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Criminal Courteaucracy

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CRIMINAL COURTEAUCRACY

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ABSTRACT

Scholars have increasingly recognized that criminal courts in the age of mass incarceration, particularly lower criminal courts, have effectively shifted from an adjudicatory system of justice to a managerial system of justice. Rather than adjudicating guilt or innocence, criminal courts are engaged in risk management and social control. However, literature on criminal courts has almost exclusively focused on judges, prosecutors, and defense attorneys, and their roles in the adjudication of criminal cases. This Article will focus instead on the managerial function of criminal courts by shining a spotlight on a less-scrutinized set of actors: criminal-court administrators.

Through an in-depth case study of administrative actions in New York, this Article will explore how court administrators co-opt the tools of the court system—including bail, adjournments, and orders of protection—to tighten the net of social control around criminal defendants. Crucially, these administrative actions extend judges' ability to detain and surveil criminal defendants despite apparent conflicts with statutes, higher court decisions, and defendants' constitutional rights.

At a time of massive reckoning with the criminal legal system, this paper will conclude that understanding the unique role of criminal court administrators in managerial criminal courts is necessary to navigate the best path forward for change.

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INTRODUCTION

David[1] was arrested for grand larceny in the fourth degree, a nonviolent offense that did not qualify for cash bail under New York's new bail-reform law.[2] Under the law, David was supposed to be released after his arraignment.[3] But due to a court administrative directive that pertained to defendants with prior open cases, David was detained instead.[4]

David was detained because on March 9, 2020, two months after the historic bail reforms in New York state went into effect,[5] the chief clerk of the New York City Criminal Court issued an operational directive aimed at "expeditiously review [ing]" the bail status of people who were rearrested while they had a pending felony case.[6]

The directive was not the decision of any individual judge—or a judge at all. Nonetheless, it directly eroded the bail reforms' protections for criminal defendants. As a result of the procedures outlined in the directive, people accused of crimes faced delayed arraignments and were either detained without bail when they had a right to be released or had bail set after the court rushed through the requisite hearings.[7] For the court system, however, the directive permitted judges to quickly and efficiently detain repeat-arrest defendants like David—which was the point of the directive.[8]

Angela[9] was arrested for assault in the third degree following an incident with her boyfriend. At her arraignment, the prosecutor requested a temporary full order of protection, which would require Angela to stay away from her boyfriend and his place of residence until the conclusion of her court case. Because Angela shared an apartment with her boyfriend, the order of protection would effectively render her homeless, despite the fact that she had not been found guilty of the charges against her. Angela's public defender requested a hearing to challenge the order of protection, under a new court decision, *Crawford v. Ally*, that provided protections for defendants in Angela's position.[10] *Crawford* had targeted the culture of judges

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1. This is a fictional example based on an amalgam of real cases I have witnessed.

2. *See* Bail Elimination Act of 2019, S.B. S2101-A, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) [hereinafter Bail Elimination Act] (limiting the conditions in which bail may be imposed on defendants facing felony charges).

3. *See id.*

4. Operational Directive 2020-04 from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y., Requests to Review Pending Securing Orders (Mar. 9, 2020) (on file with author) [hereinafter Bail Directive].

5. *See* Bail Elimination Act, *supra* note 2.

6. Bail Directive, *supra* note 4.

7. *Id.*; *see also* Angelo Petrigh, *Judicial Resistance to New York's 2020 Criminal Legal Reforms*, 113 J. CRIM. L. & CRIMINOLOGY 108, 144–47 (2023) (detailing how the operational directive circumvented the bail-reform act by allowing re-arrested individuals with open cases to be detained).

8. *See* Bail Directive, *supra* note 4.

9. This is a fictional example based on an amalgam of real cases I have witnessed.

10. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 717–18 (N.Y. App. Div. 2021) (requiring a criminal court to hold a hearing to determine whether to issue an order of protection when it would involve a significant deprivation of a property interest).

rubberstamping prosecutors' requests for temporary full orders of protection without adequately considering the harm to defendants.[11]

However, unbeknownst to Angela and her lawyer, a confidential memorandum from the New York Office of Court Administration's Counsel's Office advised judges to adopt a watered-down interpretation of *Crawford*.[12] With the stated goal of avoiding "negative operational impact[s]" and safety risks to victims of domestic violence, the memorandum advised judges not to interpret *Crawford* as requiring hearings with live witnesses or "non-hearsay" evidence.[13] By effectively tempering the effects of *Crawford*, the memorandum protected the status quo.[14]

Court administrators are rarely the subject of study by those interested in the criminal process in the United States, with judges, prosecutors, and defense attorneys occupying the limelight instead.[15] And yet, as the above examples show, court administrative actions actively shape judicial decision-making—and can ultimately undermine the impact of a statute or higher-court decision.

