and 2000s, court leaders “established clear and public performance goals for Court employees to help enforce their expectations of more efficient and predictable performance.” Rau, *supra* note 178, at 72. Indeed, as Philadelphia institutionalized its pioneering caseload-management systems in the 2000s, court leaders established a “Quality Assurance (QA) Unit” to train court staff on operational processes and develop an “access database” that tracks the productivity and performance of court staff. Steelman, *supra* note 180, at 4.

355. Rau, *supra* note 178, at 71.

356. Mashaw, *The Inside Out Perspective*, *supra* note 25, at 502.

agency actors are to make evaluations or conduct analysis, guidance about the agency's understanding of what statutes and regulations mean, informal agency practices, interagency agreements and norms, and centrally generated cross-cutting requirements for agency action.<sup>357</sup>

Among its goals, internal administrative law aims to improve “consistency, predictability, and reasoned argument in agency decision-making.”<sup>358</sup> Managerial interventions devised to improve the systemic fairness and accuracy of adjudication thus epitomize internal administrative law.<sup>359</sup>

The interventions in New York City and New Jersey exemplify how key components of the managerial turn can constitute an “internal law of court administration.” Judge Fern A. Fisher’s orders in New York, which mandated judge-conducted allocutions for settlements involving a pro se tenant, defined the procedures of New York City Housing Court and constrained judicial conduct.<sup>360</sup> While New York eventually adopted her interventions by statute in 2022, for fifteen years her directives – not legislation or appellate precedent – directed judicial and court-attorney engagement with eviction settlement.<sup>361</sup> New Jersey’s governance strategy offers an even more sweeping example. The New Jersey Supreme Court effectively created grounds for a case’s dismissal or the entry of a default judgment, replaced ordinary discovery rules with standardized, form-based “statements” and “sheets,” and established the equivalent of a required mediation before any trial could commence. The Court did so via “administrative directives,” not through more formal policymaking pathways.<sup>362</sup> Eviction-diversion programs,<sup>363</sup> specialized calendars for cases involving pro se

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357. Metzger & Stack, *supra* note 25, at 1256.

358. *Id.* at 1244.

359. See Ames et al., *supra* note 36, at 28-29.

360. See *supra* notes 269-270 and accompanying text; cf. Metzger & Stack, *supra* note 25, at 1251-56 (explaining the effects of “internal administrative law” on agency official discretion); Walker & Turnbull, *supra* note 25, at 1231 (same).

361. See N.Y. REAL PROP. ACTS. LAW § 746 (McKinney 2024).

362. See Grant, *supra* note 271. In Boston, a standing order of the court provides that, where at least one party is self-represented, a judge or clerk must endorse any stipulated judgment, via what amounts to an allocution, to confirm that it was voluntarily entered and substantively reasonable. Standing Order No. 1-23, *supra* note 276, at 3.

363. See, e.g., *New Eviction Protocol*, *supra* note 200 (establishing a new eviction protocol by judicial memorandum, requiring an initial hearing date for all eviction actions to be conducted in person by a diversion facilitator before the case is scheduled for trial before a magistrate, and with the option for parties to opt-in to the diversion program); Residential Eviction & Consumer Debt Early Resol. Program, Gen. Admin. Order No. 2020-09, at 4 (Ill. Cir. Ct. Apr. 22, 2021) (creating, by general administrative order, the Illinois Residential Eviction and

litigants,<sup>364</sup> bench cards,<sup>365</sup> and informal case-clustering practices<sup>366</sup> are further ways in which a mix of administrative orders, standing orders, judicial memoranda, administrative bulletins, local practice rules, and guidance documents – not statutes or court-supervised rulemaking – are remaking dispute-resolution processes in large swaths of the American civil-justice system.

These varied forms of internal law have also coincided with, and in many ways hastened, a related development: the demise of “general” procedure and case management. Where civil cases once largely proceeded through a single, relatively uniform sequence of procedural steps, today’s differentiated case-management systems and one-off administrative directives have splintered that path into multiple, bespoke tracks – each with its own rules, timelines, and resource commitments. This splintering is not merely procedural housekeeping. It is a profound reimagining of the judicial role, one that implicitly rejects norms of procedural transsubstantivity. Arizona offers a stark illustration. In that state, so thorough has been the adoption of procedural and case-management routings that a recent study estimated that fewer than five percent of filed civil cases are governed by the Arizona Rules of Civil Procedure.<sup>367</sup> These trends – an expansive internal law of court administration and the concomitant demise of “general” procedure – have made informality a defining trait of the managerial turn.

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Consumer Debt Early Resolution Program, which requires the plaintiff to provide notice of the program with the summons and for judges to continue all eviction cases for a minimum of fourteen days to allow either or both parties to work with the diversion program); Order Amending Pre-Eviction Diversion Program, *In re* Ind. Pre-Eviction Diversion Program, No. 22S-MS-308, at 1-2 (Ind. Sep. 2, 2022) (creating, by administrative order, a pre-eviction diversion program, which requires judges to notify parties to any residential eviction action at the first hearing of the availability of diversion resources, and, if both parties agree, to stay the eviction for ninety days); Provisional Rules for Eviction Diversion Program, Admin. Bull. No. 98, at 1-3 (Alaska Ct. Sys. Feb. 21, 2023) (creating, by court order and administrative bulletin, an eviction diversion program requiring landlords to provide certain informational materials and offering free voluntary mediation services); Order Amending L.V. Just. Ct. Loc. R. Prac. 6.2, 6.4, 6.5, & 6.7 & Adopting R. 6.8, *In re* Amend. of Part 6 of L.V. Just. Ct. Loc. Rules of Prac. Relating to Summary Evictions, No. 22-40774, at 2-6 (Nev. Dec. 28, 2022) (requiring, via local rules of practice, that landlords and tenants use certain pleading forms, directing court staff to screen mandatory tenant answers, automatically set cases for diversion intake appointments based on program eligibility criteria, and refer cases to voluntary mediation).

364. See *supra* notes 218-220 and accompanying text.

365. See *supra* notes 230-245 and accompanying text.

366. See *supra* notes 16, 220 and accompanying text.

367. See Daniel W. Bernal, *Tailored Procedures*, 101 N.Y.U. L. REV. (forthcoming 2026) (manuscript at 5), <https://ssrn.com/abstract=5463434> [<https://perma.cc/HYH8-A5DF>].

### C. *Some Preliminary Conclusions*

The above mapping of court managerialism's current frontier raises many questions that demand scrutiny, a testament to managerial courts' importance and maturation and their relative neglect by scholars. Court managerialism is a response to very real pressures of volume, complexity, and scarcity, but it also strains the features that have long distinguished courts from other governance institutions. Delegation of authority away from judges and toward quasi- and nonjudicial personnel could serve to ration judicial attention in salutary ways. Yet it also risks hollowing out judges' constitutionally conferred authority and diluting the accountability that comes with a judge's name on an order. Standardization and aggregation of court data could enable a "golden age" of transparency over court operations, allowing court leaders to spot and solve problems in ways that case-by-case adjudication and appellate review cannot. But what ensures that the same techniques of digitization and datafication do not instead prompt a slow slide into bulk—and even mindless—processing of cases at odds with the careful individuation that due process demands? Pathways case-routings and other forms of systemic administration can allocate scarce court resources in proportion to case needs, perhaps even freeing up valuable judicial attention that might otherwise be squandered on mindless administration. Yet the same techniques can also prejudge disputes and entrench a two-tiered system of justice, with litigants in "simple" cases afforded only the barest procedural protections. Finally, an emergent internal separation of powers among court actors could generate the kind of Madisonian "ambition checking ambition" that can discipline managerial excess and preserve judicial independence. Less optimistically, it could equally usher in a "Rule by Nobody," as Owen Fiss put it, in which no one—least of all judges—is held to account for the design and operation of managerial interventions and the court outputs they shape.<sup>368</sup>

As these tensions suggest, the managerial turn involves a complex set of tradeoffs. The various tools and techniques cataloged above carry both risks and opportunities. For each, important work remains to identify the right and appropriately precise evaluation metric, and then to do the measurement necessary to ensure proper design and operation. But each also raises a more fundamental issue, with which any normative reckoning with managerial courts must begin. For it is only by isolating the distinctive institutional identity of courts that one can establish a normative baseline against which the managerial turn's many innovations can be measured. The next Part makes a start at that inquiry.

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368. Fiss, *supra* note 4, at 1451-53.

### III. RECKONING WITH MANAGERIAL COURTS

Judging has long been understood to be a nonbureaucratic process, and courts nonbureaucratic institutions. Yet today's courts are saturated with bureaucratic processes and practices — often with court administrators, not judges, in the lead. Does this transformation threaten the judiciary's distinctive institutional identity and, with it, the legitimacy of judicial authority? Writing in 1982, Professor Resnik voiced the concern that management posed an existential threat to courts as institutions. “[A]s it moves closer to administration,” she cautioned, “adjudication may be in danger of ceasing to be.”<sup>369</sup> She urged judges to choose to “remain true to their ancestry” and resist managerialism's encroachment until its promise and peril could be understood.<sup>370</sup> Following Resnik's lead in evaluating managerial *judges*, this Part asks whether there is likewise something deeply troubling about managerial *courts*.

Like Resnik, we use institutional compatibility between managerialism and judging as the key measure for assessing managerial courts. But our approach, informed by several decades of ceaseless change, departs from the path she blazed. First, managerial courts encompass a good deal more than the case-management work Resnik described individual judges doing.<sup>371</sup> Indeed, the judicial managerialism she surveyed is just one of several variants, alongside litigant managerialism (i.e., pure adversarialism) and court managerialism. Second, and relatedly, managerialism is not a choice but an inevitability, an unavoidable feature of adjudication that any attempt to identify its core features should appreciate. Third, the rise of managerial courts is a normatively ambiguous phenomenon, demanding neither uncritical acceptance nor the deep skepticism Resnik expressed for managerial judges. Court managerialism poses considerable peril to adjudication's integrity. But it also holds considerable potential, especially given twenty-first-century litigation realities.

These premises frame our analysis. Given the inevitability of one or another of its variants, managerialism is not a deviation to be rejected but an institutional reality to be optimized. Moreover, managerial courts can intersect constructively with managerialism's other variants only if guided by the right answers to the question of *what* to optimize. Informed by Resnik's concern for institutional compatibility, that question requires a plausible model of judging that can accommodate bureaucratization as a response to real-world litigation conditions while remaining faithful to adjudication's distinctiveness. We offer such a model,

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369. Resnik, *Managerial Judges*, *supra* note 27, at 445.

370. *Id.*

371. Professor Resnik briefly discussed court bureaucracies as an alternative to managerial judges. *Id.* at 437-39.

striving to maintain an adjudicative core of moral judgment, neutrality, and judicial accountability for ultimate decisions while also acknowledging the necessity of system-level management. We then derive from it several principles to guide the design and governance of managerial courts – thus answering the further question of *how* to optimize.

The possibility of optimization has profound stakes. Properly governed, court managerialism can address problems that other variants of managerialism create or leave unresolved, all while maintaining adjudication's institutional integrity. If that is so, the central question shifts from justification to obligation: when litigation conditions imperil fairness and accuracy, might due process and constitutional principles *require* courts to act as managerial institutions?

### A. Optimization as the Right Task

#### 1. Tradeoffs

As a policy-analytic matter, court managerialism's bundle of practices is normatively ambiguous. These practices may improve the civil-justice system while simultaneously introducing new problems. Court managerialism thus involves difficult tradeoffs between competing goals that adjudicatory systems pursue.

First, from the perspective of litigants, some of the efficiencies that court managerialism produces can be access-widening. Inefficiency can lead parties to seek alternative means of resolving disputes, and costly litigation disproportionately burdens low-income individuals, effectively pricing them out of the judicial process. Managerial interventions can thus help to realize the Federal Rules' promise of "just, speedy, and inexpensive determination of every action and proceeding."<sup>372</sup> For instance, pathways programs obviate the need for an initial conference to address discovery limits, scheduling, and case complexity.<sup>373</sup> Mechanisms such as online dispute resolution and summary pathways can reduce logistical barriers to participation for self-represented litigants.<sup>374</sup> Pathways programs also safeguard against overproceduralization, because procedures and case management are proportional to case needs and stakes. But these efficiencies can go awry. The pursuit of efficiency can crowd out other values, especially when efficiency is easier to measure. And the efficiency of *ex ante* rules like

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372. FED. R. CIV. P. 1.

373. See *supra* Section II.A.2.

374. See, e.g., Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORN. J.L. & PUB. POL'Y 331, 352, 375-76 (2016); J.J. Prescott, *Using ODR Platforms to Level the Playing Field: Improving Pro Se Litigation Through ODR Design*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE, *supra* note 172, at 286, 286-87.

pathways programs may prove illusory if procedural streams fit awkwardly with actual cases — a mismatch that would produce other costs.

Second, court managerialism can promote judicial legitimacy by establishing the right amount of distance between a judge and the cases on the judge's docket. One of Resnik's core concerns with managerial judging was that judicial immersion in litigation before merits adjudication, whether for case-management or settlement-promotion purposes, threatened to remove a "blindfold[]" essential to impartiality.<sup>375</sup> "[D]isinterest and disengagement," Resnik argued, are "virtues that form the bases of [judges'] authority."<sup>376</sup> Managerial courts can solve this "blindfolds" problem. By delegating the task of pathway assignment to court staff or delegating initial responsibility for the supervision of settlement negotiations to parajudicial personnel, judges can remain at a remove from cases prior to merits adjudication.<sup>377</sup>

Yet court managerialism also risks creating too much distance: its shift to a more systemic vantage can produce judicial estrangement. Distance may foster acontextual judging or deprive judges of the embedded information and adjudicatory continuity they need to weigh arguments and equities and get to a just result. Moreover, delegation of responsibility for case management and settlement negotiations might diminish a judge's sense of responsibility for ultimate outcomes.

Third, the "bulk" processing at the core of many managerial tools both undermines and fosters the individuation at the core of due-process values. By applying standardized interventions based on recurring patterns identified across similar case types, court managerialism departs from norms of individuated judgment delivered one case at a time. A pathways regime, for instance, effectively prejudices presumptive discovery needs for a category of cases. Some amount of bulk processing may be necessary, though, to realize the goal of individuation under modern litigation conditions. Pathways programs can achieve a measure of tailoring that a fully individuated process could not realistically achieve due to resource limits. So long as it merely erects presumptions that litigants can rebut, bulk processing does not challenge individual consideration free of prejudgment. Moreover, meaningful individuated adjudication may require singling out certain categories of cases for differential treatment. Given the ubiquity of defendant defaults in consumer-debt litigation, for instance, a default prove-up regime involving clerks "top sheeting" problems with the plaintiffs' documentation may be the only way to give judges the capacity to assess individual plaintiffs' entitlements to judgments.

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375. See Resnik, *Managerial Judges*, *supra* note 27, at 408.

376. *Id.* at 445.

377. See *supra* notes 204-217 and accompanying text.

Bulk processing will not always have these salutary effects, however. It can also create an anchoring effect by determining what judges intuitively perceive as reasonable or fair in a given type of case without regard for individual circumstances.<sup>378</sup> Assigning a case to a “simplified” pathway also frames it in a particular way. Critics of pathways for eviction cases that limit the issues and evidence courts can consider, for instance, claim that these constraints lead to rushed adjudication that blinkers judges to some cases’ complexities.<sup>379</sup>

Finally, court managerialism can both shroud and unmask the forces driving case outcomes. Bulk processing creates the possibility that a managerial “hidden hand” – decisions about case treatment made centrally, apart from individualized adjudication – could influence individual case adjudication. Because managerial control is often exercised through court orders or informal policies rather than statutes or court-supervised rulemaking, this “internal law” can be difficult for litigants to reconstruct or challenge.<sup>380</sup> At the same time, managerialism – through datafication and the synoptic view it affords – holds the promise of making courts more legally accountable. It can allow court leaders like presiding judges or court administrators to spot and solve issues that remain invisible to individual judges and litigants, thus yielding more accurate application of duly enacted law.

These tradeoffs illustrate why court managerialism resists simple normative judgments. The same interventions that promise efficiency and access can threaten deliberative quality and individual consideration. The challenge is not to eliminate these tensions – they are inherent in any effort to reconcile bureaucratic tools with adjudicatory values – but to manage them thoughtfully.

## 2. *Managerialism’s Inevitability and Intersections*

The inevitability and irreducibility of management as a core feature of adjudication also point to optimization as the right task. When Professor Resnik published her pathbreaking study in 1982, the moment seemed to be a contingent one, when the judiciary could choose to steer toward greater managerialism

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378. On anchoring effects and intuitive reasoning in judges, see Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORN. L. REV. 1, 19–21 (2007) [hereinafter Guthrie et al., *Blinking on the Bench*]. See also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1500 (2009) (discussing administrative law judges’ and generalist judges’ gravitation toward intuitive processing).

379. See Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 378–79 (2022); John Pollock, *Right to Counsel for Tenants Facing Eviction: Justifications, History, and Future*, 51 FORDHAM URB. L.J. 1439, 1465–69 (2024).

380. See *supra* Section II.B.4.

or away from it.<sup>381</sup> Rulemakers, for instance, had not yet finished deliberations over an amendment to Rule 16 of the Federal Rules of Civil Procedure, which was designed “to encourage pretrial management that meets the needs of modern litigation.”<sup>382</sup> Four decades later, the choice seems clearly made, with changes since the 1980s “[r]edefining” the “[j]udicial” as “[m]anagement,” to quote Resnik’s later assessment.<sup>383</sup>

But, as Part I’s history suggests, the moment when “management” stood just at the door of the “judicial” ended long ago. Indeed, court bureaucracies were entrenched realities by the time Resnik named managerial judging as a consequential shift in the judicial role. The professionalization of the court administrator, the proliferation of performance standards and caseload-management systems, and other markers of administrative activity meant that judges handled cases within an institutional setting defined by managerialism. With this history now in full view, perhaps one of Resnik’s signal contributions was not to suggest choices that the judiciary might make at a moment that, in retrospect, was not as contingent as it seemed. Rather, she named an irreducible, even definitional, feature of adjudication.

In fact, a look backwards from 1982, with the benefit of Resnik’s terminology, finds a managerialism that has been there all along. A case cannot move on its own from filing to disposition. If managerial judging has its roots in the Federal Rules of Civil Procedure of 1938,<sup>384</sup> then what preceded it was a pure form of *litigant-directed* managerialism.<sup>385</sup> Pre-Rules procedural systems delegated the

381. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 542-545 (1986) (describing various options for the judiciary’s engagement with its core duties going forward).

382. FED. R. CIV. P. 16 advisory committee’s note to the 1983 amendment.

383. Resnik, *Seeing “The Courts,” supra* note 27, at 222.

384. See Resnik, *Managerial Judges, supra* note 27, at 391 (“Some aspects of pretrial management are an inevitable result of the implementation of the discovery system . . .”).

385. Professor Resnik referred to the “managerial” stance in terms of judges “encouraging the settlement of disputes” and “supervis[ing] case preparation.” *Id.* at 377. Managerial judges, in other words, had assumed responsibility for pretrial tasks that had traditionally been left to the litigants to handle. See, e.g., FED. R. CIV. P. 16(a) (describing judicial authority over case “management”). “Litigant managerialism” thus uses Resnik’s terminology to indicate how traditional adversarial litigation left these tasks for the parties themselves to manage. Court managerialism is a variant in the same sense. It entails the bureaucratic rationalization of processes for the efficient management of litigation activity to enable court systems to resolve cases acceptably and efficiently.

This bureaucratic rationalization could suggest another meaning of the term “managerialism,” referring to the bureaucratic structures and processes themselves that make up court managerialism. This meaning departs from what Resnik meant by “management,” since for the most part she did not include court bureaucracy but instead focused exclusively on how

task of getting a case prepared for resolution to the parties, enabling the judge to remain passive until the moment of merits adjudication.<sup>386</sup> This managerialism fit well with a traditional “adversarial model” of due process, one that reflected the noninterventionist values of the code-pleading era in the late nineteenth century.<sup>387</sup> But it was managerialism nonetheless—an approach to the “administration of justice,” however individualistic, and one that lawyers at the time recognized as an alternative to bureaucracy.<sup>388</sup> Along these lines, the Federal Rules’ authors, working amidst the New Deal, intended that some of their reforms enable managerial judging *avant la lettre* by shifting core managerial responsibilities from the parties to judges.<sup>389</sup>

Understanding litigant-centered managerialism as both prehistorical and baseline offers critical perspective on what turn out to be multiple “managerialisms” in American law, with managerial *courts* just one among a trio of variants that also includes managerial *litigants* and managerial *judges*. This understanding also makes clear that managerialism is not a contingent episode but an inevitable

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individual judges handled cases. That said, it is worth noting that, when the litigants themselves or judges are left to manage large volumes of cases with recurring characteristics—a considerable spur to the development of managerial courts—they too tend to develop structures and processes for the bureaucratic rationalization of case processing. See, e.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1576 (2004) (describing the replacement of individualized tort litigation with “settlement markets in tort claims characterized by aggregating bureaucracies”); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 429-47 (2019) (describing the ways in which judicial case management in federal multidistrict litigation resembles public administration). Thus, even by a thicker sense of the term “managerialism,” litigation conditions tend to produce three variants that share core similarities.

386. See, e.g., Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 387 (2003); Charles E. Clark, Book Review, 51 COLUM. L. REV. 252, 255 (1951) (describing the shift from pleadings defining issues to discovery doing so); Roy W. Harper, *Federal Practice and the Missouri Code of Civil Procedure*, 11 F.R.D. 409, 409 (1952) (contrasting the Federal Rules with code pleading).
387. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264-65 (1978) (describing traditional adversarialism in these terms). On nineteenth-century code pleadings, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932-39 (1987).
388. See, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 445-46 (1906); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 301 (1938) (contrasting traditional lawyer-centered procedures with bureaucratic procedures).
389. Clark, *supra* note 386, at 255-56 (discussing Rule 16 and judicial management of pretrial conferences and insisting that “[e]very major step in procedural reform . . . has involved a contraction of . . . the adversary nature of the proceedings”); see also David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 499-500 (2010) (discussing Rule 16’s origins and Clark’s view of the rule as shifting a judge toward the role of an “administrator”).

feature of American law. After all, responsibility for case propulsion and fair and accurate adjudication must be placed somewhere. That much was clear in the submissions of Justices Powell and Rehnquist. To them, the clear solution to the federal courts' creeping bureaucratization was jurisdictional limits. Large numbers of cases would move to state courts, relieving federal courts of the pressure to bureaucratize. But state courts would then assume responsibility for all the managerial challenges of moving millions of cases through to fair and accurate resolution.<sup>390</sup> Powell and Rehnquist would have shifted the managerial obligation away from federal judges, in other words, but they could not end it.

Managerial courts thus merit the sort of skepticism that Resnik expressed toward managerial judges only if litigant-centered managerialism is invariably superior. History tilts decidedly against this possibility.