When I refer to "court administrators," I am discussing a diverse group comprised of (1) non-judicial actors, such as chief clerks and lawyers who work in court administrative offices (as in the examples above), and (2) judicial actors, such as administrative judges, who perform administrative duties in addition to their judicial role.[16] This bureaucracy—or "courteaucracy," as I term it—is tasked with administering the court system, including by allocating and managing resources, appointing and training judges, and collecting statistics and setting standards for case management.[17]

What motivates the actions of this courteaucracy? Are court administrative actions motivated by saving resources? Or, as the above examples suggest, do

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11. *See id.* at 716 (noting it was the regular practice of the Bronx Criminal Court not to conduct hearings for orders of protection and that they were regularly issued in domestic abuse cases).

12. Sam Mellins, *New York Judges Lock the Accused out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. FOCUS (July 23, 2021), https://www.nysfocus.com/2021/07/23/new-york-judges-crawford-hearing.

13. *Id.* (citing Memorandum from Vito Caruso, George Silver & Edwina Mendelson, Deputy Chief Admin. JJ., on *Crawford v. Ally*, https://s3.documentcloud.org/documents/21014441/file_7593.pdf).

14. Mellins, *supra* note 12.

15. In general, criminal courts literature tends to focus on the courtroom workgroup. *See, e.g.*, Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235 (2018); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017).

16. The courteaucracy also includes a large "street-level bureaucracy" component—consisting of public-facing staff lower in the hierarchy such as trial judges, court officers, and court clerks. *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 3 (30th Anniversary ed. 2010) (describing various judicial actors as "street-level bureaucrats"). The street-level bureaucracy is responsible for the many informal and unwritten rules and policies that govern courts as well. *See infra* Part II.B.3.iv (discussing unwritten rules). This Article will focus on the written administrative rules and policies that are issued by higher-ranking judicial and non-judicial members of the courteaucracy, such as administrative judges, supervising judges, and chief clerks.

17. Since the 1990s, the role of court administrators has grown ever more complex due to advances in information technology that have permitted courts to collect information about case flow that had previously been too expensive or burdensome to collect. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 356–61 (2016).

these actions also place a "thumb on the scale" when it comes to constraining defendants who tend to be viewed as "dangerous" or "high risk," such as defendants who have been rearrested or accused of domestic violence? How can we understand the role of court administrative actions in the context of a broader conversation about the role of criminal courts as a site of social control in the age of mass incarceration?

This Article is the first to provide an in-depth analysis of the role criminal-court administrative actions have played in the shift from criminal courts as sites of adjudication to criminal courts as sites of social control. As part of this analysis—which relies on a case study of court administrative actions in New York—this Article examines how these actions, which are rarely subject to public input, judicial review, or other formal mechanism of challenge, conflict with statutes and higher-court decisions that protect defendants.

Thus, this Article contributes to two scholarly conversations. The first is a conversation about the endemic failure of criminal courts to live up to due process norms and the effect that failure has on perpetuating mass incarceration and racial disparities in the criminal legal system.[18] These failures of due process have an undeniable racial and class component, as criminal defendants are disproportionately Black and/or Latinx, and people of low socioeconomic status.[19] For instance, Nicole Gonzalez Van Cleve has described the phenomenon of "due process for the undeserving," in which the failure to adhere to due process requirements or the exclusion of the defendant from the process is rationalized, either consciously or unconsciously, by the defendant's marginalized status in society.[20] And Alexandra Natapoff has argued that these failures of due process are particularly extreme in court systems with high caseloads and scarce resources—what she terms "the bottom of the penal pyramid."[21] Thus, this Article joins works by scholars like

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18. This literature often focuses on the failures of due process in state lower criminal courts—from judges who coerce defendants into pleading guilty to entire court systems that knowingly fail to provide misdemeanor defendants with attorneys. *See, e.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 1–18 (2018).

19. *Id.* at 10.

20. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 73 (2016). Gonzalez Van Cleve also describes how some court actors even explicitly rationalize streamlining due process or refusing to allow defendants to speak or ask questions based on racist characterizations of defendants as unintelligent. *Id.* It is axiomatic that race plays an outsized role in the criminal legal system generally. A pervasive critique of the entire criminal legal system is that it is rooted in and serves the ends of white supremacy, from the origins of modern policing in the slave patrols of the 1700s to mass incarceration today. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (1st ed. 2010).

21. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317–18 (2012). When eighty percent of state criminal cases are misdemeanors, Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 256 (2015), and the majority of felony cases are non-violent or low-level violent felonies, *see, e.g.*, DIV. OF CRIM. JUST. SERVS., *infra* note 72 (describing a breakdown of felony offenses in New York), it is fair to say that the vast majority of the state criminal court system exists at the "bottom of the penal pyramid." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1318 (2012). Despite this fact, criminal law scholarship has focused disproportionate attention on criminal cases that lead to incarceration, particularly prison time. *See* Alexandra

Elizabeth Nevins-Saunders that have shone a spotlight on how court administrative actions can lead to "judicial drift" from the due process norms courts are obligated to protect.[22]

Second, this Article also enters in conversation with scholars who have hypothesized that the entire function of courts has changed, such that the system no longer adjudicates guilt or innocence, but sorts and monitors the primarily Black, Latinx, and people of low socioeconomic status who cycle through the system according to their perceived level of threat.[23] While sociologists have long examined the role of social control in the criminal legal system,[24] one starting place for this conversation is the "new penology"—the term coined by Malcolm Feeley and Jonathan Simon to describe the overall shift in criminal law from a focus on individual fault and the sanctioning or treatment of individual offenders to a focus on "identify [ing], classify[ing], and manag[ing] groupings sorted by dangerousness."[25] This shift towards management as opposed to adjudication[26] is increasingly seen as

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Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 256 (2015) ("[C]riminal law scholarship has long privileged serious offenses and federal practice to the exclusion of petty crimes."). Wrongful misdemeanor convictions are also particularly rampant, although under-scrutinized. *Id.* at 256 (observing that the "wrongful conviction problem" for misdemeanors "dwarfs the felony innocence docket" and "stems not from forensic failures but from the slapdash and coercive nature of the plea-bargaining process, in which innocent people plead guilty to avoid further pretrial incarceration or the burdens of misdemeanor court").

22. *See* Elizabeth Nevins-Saunders, *Judicial Drift*, 57 AM. CRIM. L. REV. 331 (2020). Nevins-Saunders' work is based on a case study of a county court in Nassau County, Long Island. She compares courthouses to administrative agencies, analogizing a supervising judge to an agency head "with rulemaking and administrative power," *id.* at 367–72, and analogizing trial judges, clerks, and clerical staff to "street level bureaucrats," the public-facing bureaucrats in an agency who determine how rules are actually implemented on the ground. *Id.* at 367–70. *See generally* LIPSKY, *supra* note 16 (discussing "street-level" bureaucrats). Nevins-Saunders uses the term "judicial drift" to analogize to "bureaucratic drift," a term that has been used to describe how "congressional mandates can be lost as legislation passes through rulemaking administrators." *See* Nevins-Saunders, *supra*, at 331, 370–72. Her key example involves a sign in a Nassau County courtroom that directed litigants to speak with the town attorney (the equivalent of the prosecutor in their cases) before entering the courtroom. As litigants lined up, unrepresented by counsel, to speak to the town attorney, Nevins-Saunders observed that most of them also missed the single announcement that the court administrative staff made regarding their right to have counsel appointed even if they could not afford to hire a lawyer. *Id.* at 331–33.

23. *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (arguing that lower criminal courts can be understood as perpetuating a managerial model of justice that is focused on sorting defendants along a spectrum of governability).

24. *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (Illustrated ed. 2009) (illustrating the control the penal system has over those of lower socioeconomic status); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990) (providing a sociological account of punishment in modern society).

25. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992).

26. Judith Resnik initially identified the shift towards managerial judging in the civil sphere. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (highlighting management techniques such as meeting with parties to encourage settlements).

integral to perpetuating racial disparities in the criminal legal system[27] and thus to reproducing mass incarceration.[28]

Scholarship addressing the managerial system of justice has focused on the actors who comprise the classic "courtroom workgroup" of judges, prosecutors, and defense attorneys.[29] But where do court administrators fit in? Are court administrators merely "neutral" players in the system whose role is to allocate resources and stay out of the fray, or do they also play a role in the sorting, testing, and monitoring of the people who pass through their doors?

In this Article, I argue that court administrators are important players in the managerial project. Court administrative actions actively shape judicial decision-making, including how judges interpret the law, when and how (and if) judges permit certain hearings to proceed, and even the minutiae of how often judges require defendants to return to court.

I argue that this vast exercise of administrative power over day-to-day judicial decision-making reflects an interest in managing categories of defendants based on the perception of the threat they pose. Thus, court administrators utilize their administrative power to write rules that effectively strengthen judges' abilities to detain and monitor "dangerous" defendants.

Court administrators are underrecognized actors when it comes to understanding the way criminal courts function as sites of social control. Given the current moment—with an increasing focus among criminal-justice reform advocates on courts in addition to jails and policing[30]—it is more important than ever to develop the fullest possible understanding of how criminal courts function.