Modern civil procedure originated in a campaign inspired by the deficits of unmediated adversarialism and its characteristic "sporting theory of justice."<sup>391</sup> More plausibly, the three managerialisms can interact in ways that respond to each one's respective limitations, working together to realize each one's promise and minimize each one's peril. In most cases, for instance, litigants manage settlement, with the parties solely responsible for the fair, accurate, and efficient resolution of their case.<sup>392</sup> But sometimes conditions undermine confidence that parties can negotiate meaningfully and provide authentic consent to a deal. Managerial judges can step in—for instance, by supervising class-action settlements.<sup>393</sup> Court managerialism, in turn, can address judicial managerialism's potential pathologies, including the possibility that immersion in the parties' disputes will remove judges' blindfolds.<sup>394</sup> Courts can delegate some of the responsibility for settlement supervision to nonjudicial personnel, for example.<sup>395</sup>

A recognition of managerialism's three variants refines the distinctive normative challenge that managerial courts pose, one that entails bureaucracy, not managerialism per se. Even if managerial judges play roles beyond the passive engagement that traditional adversarialism contemplates, managerialism's litigant and judicial strains involve the personnel and institutional structure of the

390. See Powell, *supra* note 1, at 1372; Rehnquist, *supra* note 129, at 30.

391. See, e.g., Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 518, 525-26, 535 (2006).

392. See, e.g., *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) (discussing the judge's and the parties' roles during settlement).

393. FED. R. CIV. P. 23(e). Courts also supervise settlements involving minors and others who lack the legal capacity to make litigation decisions. See, e.g., *Will v. Nw. Univ.*, 881 N.E.2d. 481, 495-96 (Ill. App. Ct. 2007); CAL. CIV. PROC. CODE § 372(a)(3) (West 2022).

394. See Resnik, *Managerial Judges*, *supra* note 27, at 426-31.

395. See Grant, *supra* note 271, at 12-13 (creating a staff position to assist with settlement-negotiation supervision in eviction cases involving self-represented litigants).

adversarial process. By contrast, managerial courts require the judiciary, a nonbureaucratic institution, to accommodate at least some of bureaucracy's definitional structures and characteristics, including divisions of labor and the specialization of tasks unfamiliar to courts, and hierarchical control of personnel and decision-making.<sup>396</sup> Courts and bureaucracies render different types of justice, and bureaucratic administration and judicial decision-making differ in ways that reflect contrasting taproots of legitimate authority.<sup>397</sup> Court managerialism can leverage bureaucratic interventions to address problems that the other variants, limited by the horizons of traditional adversarialism, create or leave unsolved. But if managerial interventions push courts too far along a bureaucratization trajectory, they might leave too much of what legitimates judicial authority behind.

With the inevitability of one or another form of managerialism as a backdrop, this tension between bureaucratic administration and judicial decision-making suggests optimization as the right frame for thinking through how best to govern the court variant. Optimization, a term that smacks of bureaucracy, makes an implicit nod to cost-benefit analysis and thus may seem to concede away an irreducible commitment to a distinctive institutional identity for the judiciary. But, by including this commitment as a measure of optimization's success, the framing ensures that the traditional taproots of legitimate judicial authority, discussed below, remain a core determinant of whether a court system appropriately balances judging and bureaucracy. At the same time, optimization suggests that, under certain circumstances, some modicum of bureaucratic administration can better achieve the best-possible mix of efficiency, accuracy, deliberative quality, and individual consideration in litigation than can a process that leaves everything to the litigants and the judge to manage.

### B. *What and How to Optimize*

Past critics would have found this claim about optimization wholly implausible. To them, bureaucracy and judging were incompatible, and thus the tension

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396. See, e.g., Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 185; Robert A. Kagan, *Varieties of Bureaucratic Justice: Building on Mashaw's Typology*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT, *supra* note 25, at 247, 252-53. On the judiciary as a nonbureaucratic institution, see, for example, Wolf V. Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW & SOC'Y REV. 759, 763 (1977); Vining, *supra* note 6, at 258.

397. See, e.g., MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 25-31; Kagan, *supra* note 396, at 253-54; Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 23-24 (2001); Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1323-24 (1995) (describing considerations that inform judicial legitimacy).

irreducible.<sup>398</sup> But they assumed a model of judging tightly bound to the constraints of traditional adversarialism, a stylized one that largely excluded the possibility of judicial or court managerialism characteristic of courts going back decades.<sup>399</sup> A model of judging less committed to this adversarialism better reflects managerialism's inevitability and honors courts' definitional traits while simultaneously enabling an accommodation of bureaucratic personnel and processes within adjudication. This model suggests that court systems can make ample use of court managerialism so long as interventions preserve what is institutionally distinctive about judging. Considered together, this model and the three modes of court managerialism described in Part II can generate principles to guide court managerialism's optimization. These principles place considerable weight on quality control, a managerial mode that may become *primus inter pares*.

### 1. *The Hart-Hand Model and Its Loosened Grip*

A deeper understanding of the friction that results when judicial and bureaucratic institutions intersect can inform the question of what courts should optimize. Like Resnik with managerial judges, critics of court bureaucratization in the 1980s – the last time the topic captured elite attention – viewed the phenomenon in terms of institutional incompatibility. Judge Patrick E. Higginbotham insisted that the “classic judicial model” involved judicial elites, isolated from majoritarian pressures, balancing fidelity to a “well-established set of principles” with the need to achieve a “just result” in an individual case.<sup>400</sup> Court bureaucratization, with its delegation to nonjudicial personnel and an emphasis on “efficiency” and “certainty,” threatened to “undermin[e] and eat[] away” at this model.<sup>401</sup> Like Justice Powell, Judge Alvin B. Rubin “fear[ed] . . . institutional judging,” and with it “the dilution of responsibility for decision-making” that ought to rest on the individual judge’s shoulders.<sup>402</sup> Owen Fiss expressed the same idea with his concern for “Rule by Nobody,” a possibility occasioned by the involvement of “many hands” beyond the judge’s in decision-making.<sup>403</sup>

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398. See *infra* notes 409-410 and accompanying text.

399. See *infra* notes 409-410 and accompanying text.

400. Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 265 (1980).

401. *Id.*

402. Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 652, 654 (1980).

403. Fiss, *supra* note 4, at 1452, 1456.

The judicial ideal that criticism in this vein assumed as a baseline resembled what Henry Monaghan termed the “Hart-Hand model.”<sup>404</sup> Exemplified by Judge Learned Hand’s insistence that he write his own opinions (by longhand, no less),<sup>405</sup> the model described appellate decision-making as the work of a small, collegial group, with ample time for reasoned deliberation and judge-authored decisions.<sup>406</sup> “Hart” referred to Professor Henry Hart and, more generally, legal-process theory, a jurisprudence that rooted adjudication in a distinctive approach to the legitimate exercise of authority.<sup>407</sup> Consistent with legal-process theory, the model contemplated full, impartial consideration of each individual litigant’s arguments, unhurried deliberation, and reasoned decision-making for which the judge, acting independently, assumed sole responsibility.<sup>408</sup>

To 1980s critics, judging in Hart-Hand form could not mix with bureaucracy. Hence, Judge Higginbotham labeled any refashioned court process or practice inconsistent with the model’s commitments a “bureaucratic carcinogen[.]”<sup>409</sup> Professor Fiss recognized that conditions of modern society

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404. Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 344-45, 344 n.3 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)); see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORN. L. REV. 273, 278 (1996) (describing a similar “Learned Hand model” of decision-making).

405. Rubin, *supra* note 402, at 651.

406. Monaghan, *supra* note 404, at 344-45; see also Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, From the Perspective of Learned Hand’s Days*, 60 BROOK. L. REV. 505, 507 (1994) (discussing the “Hart-Hand model”).

407. For the term “Hart-Hand,” Monaghan cited to canonical legal-process works, including Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978), which theorized about adjudication generally. Monaghan, *supra* note 404, at 344 n.3.

408. See, e.g., Harry T. Edwards, *The Rising Work Load and Perceived “Bureaucracy” of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 882 (1983) (“Our confidence in courts derives . . . from the existence of a process that requires judges to hear (or perhaps read) a litigant’s claims, study the issues, and reach and justify a decision regarding those claims.”); Fiss, *supra* note 4, at 1443 (describing as an “aspect of the legitimating process of the judiciary . . . the obligation of a judge to engage in a special dialogue – to listen to all grievances, hear from all the interests affected, and give reasons for his decisions” in a manner that “assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision”). For process theory and adjudication, see, for example, Fuller, *supra* note 407, at 381-93; and Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1579-84 (1996) (reviewing HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William Eskridge & Philip Frickey eds., 1994)).

409. Higginbotham, *supra* note 400, at 264. For a contrary view that anticipated more sophisticated efforts at the management of court bureaucracies, see generally Richard B. Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60 (1982).

necessitated court bureaucratization.<sup>410</sup> But his recommendations aimed to isolate judicial decision-making from bureaucratic processes as much as possible.<sup>411</sup>

Even at the time, this unyielding insistence on Hart-Hand's preservation was myopic. Tellingly, bureaucratization's critics focused on the federal courts, institutions that handle a small fraction of the nation's judicial business. They thus did not consider that state-court activity by the 1970s had already shifted dramatically away from Hart-Hand judging and toward bureaucratic administration.<sup>412</sup> Critics lionized an ideal that, at best, captured only a sliver of then-current judicial reality.<sup>413</sup>

Today, an optimization function that prioritizes Hart-Hand judging at all costs would misfire even more profoundly, for at least two reasons. First, the model either erroneously assumes robust adversarial engagement by litigants, or it blesses outcomes as legitimate regardless of whether this engagement happens. By the model's terms, reasoned deliberation happens after the parties present their arguments. In most civil actions, though, at least one party either does not do so at all, or the party lacks counsel and thus engages in highly imperfect ways.<sup>414</sup> Outcomes often result not from deliberation but from default. If the model is indifferent to whether parties engage, then the judicial attention and reasoned decision it commands are only formalistic promises.

Second, the model does not account for now-known decisional tendencies that can degrade the quality of adjudication when judges are left alone to render individualized justice. These tendencies include decisional heuristics and biases, problems that arise particularly when courts handle large caseloads.<sup>415</sup> As noted,

410. Fiss, *supra* note 4, at 1461-68.

411. *Id.*

412. See Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 296 (1976).

413. Cf. Rubin, *supra* note 402, at 648 (describing Hart-Hand judging, speculating that “[p]erhaps long ago” it “was an accurate” representation of judging, and claiming “[i]t is now fantasy”).

414. See *How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRS. 2 (May 6, 2020), <https://www.pew.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> [<https://perma.cc/EJ7A-F852>] (reporting a 70% default-judgment rate in consumer-debt litigation); *Family Justice Initiative*, *supra* note 118, at 20 (describing the percentage of litigants without counsel).

415. See Guthrie et al., *Blinking on the Bench*, *supra* note 378, at 29 (describing judicial reliance on intuition, the speed of which is an advantage when judges handle large volumes of cases); *id.* at 7 (describing intuitive decision-making as, in part, “heuristic-based” (quoting Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002))); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 43 (2016)

dramatic decisional inconsistencies among adjudicators have marred the immigration and Social Security disability-benefits adjudication systems, suggesting wide disparities in judging practices and, presumably, routine error.<sup>416</sup> Such patterns suggest that adjudicators' mental shortcuts may not always align with governing law.<sup>417</sup> Case-by-case decision-making by adjudicators not subject to guidance beyond individual interpretations of governing doctrine has surely resulted in thousands of erroneous decisions.<sup>418</sup>

The Hart-Hand model, in short, makes Herculean assumptions about individual judges' capacities to render accurate justice while managing large dockets, especially when litigant engagement is routinely lacking. The model's inattention to accuracy and the barriers that prevent litigant engagement make an optimization function tightly bound to Hart-Hand judging untenable as inconsistent with goals that court systems should pursue, at least under current constraints that limit both judicial capacities and access to counsel.<sup>419</sup>

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(describing the constitutive relationship between high caseloads and the development of decisional heuristics); Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139, 2158-60 (2023) (same).

416. See *supra* note 39 and accompanying text; see also William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 83 (2015) (suggesting the existence of systemic error in Social Security benefits adjudication). Pervasive variability in outcomes among adjudicators applying the same legal standards to randomly assigned cases that share recurring characteristics necessarily implies a high volume of erroneous decisions, since legally identical cases cannot all be correctly decided when results diverge so dramatically.
417. See Ray & Lubbers, *supra* note 39, at 1598-99 (noting that the Social Security Administration Appeals Council's error-correction process includes a focus on heuristic correction).
418. The experience of the Social Security Administration is instructive. Before the agency implemented centrally administered quality-assurance programs, administrative law judges deciding disability-benefits cases had to determine how to apply governing regulations. They erred at significant rates. See *id.* at 1589.
419. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 306 (2004) (discussing accuracy as a goal for civil litigation). Our analysis here depends on twin assumptions: first, that current investments in state judiciaries are fixed (or at least will not markedly increase for the foreseeable future); and second, that the availability of low-cost or free legal services will not dramatically expand. For instance, the minting of a right to counsel in some or all civil matters—coined as “civil *Gideon*”—would alter several of the conditions with which court managerialism grapples, among them inadequate adversarial engagement. See Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998) (coining the phrase “civil *Gideon*”). So would a dramatic increase in the availability of “legal tech” tools that serve individuals directly or extend the reach of existing service providers, such as legal-aid entities. See, e.g., David Freeman Engstrom, *Introduction: Civil Justice at the Crossroads*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE, *supra* note 172, at 1, 8-15; Engstrom & Lu, *supra* note 165, at 197-98. Our deployment of these twin assumptions in working through the normative implications of the managerial turn is by no means an endorsement of current court-funding levels or current access-to-counsel commitments.

But an optimization function that entirely sidelines Hart-Hand judging as a nostalgic relic would tilt too far in the opposite direction. The institutional structure, decision-making techniques, and values the model embodies have not yet found their replacements as buttresses for legitimate judicial authority.<sup>420</sup> Theories of adjudication's moral legitimacy continue to root it in the opportunities individuals have to argue their cases<sup>421</sup> and in the reasoned deliberation the Hart-Hand judge provides.<sup>422</sup> By the leading account's terms, adjudication's sociological legitimacy results from parties' senses that they enjoy fair opportunities to argue before respectful, attentive adjudicators.<sup>423</sup> Moreover, whether wisely or not,<sup>424</sup> procedural due process continues to consist of process rights that require Hart-Hand judging to have functional value.<sup>425</sup> An opportunity to be heard, for instance, means little without a judge willing and able to listen.

The procedural opportunities, decision-making environment, and judicial obligations that the Hart-Hand model posits also align with an ideal type of justice that court-based adjudication exemplifies – what Jerry Mashaw calls “moral judgment.”<sup>426</sup> “The goal in individual adjudications is to decide who deserves what,” he argues, particularly where, as in much common-law adjudication, the two sides have competing and entirely meritorious claims of right.<sup>427</sup> This task includes responsibility for the accurate resolution of claims and defenses according to the substantive law.<sup>428</sup> But moral-judgment justice does not imply judicial responsibility for the accurate and efficient implementation of policy in the aggregate.<sup>429</sup> That is “bureaucratic rationality” – justice for bureaucracies to

420. See Resnik, *Managerial Judges*, *supra* note 27, at 445.

421. Solum, *supra* note 419, at 308.

422. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 791 (1990). On moral and sociological legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-1800 (2005).

423. Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1105-07 (2014).

424. See *infra* Section III.C (critiquing current due-process doctrine).

425. For these process rights, see *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970).

426. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 29. On moral judgment as an ideal type, see Kagan, *supra* note 396, at 251. On court-based adjudication as the exemplar of moral judgment, see Kagan, *supra* note 396, at 254.

427. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 29.

428. *Id.*

429. Cf. Mashaw, *supra* note 35, at 779-80 (“The claims adjudicator’s role, whether at the initial consideration of a completed claim file or after an oral hearing, is essentially the same – to provide benefits to eligible individuals and to deny the claims of ineligible individuals. This is a quite different posture from that which is customary for a court in judicial proceedings.”).

pursue.<sup>430</sup> Rather, courts determine individual “deservingness”; as Mashaw argues, “The question is not just who did what, but who is to be preferred, all things considered, when interests and the values to which they can be relevantly connected conflict.”<sup>431</sup> Hence the parties must have full and fair opportunities to present claims, evidence, and arguments, and the decision-maker must remain neutral to ensure that particularized judgment trumps concern for larger policy imperatives.<sup>432</sup>

A model indifferent to the persistence of Hart-Hand judging would require a wholesale reconstruction of the judiciary as an institution. A full reckoning with managerial courts may lead in this direction, as the phenomenon’s ultimate implications for due process, discussed below, suggest. But a conservative approach to court managerialism’s optimization accepts the Hart-Hand model as the stand-in for a persistent doctrinal and theoretical settlement. At the same time, the approach described here relaxes Hart-Hand’s grip in the service of goals that bureaucratic structures and modes of action might better achieve. Court bureaucracies should have wide latitude to devise and administer managerial interventions in the service of accurate, efficient decision-making so long as they do not fundamentally disrupt capacity for Hart-Hand judging.

## 2. *Modes of Court Managerialism and Principles for Their Governance*

Optimization thus conceived needs principles to inform the governance of managerial interventions. The task of identifying and elaborating upon these principles is a considerable one that will require both theoretical and empirical efforts beyond this Feature’s scope.<sup>433</sup> But the descriptive work in Part II can support an initial endeavor. An evaluation of the major modes of court managerialism and how they can either fit or stand in tension with a relaxed Hart-Hand model of judging can generate a first set of basic principles.

The traditional Hart-Hand model implies both decisional commitments, which include instructions for how judges should decide matters, and institutional commitments, which encompass claims about the institutional structure within which judging proceeds. The former stresses the judge’s obligation to listen, deliberate, and reason from a position of passive neutrality, and the latter

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430. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 25–26.

431. *Id.* at 29–30.

432. *Id.* at 30.

433. The ALI *Principles* project with which two of us are involved will develop further principles. See *Principles of the Law, High-Volume Civil Adjudication*, *supra* note 162.

posits independence as a “foundation of judicial power.”<sup>434</sup> Decisional and institutional commitments overlap. The model hinges judicial accountability on the quality of deliberation and reason-giving, not on the subordination of judges to bureaucratic superiors, and it treats judicial independence as a prerequisite for the pursuit of legitimate outcomes in individual cases.<sup>435</sup>

Each of the three modes of court managerialism described in Part II—personnel management, systemic administration, and quality control—can assume forms inconsistent with the Hart-Hand model’s decisional and institutional commitments. Consider decisional commitments first. The involvement of civil case-management teams consisting of various nonjudicial personnel exemplifies personnel management. Court staff take on tasks that are part of the decision-making process, precisely the involvement of “many hands” in decision-making that critics of court bureaucratization like Fiss feared would produce “Rule by Nobody.”<sup>436</sup> Master-calendar approaches to case management, an example of systemic administration, likewise divide up the work that goes into decision-making. Bench cards, an example of quality control, effectively channel the issues that a proceeding will raise, defining the matters about which the judge will deliberate.

The modes can also conflict with the model’s institutional commitments. In 2022, New York passed a statute requiring judges to conduct settlement allocutions in cases involving self-represented tenants. The law specifies nine topics about which the judge must inquire.<sup>437</sup> A form of quality control, this settlement governance constrains judges’ prerogative to evaluate the integrity of settlements as they might otherwise prefer. Pathways, perhaps the most prevalent exemplar of systemic administration, depart considerably from a baseline of nearly unchecked discretion that the Federal Rules of Civil Procedure and state analogs give judges for pretrial case management.<sup>438</sup>

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434. *E.g.*, Fiss, *supra* note 4, at 1443 (describing the “foundation of judicial power” as “the reason-giving, deliberative process by which judges decide individual cases,” which includes judicial “independence”).

435. See MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 25, at 29; Vicki Lens, *Judge or Bureaucrat? How Administrative Law Judges Exercise Discretion in Welfare Bureaucracies*, 86 *SOC. SERV. REV.* 269, 287-88 (2012); Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 *UCLA L. REV.* 1055, 1055-56 (1992).

436. Fiss, *supra* note 4, at 1452, 1456.

437. N.Y. REAL PROP. ACTS. LAW § 746(2) (McKinney 2025).

438. *E.g.*, Andrew Bradt & Calen Bennett, *Adult Supervision? Appellate Review, Mandamus, and the Federal Rules in Multidistrict Litigation*, 50 *FLA. ST. U. L. REV.* 187, 194 (2022) (identifying “the discretion they afford the district judge” as the “defining characteristic of the Federal Rules of Civil Procedure”).

But each mode can also enable decision-making that honors Hart-Hand's decisional commitments. Judge Jennifer D. Bailey's response to the foreclosure litigation crisis in Florida included teaming, a form of personnel management.<sup>439</sup> Court staff screened cases before she convened hearings, "top sheet[ing]" key evidentiary and legal issues and thereby strengthening her deliberative capacity as she juggled her enormous docket.<sup>440</sup> Among other considerations, pathways take form based on decisions about how best to allocate judicial time and attention. Because a court system's judicial resources are necessarily finite and zero-sum, the routing of a set of cases along a "simple" pathway preserves time and decisional capacity for cases routed along a "complex" pathway.

Court managerialism's modes can also protect, if more indirectly, the independence that the Hart-Hand model commends at multiple institutional levels. One involves an individual judge's decisional independence within the court system itself. Whether it assumes the form of personnel management, systemic administration, or quality control, a managerial intervention can support more successful judging, obviating the need for court leadership to take remedial action against an underperforming colleague. Court managerialism can also protect courts from political or executive-branch incursion. A court that deploys a quality-control tool—a dashboard providing judges with updated performance data, for instance—uses an internal mechanism for accountability and may thereby relieve the pressure for external oversight. Fiss intuited as much in his 1983 critique, conceding that "the independence of the judiciary from the political branches might depend on its capacity to develop the organizational resources usually associated with a bureaucracy."<sup>441</sup>

Each of the three modes can both strengthen and threaten a residuum of Hart-Hand judging. This reality means that principles to guide the design and administration of court managerialism will necessarily be open-textured. They are best understood as guardrails. Principles should demarcate boundaries that preserve an adjudication core, consistent with Hart-Hand's decisional commitments. They should also keep managerialism within boundaries necessary to protect independence and thereby honor the model's institutional commitments. But otherwise, these principles should enable considerable experimentation and bureaucratic innovation.

Several basic principles can do this work and thereby inform governance for any of court managerialism's modes. Two protect an adjudication core. First, the

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439. See Bailey 2021 Interview, *supra* note 10, at 7-8.