Part I defines a "managerial" as opposed to an "adjudicative" system of justice.[31] Part II describes New York's court administrative bureaucracy, or "courteaucracy," and provides some examples of how it functions in practice and how administrative orders and directives can conflict with constitutional guarantees, statutes, and higher-court decisions. Part III identifies how administrative actions are motivated by interrelated concerns about resources and dangerousness. Part IV

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27. KOHLER-HAUSMANN, *supra* note 23, at 266 ("One question we might ask is if the managerial system in its real-world incarnation accurately and fairly identifies persistent lawbreakers . . . . Those who are brought into the misdemeanor justice system [represent] . . . a sample systematically biased by certain social facts, some of which raise fundamental concerns of racial and class inequities.").

28. *See* GONZALEZ VAN CLEVE, *supra* note 20, at 3–4.

29. *See, e.g.*, KOHLER-HAUSMANN, *supra* note 23; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015).

30. *See, e.g.*, BEYOND CRIMINAL COURTS, https://beyondcourts.org/en (last visited Feb. 14, 2024) (a "digital resource hub for organizers, advocates and community members working together to build the organizing-power we need to defund, divest, and ultimately to dismantle criminal courts for good"). The recent battle over New York Governor Hochul's nomination of Judge Hector LaSalle for Chief Judge of the New York Court of Appeals highlights the growing attention being paid to the role of state courts in setting or dismantling political agendas. *See* Jesse McKinley & Luis Ferré-Sadurní, *Inside the Political Fight That May Have Doomed a Chief Judge Nominee*, N.Y. TIMES (Jan. 18, 2023), https://www.nytimes.com/2023/01/18/nyregion/lasalle-politics-democrats-hochul.html.

31. *See* Feeley & Simon, *supra* note 25 (describing the shift to a managerial system of justice).

introduces the concept of the "social control framework" to encapsulate how court administrative actions reveal a vision of "what the criminal law is good for"[32]—a vision grounded in the management of groups of "dangerous" criminal defendants. Finally, Part IV also contemplates some potential pathways forward.

While there are many jurisdictions where court administrative power is underscrutinized across the country, this Article utilizes New York as a case study for several reasons. First, focusing on New York alone permits a level of in-depth analysis that would not be possible by widening the lens to include more jurisdictions. Second, and relatedly, I worked for several years as a public defender in New York City, allowing access to the detailed information about administrative actions required to conduct this type of study. Finally, because New York has already been studied as an example of the managerial model of justice in action,[33] and because it was the recent site of significant criminal legal reforms[34]—some of which were the triggers for the administrative actions studied in this Article—New York provides particularly fertile ground for study.

I. THE NEW PENOLOGY AND THE MANAGERIAL SHIFT IN COURTS

A. The New Penology

The adjudicative ideal of criminal courts states that the purpose of a criminal court is to determine guilt or innocence and impose appropriate punishment through a process of decision-making that relies on the application of legal standards to evidence.[35] A visitor from another planet who read our penal codes and criminal procedural law would correctly assume that the adjudicative ideal is achieved through the adversarial system, which involves equally matched adversaries vigorously competing to uncover the relevant facts and ultimately advocate before a jury for the correct disposition of a criminal case.

However, as the Supreme Court has observed, "criminal justice today is for the most part a system of pleas, not a system of trials."[36] Ninety-seven percent of federal criminal convictions and ninety-four percent of state felony criminal convictions are the result of guilty pleas.[37] The high rate of plea bargaining has been

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32. KOHLER-HAUSMANN, *supra* note 23, at 76 (quoting Herbert L. Packer, *Two Models of Criminal Process*, 113 U. PA. L. REV. 1, 4–6 (1964)).

33. *See generally id.* at 2 (providing a study of misdemeanors in New York City).

34. *See, e.g.*, Bail Elimination Act, *supra* note 2.

35. *See* KOHLER-HAUSMANN, *supra* note 23, at 71–72 (explaining criminal courts operating under the adjudicative model seek to determine whether the defendant "in fact committed the criminal act of which she is accused" by "receiving and evaluating 'proofs and reasoned arguments' in the form of evidence about the facts of the case and information about the legal standards that pertain to an accusation of guilt for a specific offense").

36. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

37. *See* Dep't of Just., *Sourcebook of Criminal Justice Statistics Online*, UNIV. AT ALBANY, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (last visited Mar. 3, 2024); SEAN ROSENMARKEL, MATTHEW DUROSE & DONALD FAORLE, JR., BUREAU OF JUST. STAT., FELONY SENTENCES IN STATE COURTS, 2006 — STATISTICAL TABLES (revised 2010), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf. In the states for which data was available, less than two percent of misdemeanor dispositions overall were bench or jury trials.

linked to several factors: vast unchecked prosecutorial power;[38] the expansion of criminal law;[39] the increased availability of mandatory minimum punishments and higher sentences;[40] underfunded defense counsel;[41] and judges who fail to hold prosecutors accountable for misconduct,[42] punish defendants for exercising their right to trial,[43] or set unaffordable bail to keep defendants detained before trial.[44]

As a result, under our current "system of pleas," many defendants accused of a crime plead guilty even when they are innocent of the charges.[45] The ways in which the adversarial system fails to live up to the textbook ideal thus have serious implications for the ability of courts to achieve their supposed purpose: the accurate adjudication of guilt or innocence and imposition of punishment.

CSP STAT Criminal, CT. STAT. PROJECT (last updated Oct. 9, 2023), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal.

38. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 878 (2009) ("In most cases, then, the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence . . ."); Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998) (discussing how plea bargaining is more like an "inquisitorial" system than an adversarial system). In state courts across the country, prosecutorial decision-making occurs rapidly and with little oversight. *See* GONZALEZ VAN CLEVE, *supra* note 20, at 122 (describing how prosecutors in a Cook County, Illinois case study rarely read complete files or engaged in legal strategy).

39. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 721–22 (2005) (describing how politicians are rewarded for passing new criminal codes); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (describing how the expansion of criminal law is motivated by both the surface politics of public opinion and a "deeper politics" of "institutional competition and cooperation").

40. *See, e.g.*, RACHEL E. BARKOW, PRISONERS OF POLITICS (2019).

41. In such circumstances, even adequately funded defense counsel may simply be able to tell defendants "how the gun works." Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 55 (1975). And yet, an adequately funded public defense system has never existed in reality. *See* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 139 (2020) (discussing the systemic problems of underfunding of public defender systems); *see also* David Carroll, *Gideon's Despair*, MARSHALL PROJECT (Jan. 2, 2015), https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis (describing how underfunding has turned courts into "assembly lines to process poor people into jail or prison without adequately sorting the guilty from the innocent").

42. *See, e.g.*, Thomas P. Sullivan & Maurice Posley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 894 (2015) ("Courts and ethics bodies rarely sanction prosecutors, and the rare disciplinary measures tend to be mere slaps on the wrist.").

43. *See, e.g.*, Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 101 (2018) (describing how many judges "signal, directly or indirectly, that a much longer prison sentence will be forthcoming should the defendant go to trial and lose").

44. The vast majority of states permit judges to consider public safety as a factor in pretrial detention. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 548 (2012) (describing how only two states prohibited the consideration of dangerousness in 2011: New York and New Jersey). Even in states that permit judges to detain defendants on the basis of dangerousness alone, many judges prefer to set unaffordable bail as a "sub rosa" method of detention. *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507 (2017) (describing how judges "rely on money bail and *sub rosa* detention as a crude mechanism for managing pretrial crime risk").

45. *See, e.g.*, Wiseman, *supra* note 15, at 252 (discussing increased pretrial detention as a possible factor in wrongful convictions); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188–90 (2010) (describing insufficient limits on prosecutorial charging decisions as a factor in wrongful convictions).

And yet, focusing on how to ensure that courts live up to the adjudicative ideal sidesteps a fundamental question regarding whether "adjudication" best answers the question of, "what do courts do?" Several decades ago, Malcolm Feeley and Jonathan Simon identified a shift in the orientation of the criminal justice system toward "a new penology," which is concerned with the management of populations based on risk.[46] This new penology encompasses a shift in orientation of the entire criminal justice system, including police, corrections, and courts.[47] Under the new penology, criminal justice institutions focus not on the individual adjudication of guilt and punishment but instead on "identifying and managing unruly groups"[48] through "techniques to identify, classify, and manage groupings sorted by dangerousness."[49] While the old penology used the language of "clinical diagnosis and retributive judgment," the new penology's language is that of "probability and risk."[50] Under the new penology, the goal "is not to eliminate crime" and rehabilitate defendants but rather to make crime "tolerable through systemic coordination."[51]

Scholars have observed signs of the new penology everywhere in the criminal legal system, from policing tactics that focus on the prevention of crime[52] to the pervasiveness of "evidence-based" risk assessments,[53] which are now utilized at almost every stage of a criminal case—including sentencing and parole—and play a role in determining a defendant's eligibility for diversion or alternatives to incarceration.[54] Scholars have also utilized the framework of the new penology to

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46. Feeley & Simon, *supra* note 25.

47. *Id.* at 451–58.

48. *Id.* at 455.

49. *Id.* at 452.

50. *Id.* at 450.

51. *Id.* at 455.

52. *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 331 & n.161 (2015) (citing Paul Butler, *Stop and Frisk: Sex, Torture, Control*, *in* LAW AS PUNISHMENT/LAW AS REGULATION (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 335 (2015)).

53. *See* Mayson, *supra* note 52, at 331; Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, *in* CRIME AND THE RISK SOCIETY 375 (Pat O'Malley ed., 1998).

54. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 215 (2013) [hereinafter *Against Neorehabilitation*]. Indeed, Jessica Eaglin and Eric Miller have identified the connection between the new penology and "neorehabilitation," an approach to rehabilitation that seeks to utilize "particular statistically proven tools," rather than medical expertise, to manage offenders through treatment. Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 874–75 (2013) [hereinafter *Neorehabilitation and Indiana's Sentencing Reform Dilemma*]; *see also* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 441 (2009) (noting how drug courts have "rework[ed] the old penology of intervention and treatment into what might be called 'neorehabilitation'" by "using supervision and incapacitation as a form of risk management to train individuals as responsible members of society"). Neorehabilitation "manage[s] the risk of recidivism for low-level offenders through supervision and treatment" while at the same time channeling higher-risk offenders that are deemed likely to recidivate into incarceration. *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, *supra*, at 875. In other words, neorehabilitation "manages offenders through treatment for the benefit of society, not the individual." *Id.*

explore collateral consequences,[55] electronic monitoring and other forms of technological restraint,[56] and arrests.[57] Most relevant for this Article, scholars have applied the lessons of the new penology to criminal courts—specifically to examine how the focus of criminal courts has shifted away from the adjudication of guilt or innocence and toward sorting defendants based on their level of risk and monitoring and sanctioning them accordingly.

Following a three-year study of New York City criminal-court practice after the advent of "broken windows" policing, Issa Kohler-Hausmann concluded that lower criminal courts in New York responded to the onslaught of cases by operating according to a "managerial model" of criminal justice where the focus of court actors was not on guilt, innocence, or the appropriate punishment for the crime, but rather on the management of defendants based on risk.[58] Alexandra Natapoff has made similar claims that the misdemeanor process is "less about establishing guilt under law" than "identifying, labeling, and controlling disadvantaged and disfavored populations," beginning with police, prosecutors, and courts "iteratively mark[ing] and keep[ing] tabs" on defendants who are deemed risky—even those who may never be convicted of a crime.[59]

The new penology is thus relevant to understanding how court actors make decisions at critical junctures in a case—and the extent to which these decisions are not motivated by questions of guilt or innocence but instead motivated by the goal of risk management and the "presumption of the need for social control."[60]

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55. *See* Mayson, *supra* note 52, at 331–33 (describing how the rise of the "new penology" and the "preventive state" suggest that "contemporary U.S. law deploys mixed systems of risk administration," and discussing the problems that these systems pose for the classification of collateral consequences as punishment or as risk prevention).

56. *See* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1321–22 (2008) (analyzing "the state's increasing desire to preventively regulate targeted classes of individuals" through the "use [of] innovative technologies" that "are imposed without necessary procedural safeguards").

57. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815 (2015) (arguing that arrests can be understood as "a regulatory tool—a means of monitoring, ordering, and tracking individuals"). *See generally* Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2282 & n.228 (2019) (listing scholars who have expanded on the new penology's "diagnosis").

58. *See* KOHLER-HAUSMANN, *supra* note 23, at 4–5.

59. *See* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 263 (2015). Natapoff also observes that for misdemeanors, prosecutors "play a weaker evaluative role," thus making the police the most powerful actor in misdemeanor-land. *Id.* at 262. This, in turn, means that arrest practices "driven by zero tolerance, order maintenance, gentrification and other class- and race-inflected policies" determine the composition of the misdemeanor pool, ultimately "criminaliz[ing] broad classes of socially vulnerable people." *Id.* This concentration of power in the hands of police officers, along with the fact that "each stage [in the path of a misdemeanor case] disables or disincentivizes each class of legal actor—prosecutor, public defender, judge—who might otherwise ensure fidelity to criminal justice norms such as evidentiary integrity, individuation, and due process" results in a "misdemeanor system [that] permits a regulatory social control agenda to proceed under the formal aegis of criminal law." *Id.* at 263–64.

60. *See* KOHLER-HAUSMANN, *supra* note 23, at 77.