440. *Id.*

441. Fiss, *supra* note 4, at 1443.

*principle of moral judgment* refers to Mashaw’s ideal type of court-based justice.<sup>442</sup> This principle posits that systemic administration — a pathways regime, for instance — is acceptable so long as it allows judges flexibility when considerations of individual deservingness trump aggregate determinations of optimal case management. This principle constrains court managerialism, but not tightly. A pathways regime can match a case type to a particular discovery protocol so long as parties in specific instances can argue that the protocol’s limits do not make sense for their case. The principle of moral judgment can also inform personnel management. A teaming approach to case processing should keep the judge in the loop when issues require discretionary judgment and thus could entail considerations of individual deservingness.<sup>443</sup>

The principle of moral judgment counsels not only in favor of the formal authority to make individual determinations of deservingness but also discourages interventions that unduly dissuade judges from doing so in practice. In this sense, the principle constrains quality control. A dashboard that reports only case-disposition rates, for instance, would conflict with the principle because it may prompt judges to focus exclusively on considerations of aggregate efficiency, thereby potentially deterring the unhurried deliberation that a particular case involving challenging issues of individual deservingness might require.<sup>444</sup>

A second guardrail that preserves an adjudication core while enabling innovation is the *principle of engaged neutrality*. It counsels for interventions that push judges out of a posture of passivity, but with protections in place to ensure that engagement does not threaten neutrality. Personnel management, such as the delegation of case-management tasks to court staff, can enable accurate, efficient decision-making but also estrange judges from their cases. If a court attorney supervises eviction settlement negotiations and the parties’ agreement comes before the judge simply for a rubber stamp, the involvement of these “many hands,” as Fiss feared, may weaken a judge’s felt responsibility for the outcome.<sup>445</sup> The principle of engaged neutrality thus supports interventions that necessitate the judge’s engagement when decision-making may require the exercise of discretion — a required settlement colloquy, for instance, before a consent judgment’s entry.<sup>446</sup>

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442. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 29-31. Mashaw terms this “moral judgment.” *Id.*

443. This distinction tracks federal practice, which permits a clerk to enter a default judgment when a claim is for “a sum certain or a sum that can be made certain by computation” but otherwise requires a judge’s involvement. FED. R. CIV. P. 55(b).

444. See Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 561-62 (2022).

445. Fiss, *supra* note 4, at 1456.

446. *E.g.*, Fisher Updated Order, *supra* note 269, at 1-2.

Engagement also justifies managerial interventions that loosen the strictures of traditional adversarialism. Judges cannot meaningfully render moral judgment in most instances when one party to a case is self-represented.<sup>447</sup> Such conditions often doom wholly adversarial engagement to fail. They require “active judging” to ensure that adjudication meets an acceptable threshold of accuracy and fairness.<sup>448</sup> Record development pursued *sua sponte* and other such practices push judges out of traditional roles, but in the service of the adjudicative core.<sup>449</sup> But this engagement can also threaten judicial neutrality and thereby fuel judging at odds with the Hart-Hand ideal.<sup>450</sup> The principle thus pairs engagement with neutrality to emphasize checks that preserve impartial decision-making. Quality control can do considerable work here. A nudge like a bench card, for instance, could protect against one-sided engagement.<sup>451</sup> A more aggressive intervention is a peer-review protocol, whereby judges observe each other and comment on each other’s performance.<sup>452</sup>

Three principles for institutional commitments erect guardrails that enable innovation without undermining independence. The first, the *principle of bureaucratic expertise*, recognizes that court managerialism, as a type of bureaucratic action, requires both technocratic competencies and institutional commitments that differ from what Hart-Hand judging requires and values. A judge’s training, skills, and professional identity might inhibit interest in or sympathy for something like systemic administration or quality control. Some judges, for instance, surely disdain dashboards that provide performance data.<sup>453</sup> The principle thus

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447. *E.g.*, Mashaw, *supra* note 35, at 781-82, 811, 813-15.

448. *See* *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (requiring courts to provide defendants with an opportunity to “respond to statements and questions” about a common affirmative defense, presumably posed either by a judge or other court personnel); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 *BYU L. REV.* 899, 953 (discussing *Turner* and “affirmative judging”).

449. *E.g.*, Daniel Curry, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 *GEO. J. LEGAL ETHICS* 487, 498-99 (2012).

450. On discretion and active judging, see Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *NOTRE DAME L. REV.* 647, 707 (2017); Carpenter et al., *supra* note 444, at 528. On biased decision-making and active judging, see, for example, Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 *J.L. SOC’Y* 61, 87-88 (2014).

451. *E.g.*, *Bench Card: Self-Represented People in the Courtroom*, *supra* note 236; *cf.* Carpenter et al., *supra* note 444, at 562-63 (describing the problems that resulted when a judge was not nudged).

452. *See* Carpenter, *supra* note 450, at 700 (describing a “peer review requirement, where judges observe and grade one another’s hearings on a quarterly basis”).

453. *Cf.* Nancy Gertner, *There’s Another Side to the Story on Judge Stats*, *MASS. LAWS. WKLY.* (Dec. 29, 2022), <https://masslawyersweekly.com/2022/12/29/theres-another-side-to-the-story-on-judge-stats> [<https://perma.cc/JK6X-V6PH>] (critiquing the federal “six-month list” from the perspective of a former federal judge).

legitimizes the prerogative of nonjudicial officials to subject a court system's activities to managerial governance.<sup>454</sup> Nonjudicial personnel, including court administrators, should have important roles in creating and overseeing managerial interventions to ensure that a set of professional commitments rooted in more than the adjudication of individual controversies prevails.

Conversely, a *principle of structural independence* places limits on what technocratic authority can encompass. Individualized consideration of the parties' arguments and reasoned decision-making aimed at individual desert requires an adjudicator not beholden to an aggregate-level policy goal.<sup>455</sup> Moreover, judges in many court systems are politically accountable, a constitutional arrangement that subjects them to oversight by voters, not bureaucrats. Managerial interventions go awry if shifts of bureaucratic authority effectively position judges as bureaucratic inferiors. A disinclination toward the individualized exercise of judgment might result, as well as a shift of accountability away from voters and toward bureaucrats. For instance, a quality-control program that gathers and publicizes performance data before an election would violate the principle absent authorization for the data's release by a lawmaking body with established supervisory power over judges.<sup>456</sup> Otherwise, court leadership could leverage quality control for political impact without the lawful authority to do so and steer decision-making toward their preferences.

A *principle of ultimate judicial responsibility* also places limits on the delegation of authority from judges to court staff. By the Hart-Hand model's terms, judicial responsibility for decisions undergirds adjudication's claim to legitimate authority and, if indirectly, strengthens the case for judicial independence.<sup>457</sup> If "many hands" beyond the judge's bear responsibility for decision-making, the case for judicial independence lessens, and the case for bureaucratic hierarchy strengthens. The principle of ultimate responsibility requires a modicum of meaningful judicial involvement in matters that may require the exercise of discretion. A settlement-governance regime that requires the judge to review the parties' filings

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454. Whether agency officials enjoy this sort of prerogative, or whether adjudicators' decisional independence denies it, has generated considerable contestation in federal agency adjudication. *E.g.*, Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1728-29 (2020); *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980).

455. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475-76 (1986) ("None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.").

456. New Mexico and Utah, for instance, gather and publish these sorts of data pursuant to a statute and court rule, respectively. *Overview of Official Judicial Performance Evaluation Programs*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 4-5 (2022), [https://iaals.du.edu/sites/default/files/documents/publications/chart\\_jpe\\_programs\\_2022.pdf](https://iaals.du.edu/sites/default/files/documents/publications/chart_jpe_programs_2022.pdf) [<https://perma.cc/AH7K-W2DM>].

457. See *supra* notes 404-408 and accompanying text.

and proposed deal serves this principle. A protocol that would allow court staff to enter a consent judgment without a judge's involvement would not. In this sense, the principle of ultimate responsibility safeguards independence by protecting the adjudication core.

But the principle of ultimate judicial responsibility does not simply demarcate terrain reserved for judges. It also legitimates managerial interventions that subject judges to some degree of bureaucratic oversight—or at least oblige them to receive feedback and guidance informed by bureaucratic expertise. Court systems are committed to the efficient management of their dockets.<sup>458</sup> But judges cannot meaningfully contribute to efficiency goals if data measuring case production is not provided to them.<sup>459</sup> Perhaps more fundamentally, information about decision-making quality will often fail to materialize without managerial interventions. Hart-Hand assumptions about what ensures accurate decisions—robust adversarial engagement, including parties' opportunities to be heard and reasoned deliberation—fail under recurring litigation conditions prevalent in high-volume dockets.<sup>460</sup> Judges cannot be responsible for outcomes, as the Hart-Hand model insists, without management *qua* quality control.

### 3. *The Centrality of Quality Control*

The challenge of balancing bureaucratic imperatives with Hart-Hand commitments lends particular weight to quality control as a mode of court managerialism. The foregoing principles have fuzzy edges, and the inherent tensions sketched above make optimization a pragmatic endeavor. The successful governance of managerial courts will thus require ongoing evaluation and improvement, not bright-line rules—especially as the work of elaborating upon a new judicial model that accommodates bureaucracy and Hart-Hand tenets continues.

Quality control poses a unique set of institutional challenges. While standard within bureaucracies, certain types of centrally administered quality-control programs may threaten to undermine the decisional and institutional independence core to Hart-Hand legitimacy. But many of the potential benefits that court managerialism offers require a tolerance for innovation.

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458. See, e.g., FED. R. CIV. P. 1; CAL. CT. R. 1.5(a) (requiring the just and speedy management of court dockets).

459. This proposition seems straightforward. But the effort at the federal level to provide case-production data in the form of the six-month list has generated pushback from the bench and beyond. See, e.g., de Figueiredo et al., *supra* note 34, at 437; Suja A. Thomas, *Take Down the List*, JOTWELL (Apr. 9, 2018), <https://courtslaw.jotwell.com/take-down-the-list> [<https://perma.cc/R689-NYF5>]; Gertner, *supra* note 453.

460. See *supra* notes 406-419 and accompanying text.

Administrative agencies that adjudicate cases or claims have long deployed centrally managed quality-assurance programs for the evaluation and improvement of decision-making.<sup>461</sup> Such programs – audits of decisions for errors, peer review of decision-making, the use of quantitative measures of performance, and more – find many fewer deployments in state and federal judiciaries.<sup>462</sup> For courts, quality assurance is mostly a matter of litigant, not court, managerialism. Due process and rules of procedure give parties various rights they can use to demand fair and accurate decision-making.<sup>463</sup> A party can appeal an erroneous decision, for instance.

As noted, though, individual procedural rights perform poorly as guarantors of a court system's overall quality.<sup>464</sup> Among their flaws, appeals, for instance, do not rigorously sample for representative deficiencies in adjudicators' decisions.<sup>465</sup> Some problems, such as adjudicator bias, may elude detection in an individual case altogether.<sup>466</sup> Litigant-managed quality control particularly fails when asymmetries between the sorts of parties that particular case types tend to involve mean that one side uses procedural rights to protect its interests far more than the other side.<sup>467</sup> Such is the case in eviction litigation, where asymmetries between landlord and tenant engagement have hollowed out core tenant protections.<sup>468</sup>

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461. See Ames et al., *supra* note 36, at 30-47 (describing examples of these strategies); Jerry L. Mashaw, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, ADMIN. CONF. U.S. 163-64 (June 1973), <https://www.acus.gov/sites/default/files/documents/1973-03%20Quality%20Assurance%20Systems%20in%20the%20Adjudication%20of%20Claims%20of%20Entitlement%20to%20Benefits%20or%20Compensation.pdf> [<https://perma.cc/XL2U-HVYW>].
462. See *supra* Section II.A.3; see also Perlow, *supra* note 132, at 53 (describing “state practices” as not having “fully incorporated the broader quality-management landscape applied in other areas of government” and “formalized quality management practices” in the federal courts as “in their infancy”); Perlow, *supra* note 32, at 131-33 (discussing current quality-management practices in federal appellate courts).
463. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (pegging the risk of erroneous deprivation resulting from procedure as an important risk to consider in assessing due process); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (insisting that due process “[r]epresent[s] a profound attitude of fairness”).
464. See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 225-26.
465. See Mashaw, *supra* note 35, at 784-85.
466. E.g., Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry “Bias!”*, 28 GEO. J. LEGAL ETHICS 177, 202 (2015).
467. E.g., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98-103 (1974).
468. See Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 211-12 (2020) (discussing the impact of asymmetric representation on the assertion of implied warranty of habitability claims).