B. The Managerial Model of Criminal Justice: A Framework for Understanding Criminal Court

1. The Managerial Model

Following in the vein of the new penology, Issa Kohler-Hausmann's "managerial model" of criminal justice incisively examines how prosecutors and judges in lower criminal courts responded to the massive caseloads wrought by "broken windows" policing by sorting and testing criminal defendants along a spectrum of governability.[61] Kohler-Hausmann's model is based on her study of misdemeanor practice in New York City.[62] However, it is also more broadly applicable to all criminal cases and provides a useful vocabulary for analyzing how court actors put forward a new vision of "what the criminal law is good for."[63] It is also an example of how scholarship has focused on the decision-making of individual members of the traditional courtroom workgroup as opposed to how these decisions relate to the larger organizational structures in which these members are embedded.

The key difference between the managerial model of justice and the adjudicative model is that the driving question for court actors is not "[d]id the defendant commit the act alleged on the criminal complaint?" but "[i]s the defendant a manageable person?"[64] Thus, prosecutors and judges driven by a managerial model rely on police and court records for information about a defendant's prior interactions with the criminal legal system to "construct a profile" of the defendant's "governability," which in turn determines their assessment of what level of sanctions or monitoring is appropriate.[65]

So, a prosecutor may make a plea offer based not on the strength of the evidence against a particular defendant but on how they assess that defendant's risk of future offending. This is determined through the use of various penal techniques, including "marking," "procedural hassle," and "performance."[66] "Marking" describes the use of both temporary and permanent records to gather information about defendants.[67] "Procedural hassle" encompasses the burdens of having an open criminal

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61. *Id.* at 73–74.

62. Thus, it can also be compared to past studies of lower criminal courts, most famously Malcolm Feeley's study of New Haven lower criminal courts in the 1970s. MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979). Like Kohler-Hausmann, Feeley also drew on the insights of organizational sociology to challenge the "assembly-line" metaphor so often applied to lower criminal court. *Id.* at 12–13, 18–21; KOHLER-HAUSMANN, *supra* note 23, at 10, 65.

63. KOHLER-HAUSMANN, *supra* note 23, at 76 (quoting Packer, *supra* note 23, at 4–6).

64. *Id.* at 72–73.

65. *See id.* at 73 (describing how this profile is constructed based on "the type, number, and outcomes of [the defendant's] prior criminal justice encounters").

66. *Id.* at 79.

67. *Id.* at 80. "Marking" describes the way "conviction and punishment express social condemnation by designating that the offender's status has been degraded." *Id.* at 144. Marks include the permanent marks of criminal convictions and temporary marks, such as an adjournment in contemplation of dismissal ("ACD"), which signifies that a defendant's case is adjourned for six months and will be dismissed at the end of that period as long as they are not rearrested in the interim. *Id.* at 80, 144. During the adjournment period for the ACD, the

court case.[68] Defendants who can "perform"—ones able to withstand the degradation of arrest and custody, and the stress of multiple court appearances and lost work or family time without missing court, being late, or getting upset—are more likely to be judged as "governable" and receive better offers.[69] Similarly, defendants who are able to "perform" by accomplishing the various demands court actors make of them, including completing required programs and abiding by orders of protection, are also more likely to receive better offers.[70] Under the managerial model, the goal of imposing "procedural hassle" and requiring "performance" through programs and other demands is to separate the "governable" from the "ungovernable" and apply penal sanctions accordingly.[71]

Although Kohler-Hausmann specifically studied misdemeanors, the penal techniques of marking, procedural hassle, and performance are relevant to felonies as well. For example, the majority of felony cases in New York consist of nonviolent or low-level violent felonies.[72] Ninety-four percent of felony cases in New York are resolved by guilty pleas.[73] Court actors face the same high caseloads and pressure to resolve cases quickly with the vast majority of felony cases as they do with misdemeanors.[74] Alexandra Natapoff has aptly described the criminal legal system as a penal pyramid, in which procedural rules and the strength of the evidence determine outcomes at the top, while at the bottom, high caseloads and scarce resources lead to "outcomes . . . driven by institutional practices and inegalitarian social relations."[75] In my experience as a public defender, the techniques of performance, procedural hassle, and marking are relevant in the majority of felony cases as well. Prosecutors and judges face high caseloads in felony court, as they do in misdemeanor court. And they utilize required court programs and repeated court appearances to determine which defendants merit which dispositions in

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charges against the defendant will appear on a background check, thus limiting job opportunities and triggering immigration collateral consequences. *Id.* at 150–51. Thus, even though an ACD may ultimately terminate in a dismissal and sealing, it has still operated as a temporary mark. *Id.* Prosecutors and judges also utilize these marks as a source of information about defendants' governability. For instance, defendants with lengthy criminal records are deemed less governable, as are defendants who are re-arrested within six months of receiving an ACD. *Id.* at 80, 144–46.