Many of the interventions described in Part II surely have been adopted in many instances because decision-makers have recognized the need to shift from litigant-managed to court-managed quality control. Some can fit Hart-Hand judging with little friction. Decisional aids like bench cards that operate *ex ante* can strengthen deliberative capacities, especially under resource constraints. Thus, nonappellate review processes, such as a default prove-up requirement, improve quality by requiring more, not less, judging.

Some quality-control interventions that operate *ex post* (i.e., auditing performance and identify places for improvement *after* decisions are made) likewise prompt few concerns about institutional fit. These include programs that assess court business practices and nonjudicial personnel. If a court system devises a pathways regime for a particular type of litigation, surely the system's leadership can legitimately evaluate the regime to determine if it achieves its intended goals.<sup>469</sup> Likewise, if a default prove-up program involves court staff, surely a supervisor can legitimately review a staff member's work, check for errors, and include these results in a performance evaluation. Court systems use this sort of quality assurance routinely, if episodically.<sup>470</sup> No principled basis, only resource constraints, can justify a court system's failure to evaluate its work in these regards.

But quality control as a managerial mode can fully succeed only if judicial performance comes within its ambit. Otherwise, interventions will either fail or, at most, have unproven merit. The Los Angeles County Superior Court, for example, created a self-help center for tenants in eviction litigation, an example of personnel management. Tenants who accessed the center were more likely to feel poorly prepared for their hearings than tenants who did not.<sup>471</sup> Tenants who had gone to the self-help center may have had their expectations for a successful trial dashed because self-help-center staff poorly instructed them and thereby set tenants up for failure. But perhaps judges governed eviction cases with a "law of the courtroom" that departed from controlling doctrine, leading more knowledgeable tenants to experience particular frustration.<sup>472</sup> An audit would have to

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469. The New Jersey Supreme Court, for instance, reviewed an aspect of its eviction-litigation pathway, determined that it did not succeed, and thus dispensed with it. Glenn A. Grant, *Notice to the Bar Landlord Tenant—Conclusion of Mandatory Case Management Conferences & Continuation of Other Landlord Tenant Reforms*, N.J. CTS. 1-2 (July 18, 2023), <https://www.njcourts.gov/sites/default/files/notices/2023/07/n230720b.pdf> [<https://perma.cc/NU35-4L8L>].

470. See, e.g., Perlow, *supra* note 32, at 133-34.

471. Empirical Rsch. Grp., *Evaluation of the Van Nuys Legal Self-Help Center*, UCLA SCH. L. 14 (Aug. 30, 2001), <https://www.srln.org/system/files/attachments/Evaluation%20of%20the%20Van%20Nuys%20Legal%20Self%20Help%20Center%20Final%20Report%20%28California%202001%29.pdf> [<https://perma.cc/GRK2-SGSQ>].

472. *Id.* at 15.

scrutinize judicial performance to determine what ails the self-help program and how to improve it.

Judicial performance review happens in plenty of jurisdictions. As noted, numerous courts use quantitative measures of performance, such as data on times to disposition,<sup>473</sup> while other jurisdictions attempt more qualitative assessments.<sup>474</sup> But the systematic, ongoing evaluation of decision-making represents perhaps the most direct and consequential intrusion of bureaucracy into the judiciary. When focused on judges, this outer frontier of court managerialism poses at least three challenges.

The first involves the multifarious qualities of judicial performance. What should be measured, and how?<sup>475</sup> The survey methods that states with JPE programs often use suffer from a range of problems, including selection effects that influence who responds and biases that distort what respondents report.<sup>476</sup> Another problem involves error definition. While courts have obligations to decide cases correctly, litigant choice often determines outcomes, such as when parties choose to settle even when they have strong arguments on the merits. Such outcomes would not traditionally be classified as errors even if unmerited under the applicable law.<sup>477</sup>

The what-and-how-to-measure problem is not insoluble. Indeed, it may have easy solutions for dockets involving self-represented litigants – cases where court managerialism offers the only real possibility for quality assurance because litigant managerialism tends to fail. If, for instance, a law instructs judges not to enter default judgments unless the plaintiff supports its pleading with specific

473. See, e.g., Off. of the State Cts. Adm’r, *Recommendations on a Performance Management Framework for Florida’s Trial Courts*, FLA. CTS. 7-8 (June 15, 2016), <https://flcourts-media.flcourts.gov/content/download/218026/1974102/Recommendations-on-Performance-Management-Framework-6-15-16.pdf> [<https://perma.cc/Q7F2-VP7E>]; see also Schaffler, *supra* note 132, at 122 (listing examples of court-level performance management in states including Utah, North Carolina, California, Arizona, Oregon, and Massachusetts); TEX. GOV’T CODE ANN. § 72.082 (West 2023) (noting that the Office of Court Administration of the Texas Judicial System must “annually collect and publish a performance report of information regarding the efficiency of the courts of this state . . . [which] include[s] disaggregated performance measures for each appellate court, district court, statutory county court, statutory probate court, and county court”).

474. See *supra* Section II.A.3.

475. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1318 (2009) (commenting on this problem).

476. Thomas J. Miles, *Do Attorney Surveys Measure Judicial Performance or Respondent Ideology? Evidence from Online Evaluations*, 44 J. LEGAL STUD. S231, S261 (2015); Kalil et al., *supra* note 252, at 4-5.

477. See Mashaw, *supra* note 35, at 779-80 (explaining that social-welfare adjudication serves programmatic rather than adversarial aims).

documentation, a judicial-performance audit would simply investigate how often a judge enters judgment when the plaintiff fails to include these documents.<sup>478</sup>

The second and third problems, by contrast, implicate the adjudication core and judicial independence in more nettlesome ways. One involves the perils that performance evaluation generally entails, which have particular significance for judicial decision-making. Quality-assurance programs tend to induce those under review to prioritize what gets measured over aspects of their work that are harder to assess.<sup>479</sup> This “make-what-you-measure” phenomenon can threaten the adjudication core. If quality review assesses judges by the number of cases they close, for instance, a judge might shortchange deliberative quality in the rush to enter judgments.<sup>480</sup> The program becomes a managerial hidden hand, influencing outcomes in ways that degrade Hart-Hand judging.

Third, a performance evaluation program suggests a subordinate position of sorts for judges within a court bureaucracy, shifting bureaucratic authority in two ways.<sup>481</sup> If judges “judge to the test,” court management that creates the test has seized some decision-making authority.<sup>482</sup> The program would make judges, otherwise accountable only through appellate review or elections, answerable to court leadership. Even if a program has no disciplinary component, any disclosure of results to the public, especially in states where judges run for election, would give judges a powerful reason to heed the preferences of court leadership.

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478. Cf. Abhay Aneja et al., *More Paper in Connecticut: An Evaluation of Documentation Reforms in State Court*, DEBT COLLECTION LAB 3 (July 30, 2024), <https://debtcollectionlab.org/docs/connecticut-debt-documentation-evaluation.pdf> [<https://perma.cc/77VF-PDRG>] (determining that no plaintiff in a sample of debt-collection cases met Connecticut’s documentation requirements).

479. See, e.g., Choi et al., *supra* note 475, at 1318-25; John Hauser & Gerald Katz, *Metrics: You Are What You Measure!*, 16 EUR. MGMT. J. 517, 518 (1998); MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 155-56; JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 161 (1989).

480. See, e.g., de Figueiredo et al., *supra* note 34, at 437 (evaluating the effects of the federal-district-court six-month list on judicial decision-making and concluding that it probably impacts quality); Petkun, *supra* note 34, at 48-57 (finding mixed evidence of effects of exposure to the six-month list on the quality of adjudication); Ass’n of Admin. L. Judges v. Colvin, 777 F.3d 402, 404-05 (7th Cir. 2015) (noting the link between caseload and quality); MASHAW, BUREAUCRATIC JUSTICE, *supra* note 25, at 66 (observing that efforts to remediate “excessive delay in claims processing” may lead to “error”).

481. See, e.g., Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 687-700 (1980) (highlighting the independence and separation of powers of judges).

482. Cf. Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 557 (2009) (arguing that evaluation metrics “rigidif[y]” how agency officials exercise their discretion).

Performance evaluation thus has the potential to destabilize an internal separation-of-powers equilibrium. Within administrative agencies, this sort of quality-assurance intervention has prompted fierce resistance from adjudicators claiming intrusion on their decisional independence.<sup>483</sup> Absent careful limits, what begins as neutral “performance evaluation” can become a de facto transfer of authority from judges to managers.

These problems do not make ongoing evaluation and judging irreconcilable. Like all managerial interventions, quality-assurance programs present optimization challenges that, guided by the right principles, have solutions.<sup>484</sup> The principle of structural independence, for instance, suggests that data on judicial performance be kept confidential unless a lawmaker with constitutional authority to supervise the courts requires otherwise. A peer-review program that tasks judges with evaluating each other’s performance perhaps honors a principle of ultimate judicial responsibility better than a staff-attorney-led program.<sup>485</sup> The principle of moral judgment counsels against a dashboard that reports only quantitative data on performance.

### C. *Reckoning with Due Process*

The failure of pure litigant managerialism as a quality-control strategy not only counsels for innovation in court managerialism but also – coupled with the compensating potential of judicial and court managerialism – should require a reckoning with constitutional fundamentals.

The pure Hart-Hand model is not just a legal-process abstraction. It has both reflected and helped define assumptions of what procedural due process ought to be.<sup>486</sup> The canonical suite of rights described in *Goldberg v. Kelly* – notice, the opportunity to be heard, the opportunity to present and confront witnesses, and the right to a reasoned, on-the-record decision from a neutral adjudicator – is Hart-Hand judging in constitutional form.<sup>487</sup> A commitment to traditional adversarialism thus determines not just judicial legitimacy, at least in Hart-Hand

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483. See, e.g., *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980).

484. See generally Ho et al., *supra* note 226 (outlining the key design dimensions for quality-assurance programs).

485. See Kalil et al. *supra* note 252, at 3; see also Ho et al., *supra* note 226, at 25-26 (noting the advantages of peer-review programs in which administrative law judges review each other’s work).

486. This bidirectional relationship is best observed in Lon Fuller’s work. Compare Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30, 42-43 (Harold J. Berman ed., 1961) (discussing the benefits of adversarial procedure), with Fuller, *supra* note 407, at 381-93 (modeling adjudication).

487. 397 U.S. 254, 266-71 (1970).

terms, but also due process's possibilities and horizons. Put differently, due-process doctrine conceives of protections solely in terms of litigant managerialism by focusing on the opportunities that litigants have to protect their interests in adjudication.

Each year, millions of litigants struggle to participate meaningfully in litigation due to intersecting vulnerabilities. For them, the formal availability of *Goldberg*-style rights offers little. Their incapacities to manage litigation on their own have prompted judges and courts to turn to managerialism's other variants – to engage in active judging, for instance, or to deploy court staff when self-represented litigants fall short. When catalyzed for this reason, court managerialism does not empower bureaucracy at the expense of adjudication's integrity. Rather, it aims to achieve actual, not formal, justice.

If a court system conforming to a relaxed version of the Hart-Hand model that accommodates bureaucratic interventions can better achieve actual justice, what then happens to procedural due process? In some instances, active judging, aided by bureaucratic support, may perform better by metrics of accuracy and efficiency and engender superior litigant participation than a process that does nothing more than make *Goldberg*'s full suite of rights formally available. Will due process remain bounded by an outdated idealization of traditional adversarialism if managerialism is inevitable – and if its litigant, judicial, and court variants can complement each other in the service of just results?<sup>488</sup>

Unless traditional adversarialism limits what due process can require, the Constitution may compel court systems to deploy certain managerial interventions under particular circumstances. And there is no obvious reason why traditional adversarialism should define constitutional boundaries if litigant managerialism is indeed just one of three potentially complementary variants. These claims, if right, have profound implications, indicating the need to reckon with fundamental questions of what due process should accomplish and whether due process and traditional understandings of judicial legitimacy can fully align.

### 1. *Managerial Courts' Due-Process Implications*

With courts' managerial capacities expanding rapidly, the question of when due process requires something beyond litigant managerialism may soon demand an answer. Consider consumer-debt litigation, where a supermajority of defendants default and thus do not make plaintiffs prove their cases.<sup>489</sup>

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488. We explore this question in greater depth in David Engstrom, David Marcus & Elliot Setzer, *The New Due Process* (unpublished manuscript) (on file with authors).

489. See, e.g., *How Debt Collectors Are Transforming the Business of State Courts*, *supra* note 414 (reporting a greater than 70% default judgment rate).

California law addresses this lack of adversarial testing by requiring debt-buyer plaintiffs to establish a right to recover with documentation attached to their pleadings. If a debt-buyer plaintiff does not meet this pleading obligation, “the court shall not enter a default judgment.”<sup>490</sup> In other words, the court must act affirmatively to check the adequacy of the plaintiff’s case regardless of whether the defendant has appeared or not—a form of judicial managerialism that departs from the passivity contemplated by the traditional Hart-Hand model.

But judges routinely fail to check for the required documentation, resulting in thousands of erroneously entered judgments.<sup>491</sup> Court managerialism promises a solution. A low-cost AI tool that can screen filings in debt-collection cases for compliance with the law already appears to be within current technological capabilities.<sup>492</sup> Assume that such a tool becomes available after rigorous testing demonstrates its accuracy. If the California court system adopts it, AI will enable courts to meet the judicial-check obligation that California law requires with little effort and, with appropriate quality-control checks in place to ensure its continued efficacy, to a high degree of accuracy.

Once the AI tool, as described, becomes available, does due process require California courts to use it? According to the venerable *Mathews v. Eldridge* balancing test,<sup>493</sup>

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the

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490. CAL. CIV. CODE § 1788.60(c) (West 2019).

491. E.g., Julia Barnard, Kiran Sidhu, Peter Smith & Lisa Stifler, *Court System Overload: The State of Debt Collection in California After the Fair Debt Buyer Protection Act*, CTR. FOR RESPONSIBLE LENDING 3 (Oct. 2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf> [<https://perma.cc/3UC4-XZBY>]; *id.* at 14 (describing the authors’ sampling method); *id.* at 35 (reporting the number of erroneously entered default judgments in the sample).

492. Analogous tools are currently in development, for use in the near future. See, e.g., Shana Lynch, *Harnessing AI to Improve Access to Justice in Civil Courts*, STAN. L. SCH. NEWS (Mar. 27, 2025), <https://law.stanford.edu/press/harnessing-ai-to-improve-access-to-justice-in-civil-courts> [<https://perma.cc/F4VW-94B2>].

493. The California courts administer a slightly different version of this test. See, e.g., *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979).

fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>494</sup>

An erroneously entered judgment in a consumer-debt case can readily result in the garnishment of a person's wages or assets and thus inflict considerable harm on a private interest.<sup>495</sup> Judges fail on their own to catch thousands of instances where consumer-debt plaintiffs fail to meet the documentation requirement. The AI tool would eliminate many of these errors, cost very little on its own, and considerably reduce the fiscal or administrative burdens that the judicial check imposes.<sup>496</sup>

If the AI tool functions as described, the answer seems clear. But the result for due process seems radical, at least at first blush. If the Fourteenth Amendment indeed requires California courts to use the AI tool, then the Constitution effectively requires judicial managerialism (the judicial check for compliance with the pleading requirement) and court managerialism (the AI tool's acquisition, use, and maintenance), not just the support for litigant managerialism that *Goldberg* envisions.

A new due process that mobilizes the three variants of managerialism may be revolutionary, but it is not radical. It has roots in the very era that witnessed the entrenchment of managerial courts and the expansion of managerial judging.<sup>497</sup> The latter maps onto what Judge Henry J. Friendly called the "investigatory model" of due process in his canonical 1975 lecture on the hearing right.<sup>498</sup> Friendly suggested that traditional adversarialism of the sort *Goldberg* celebrated might fail "in certain areas of mass justice, notably in the many ramifications of the welfare system."<sup>499</sup> In these areas, the adjudicator cannot rely upon parties to generate the information and arguments necessary for accurate and efficient decision-making.<sup>500</sup> The passive, neutral judge should thus give way to the active,

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494. 424 U.S. 319, 335 (1976) (citation omitted).

495. E.g., Mich. Just. for All Comm'n, *Advancing Justice for All in Debt Collection Lawsuits*, MICH. CTS. 43 (Nov. 16, 2022), [https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa\\_advancing\\_justice\\_for\\_all\\_in\\_debt\\_collection\\_lawsuits.pdf](https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa_advancing_justice_for_all_in_debt_collection_lawsuits.pdf) [<https://perma.cc/2DY9-4GD4>] (discussing problems with default judgments and garnishment in debt-collection cases).

496. See Lynch, *supra* note 492 (discussing a version of this tool in development to be used at the Los Angeles County Superior Court).

497. For a proposal for a revised due process along these lines from the 1970s, see Rubenstein, *supra* note 92, at 82.

498. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1290 (1975). For the lecture's influence on due-process doctrine, see *Mathews*, 424 U.S. at 343, 348, which cites Friendly, *supra*, at 1281, 1276, 1303.

499. Friendly, *supra* note 498, at 1289.

500. *Id.* at 1289-91.

managerial one. Conferencing informally with the parties, the adjudicator works collaboratively with them toward a fair resolution.

Court managerialism, in turn, maps to Jerry Mashaw's "management" model of due process, first worked out in his landmark study of social-welfare-benefits decision-making published in 1973.<sup>501</sup> Mashaw, too, saw in traditional adversarialism a false hope for social-welfare beneficiaries ensnared in a system of mass justice. Adjudication in Hart-Hand terms assumes that "the claimant [will be] aggressive, knowledgeable about the program, and skillful in developing and presenting facts (or has access to those who are)."<sup>502</sup> Gesturing at vulnerabilities that preclude engagement, Mashaw pronounced this assumption unrealistic.<sup>503</sup> "In this context," Mashaw continued, "the theoretical model of the passive adjudicator ruling on the basis of facts and arguments presented by opposing parties is wholly inappropriate."<sup>504</sup> Instead, due process conceived in managerial terms could offer protections that "include the application of systemic management techniques [to] discover errors, identify their causes and implement corrective action."<sup>505</sup> A "positive caseload management system" would enumerate standards for timeliness, accuracy, and fairness;<sup>506</sup> deploy quality-assurance programs on a continual basis to evaluate performance;<sup>507</sup> and design responsive interventions, including training and the distribution of resources to adjudicators and claimants, to fix problems.<sup>508</sup>

Judge Friendly's and Professor Mashaw's alternatives are not lost to due-process history. Doctrine has edged past Hart-Hand constraints in modest ways, consistent with their ideas. *Mathews v. Eldridge* treated *Goldberg* not as a rigid code of adversarial rights but as identifying considerations to be balanced when determining the process due, with cost-effective accuracy as adjudication's

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501. Mashaw, *supra* note 461, at 161. Mashaw described the model in a companion law-review article. See generally Mashaw, *supra* note 35 (arguing that due process in the social-welfare context must include management processes to ensure fairness and accuracy).

502. Mashaw, *supra* note 35, at 815.

503. *Id.*; see also Mashaw, *supra* note 461, at 164 ("[B]enefit and compensation claimants are often the aged, the infirm, children and other dependent segments of the population. Reversion to a system which put the full burden for making his case on the claimant would hardly be a contribution to fairness or accuracy in claims adjudication.").

504. Mashaw, *supra* note 35, at 782.

505. *Id.* at 815-16.

506. Mashaw, *supra* note 461, at 166-67; Mashaw, *supra* note 35, at 792.

507. Mashaw, *supra* note 461, at 169-70; *id.* at 174; see also Mashaw, *supra* note 35, at 798-803 (describing statistical-reporting systems as part of the continuous evaluation of judicial management).

508. Mashaw, *supra* note 461, at 177.

primary goal.<sup>509</sup> Furthermore, nothing in the terms or logic of the *Mathews* balancing test limits due process to litigant-delegated managerialism.<sup>510</sup> By its terms, the test contemplates procedural safeguards as due-process protections, but it does not limit these safeguards to the canonical suite enumerated in *Goldberg*. The test's logic stresses the cost-effective reduction of erroneous decisions in adjudication.<sup>511</sup>

*Turner v. Rogers*<sup>512</sup> confirms the test's capacity to encompass multiple variants of managerialism. There, the Supreme Court, encountering an overmatched self-represented litigant, prescribed a combination of court and judicial managerialism as a due-process alternative to an adversarial protection (appointed counsel) it was unwilling to extend. If a court provides a form to elicit from the party information crucial to a claim or defense (court managerialism), and if the judge uses this form to develop the record at the hearing (judicial managerialism), then the proceeding passes due-process muster.<sup>513</sup>

The quiet revolution that lurks in *Turner's* shadow has been just that—quiet.<sup>514</sup> Why court managerialism has not prompted a more forthright reckoning with Hart-Hand limits on the due-process imagination is a puzzle—especially given the decades-long emergence of court managerialism. A ready explanation, couched in *Mathews* terms, emphasizes fiscal and administrative burden. In an analog era, the sort of default prove-up obligation that the California law imposes has required court staff to assist judges. The argument that *Mathews* requires managerial interventions could easily founder on the shoals of its third factor, particularly for overextended, underresourced state courts.<sup>515</sup> The digital

509. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (emphasizing that due process is flexible and requires balancing private, governmental, and accuracy interests, and citing *Goldberg* as one factor within the broader calculus).

510. See, e.g., *In re M.H.*, 751 N.E.2d 1134, 1142-43 (Ill. 2001) (concluding after a *Mathews* analysis that the court in a parental-rights-termination proceeding has an affirmative obligation to elicit information about parental unfitness even when the parent does not contest the allegation); Engstrom et al., *supra* note 488, at 2-5, 44 (discussing this point at length).

511. Mashaw, *supra* note 396, at 185 (describing the “bureaucratic rationality” model of administrative justice); *id.* at 207-08 (identifying *Mathews* with this model).

512. See 564 U.S. 431, 447-48 (2011) (illustrating how the *Mathews* balancing test accommodates managerial variants of due process, emphasizing flexible, low-cost safeguards that maintain accuracy without adversarial formalities).

513. *Id.*

514. Cf. Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1144 (2019) (referring to *Turner* as a “small but important step toward connecting the requirements of due process with the role of the judge in cases involving pro se litigants”).

515. See, e.g., *Leveraging Technology to Improve Access to LA Courts*, STAN. L. SCH. PODCASTS (June 12, 2025), <https://law.stanford.edu/stanford-legal/leveraging-technology-to-improve->

era complicates this facile objection. The AI future may be murky at this point, but more prosaic technology that can improve adjudication quality at modest administrative cost indisputably exists.<sup>516</sup> Rapid development and diversification of managerial capacities that courts can leverage will put considerable pressure on due process's horizons to expand.

## 2. *The Dilemmas of Due Process*

A new due process that accounts for what judicial and court managerialism can offer has obvious potential, particularly in litigation environments where assumptions about adversarial engagement so routinely misfire. But expanding managerial capacities will require a reckoning with due process more fundamental than what the case-by-case assessment of constitutional obligation can provide. Court managerialism may unsettle the foundations of due process. It may pit the doctrine against itself, and it may challenge what has long been a straightforward alignment between due process and traditional understandings of judicial legitimacy.

The *Mathews* balancing test conceives of due process in “[i]nstrumental[ly] rational[.]” terms, pegging procedure’s value to its potential to reduce error and correctly realize substantive entitlements for litigants.<sup>517</sup> But, at least to many of its leading theorists, due process retains a noninstrumental core. The right to be heard before a neutral decision-maker respects the dignity and autonomy of each individual enmeshed in the dispute.<sup>518</sup> Participation ensures that a court avoids

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la-courts-access [<https://perma.cc/KJ7M-T8UM>] (describing the court staff and effort required for default prove-ups in consumer-debt cases).

516. For an example more prosaic than the AI one described previously, consider text-message reminders of court dates, an intervention that reduces defaults considerably. Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE art. no. eabb6591, at 1 (2020). Some courts have held that, when a party is entitled under the applicable statute or rule to notice of a court proceeding, the failure to provide this notice is a due-process violation. See, e.g., *Rodriguez v. Marcus*, 564 S.W.3d 216, 221 (Tex. Ct. App. 2018). A state-court system’s case-management software can send text-message reminders automatically. See, e.g., Bridget Mary McCormack, *The Disruption We Needed: COVID-19, Court Technology, and Access to Justice*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE, *supra* note 172, at 307, 317. Given that this imposes no administrative burden at a negligible marginal cost, why doesn’t procedural due process require such text-message reminders?
517. MASHAW, *supra* note 46, at 102; see also Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 895 (1981) (describing due process after *Mathews* as assessing “[t]he goodness of a procedure” by “its capacity for accurate factfinding and appropriate application of substantive legal norms to the facts as found”).
518. See, e.g., *Today’s Fresh Start, Inc. v. L.A. Cnty. Off. of Educ.*, 303 P.3d 1140, 1150 (Cal. 2013); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 NOMOS 127, 128 (1977).

“treating [a litigant] as a nonperson, an object, rather than a respected, participating citizen.”<sup>519</sup> The independent value due process assigns to participation has its analog in the basis for judicial legitimacy that informs the Hart-Hand model. What matters is the judge’s reasoned deliberation after full and impartial consideration of each litigant’s arguments, and not necessarily the substantively correct result.

These two core values – accuracy and dignity – combine to produce a procedural due process that fits within the boundaries of traditional adversarialism. *Goldberg* and *Mathews* assume a positive correlation between procedure and accuracy: as participatory rights expand, the accuracy of the decision-making process improves.<sup>520</sup> Put differently, as the opportunities for litigants to manage their disputes increase, so too does accuracy. The only issues are the marginal returns, in terms of accuracy and dignity, from additional procedural protections and the comparison of these returns to the procedures’ marginal costs.<sup>521</sup> A due process thus confined also aligns neatly with Hart-Hand assumptions about judicial legitimacy. As opportunities to participate increase, so too do opportunities for judges to hear from the litigants and deliberate over and reason about the arguments they make.

But if due-process doctrine can require not just higher-quality opportunities for litigant managerialism but also judicial or court managerialism, the possibility of a fundamental rupture looms. Due process’s goals may compete with traditional understandings of judging, and due process and judicial legitimacy, at least as measured by a traditional Hart-Hand metric, may grow estranged.

Consider another plausible AI scenario. Trials in eviction cases often last no more than a few minutes.<sup>522</sup> Caseload pressures may nudge some judges to rush the proceedings. Overmatched self-represented tenants may struggle to navigate the rules that limit the arguments they can make and the evidence they can adduce. The seemingly simple task of getting to the courthouse for a trial can prove

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519. *People v. Ramirez*, 599 P.2d 622, 626 (Cal. 1979) (quoting Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 30 (1977)).

520. See, e.g., Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 985 (1993) (“Adversarial presentation by parties’ lawyers enhances the likelihood of reaching a correct decision.”).

521. The *Mathews* test estimates the efficacy of existing procedures at producing accurate results and the degree to which enhanced procedural protections will increase this accuracy. It then compares the marginal returns from investment in additional procedure to the costs of adding it. See *Mathews v. Eldridge*, 424 U.S. 319, 343-48 (1976).

522. See, e.g., Victor Geminiani, Jennifer F. Chin & Isaiah Feldman-Schwartz, *Evicted in Hawai‘i: Lives Hanging in the Balance*, LAWS. FOR EQUAL JUST. 22 (Dec. 2018), [https://cdn2.hubspot.net/hubfs/4408380/PDF/Eviction-Reports-Articles-Cities-States/Hawaii\\_Evicted-in-Hawaii-Report\\_DEC6\\_Update.pdf](https://cdn2.hubspot.net/hubfs/4408380/PDF/Eviction-Reports-Articles-Cities-States/Hawaii_Evicted-in-Hawaii-Report_DEC6_Update.pdf) [<https://perma.cc/N938-WUTN>].

challenging for underresourced tenants struggling with transportation or child-care.<sup>523</sup> These litigant vulnerabilities and resource limitations may distort outcomes, resulting in many judgments not warranted by the applicable substantive law.

Assume that an AI tool develops that can elicit all information necessary for accurate decisions in eviction cases. Unlike judges, this tool does not tire after long days on the bench or develop decisional heuristics inconsistent with governing law. It can run at all hours. Litigants can engage remotely and thus do not need to take time off of work, find childcare, and arrange transportation to appear in court at inconvenient times. The tool can nudge self-represented litigants to present germane arguments, supported by competent and admissible evidence. This tool can also connect with other information sources, such as a city housing agency's records, that might bear upon the landlord's entitlement to prevail.<sup>524</sup> The AI tool, in short, generates more accurate results at lower costs than what in-person trials can achieve.

Could a jurisdiction, faced with an overwhelming eviction docket, replace trials in eviction cases with this AI tool? By *Mathews's* metric of instrumental rationality, due process not only would permit but indeed arguably would require this substitution. But parties to eviction matters would lose their days in court, before a judge, and thus forgo the dignitary returns that participation promises. The due-process calculus would have to choose between accuracy and dignity, with a preference for one coming at the other's expense.

Moreover, the AI tool could open a rupture between a Hart-Hand conception of judicial legitimacy, on one side, and due process, or at least its instrumentally rational variant, on the other. Our optimization calculus argues that court managerialism should maintain an adjudication core, or some residuum of Hart-Hand judging. Due process cabined by traditional adversarialism effectively compels this residuum, since it requires some opportunity to be heard by the decision-maker before the entry of final judgment. But the pursuit of decisional accuracy in an AI era may leave this residuum behind. This is Owen Fiss's nightmare in full bloom. Rule by algorithm is really "Rule by Nobody."<sup>525</sup> But what if

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523. See, e.g., David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, 120 PNAS art. no. e2210467120, at 1 (2023); *New Report Surveys the Reasons for Tenant Defaults in Housing Court Eviction Cases*, MASS. L. REFORM INST. (Jan. 19, 2023), <https://mlri.org/2023/01/19/new-report-surveys-the-reasons-for-tenant-defaults> [<https://perma.cc/J6SL-JZU2>] (reporting that one of the barriers that tenants face when they are sued for eviction includes "childcare complications").

524. See, e.g., *Margola Assocs. v. City of Seattle*, 854 P.2d 23, 38 (Wash. 1993) (describing the requirement that rental properties be registered and noting that failure to register is a defense to eviction).

525. See Fiss, *supra* note 4, at 1458.

Rule by Nobody renders more actual justice, especially in litigation contexts where opportunities to be heard run aground in the face of the formidable barriers to meaningful participation that many litigants face?

In short, expanding court managerial capacities do not just test due process's limits, as determined by traditional adversarialism. They also disturb due process's very foundations, requiring a basic grappling with what due process is for and to what extent it must align with notions of judicial legitimacy.

This reckoning is unavoidable and – as court managerialism's decades of entrenchment suggests – overdue. Procedural due process gets remade every fifty years or so.<sup>526</sup> As Professor Thomas Grey observed in 1977, amidst due process's last moment of recreation, “the basic core of what lawyers call ‘procedural due process’ is formed around the popular conceptions of procedural fairness manifested in the common judgments of conventional morality.”<sup>527</sup> Once popular conceptions and conventional morality catch up with managerial courts' ubiquity, diversification, and expansion, the pressure on due process to change again will build.

## CONCLUSION

The managerial turn is remaking American courts from the inside out. What began as a pragmatic response to docket pressures and budgetary shortfalls has matured into a durable institutional orientation that fuses adjudication with bureaucracy. Managerial courts no longer merely manage cases; they design and operate systems of adjudication that govern how cases move and how authority is exercised. Considered one by one, this patchwork of personnel measures, bulk movement and processing of cases, and quality-control measures can read like so much tinkering—a marginal shift in court organizational charts, a commonsense effort to match procedures to case needs, or the opportunistic use of a piece of software to improve upon an analog process. As it accretes, however, court managerialism has been subtly rewiring the system. Discretion migrates from individual judges to bureaucratic processes, courts shift from case-by-case

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526. The first Supreme Court case on procedural due process after the Fourteenth Amendment's ratification was *Hurtado v. California*, 110 U.S. 516 (1884). *See id.* at 520–24 (citing state authorities and Lord Coke, a seventeenth-century jurist, at the outset of the opinion, and strongly implying the absence of any Supreme Court precedent on the issue since the Fourteenth Amendment's ratification). The Supreme Court then refashioned procedural due process in the 1930s. *See, e.g., Morgan v. United States*, 298 U.S. 468, 477–82 (1936) (requiring a full hearing, decision on the record, basic findings, and that the officer who decides must hear the case). It wrestled with numerous due-process cases through the middle part of the twentieth century, an effort that culminated with *Goldberg* and *Mathews* in the 1970s. *See generally* Engstrom et al., *supra* note 488 (describing this history).

527. Thomas C. Grey, *Procedural Fairness and Substantive Rights*, 18 *NOMOS* 182, 182 (1977).

adjudication to system-level policymaking, and new channels take shape for law's production, dissemination, and review. As a result, the managerial turn is challenging a centuries-old conception of judging in an adversarial system as individuated, passive, and neutral, even as it promises new forms of fairness, accuracy, and institutional capacity. To understand courts today is therefore to study not only what judges decide but also how these bureaucratic structures are reshaping what counts as decision-making itself.

Yet the rise of managerial courts also reopens foundational questions about legality and legitimacy. The task ahead is neither to romanticize a return to the mythic figure of the solitary judge, nor to uncritically embrace managerialism, particularly its software-based forms, as the inevitable future. It is to craft design principles that preserve an adjudicative core — a space for moral judgment, transparency, and ultimate judicial responsibility — while harnessing bureaucratic expertise to secure accuracy and equal justice, particularly where the adversarial process has broken down. Doing so may require, for example, reimagining due process as a living constitutional value capable of operating through bureaucracy rather than against it. The challenge for courts, scholars, and reformers alike is to ensure that, in an age of management and machines, the rule of law remains recognizable as rule by law, rather than rule by nobody. This Feature offers a blueprint to courts that have begun that process — and the many more that will do so as the next chapter of the American civil-justice system unfolds.