68. *Id.* at 80.

69. *Id.*

70. *Id.* at 228–30, 233–35.

71. *Id.* at 79–82.

72. In 2021, sixty-seven percent of felony arrests in the state of New York were for felonies categorized as non-violent. *Adult Arrests 18 and Older: 2013–2022*, DIV. OF CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/index.htm (last visited Feb. 24, 2024). Although data was not available for the thirty-three percent of felonies categorized as violent, presumably, a significant portion of those felonies were level D or E felonies (felonies are graded from levels A to E in New York). *See id.*

73. N.Y. STATE ASS'N OF CRIM. DEF. LAWS., THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK 3 (2021).

74. Kohler-Hausmann argues that it is because the formal adversarial model is impossible to scale for high caseloads that the managerial model came into being. KOHLER-HAUSMANN, *supra* note 23, at 75. The same logic applies to courts with high caseloads of low-level felonies.

75. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317 (2012).

felony court, just as in misdemeanor court. To use Natapoff's words, the majority of felony cases are much closer to the bottom of the penal pyramid than the top.[76]

Without using the same vocabulary as Kohler-Hausmann, other scholars have observed penal techniques at work in drug courts, which include both misdemeanor and felony cases. Scholars have scrutinized how judges and prosecutors arguably employ the penal technique of performance when they require defendants to complete drug treatment programs or face steep sentences. Jessica Eaglin has described how treatment court is increasingly utilized as a way to manage defendants through treatment for the "benefit of society"—meaning defendants must prove they are governable and deserving of release through success in treatment and face steeper sentences upon failure than they might otherwise have received.[77] Eric Miller has also noted drug courts' "embrace" of a "responsibilization strategy," that "plac[es] the onus on individuals" to change their conduct, which, in turn, enables courts to separate "law-abiders from law-breakers,"[78] with the court imposing severe sanctions on those who cannot follow the rules of drug court.[79]

2. The Managerial Model Perpetuates Race and Class Disparities

One way to view the managerial project is as a representation of the "police-ification" of the courts. The presumption of social control that Kohler-Hausmann describes as a key feature of the managerial model also "animates ['broken windows' policing itself] . . . which, in turn, define[s] the practical conditions facing court actors."[80] "Broken windows" policing is about determining "who [is] engaged in more serious offending and who [can] be dissuaded from . . . 'disorder.'"[81] In that sense, by sorting and testing defendants by their governability, the courts are ultimately mirroring the work of "broken windows" policing but in a way that compounds its effects. "Broken windows" policing targets low-income neighborhoods in cities—neighborhoods that are disproportionately made up of Black and Latinx people.[82] As a result, the people summoned into court to prove

76. *Id.* at 1318.

77. *Against Neorehabilitation*, *supra* note 54, at 201, 218–19.

78. Miller, *supra* note 54, at 425, 437–38.

79. *See id.* at 436 (citing Victoria Malkin, *The End of Welfare As We Know It: What Happens When the Judge Is in Charge*, 25 CRITIQUE ANTHROPOLOGY 361, 375 (2005) (describing the severe punishments that await those who fail drug court)); *Against Neorehabilitation*, *supra* note 54, at 219 ("In the context of drug courts, ample evidence demonstrates that criminal offenders who have participated in drug courts and failed, for whatever reason, receive much harsher punishments.").

80. KOHLER-HAUSMANN, *supra* note 23, at 78–79.

81. *Id.* at 79.

82. *See, e.g.*, K. Babe Howell, *The Costs of "Broken Windows" Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1068 & n.59 (2016) (citing Floyd v. City of New York, 813 F. Supp. 2d 417, 436 (S.D.N.Y. 2011) (describing how "broken windows" policing targets neighborhoods of color deemed to be high-crime, despite statistics suggesting otherwise)). *See generally* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786 (2020) (describing how legal scholars increasingly "recognize[] that police violence is routine, is legal, takes many shapes, and targets people based on their race and class [and] even that police violence reflects and reproduces our political, economic, and social order").

their governability are disproportionately those with low income and Black and/or Latinx individuals.[83] And rather than serving as a check on potentially abusive or discriminatory policing tactics, judges and prosecutors complete the sorting process with those same policing tactics that began it, spitting out defendants with records that reflect their assessed level of governability.[84] Those same defendants are then policed again, and the cycle continues.[85]

C. The Overlooked Role of Court Administrative Rules and Policies

Scholars who have applied the framework of the new penology to criminal courts have tended to train their focus on how members of the traditional "courtroom workgroup"—the prosecutor, defense attorney, and trial judge—exercise their discretion. For instance, as discussed in the preceding section, Kohler-Hausmann analyzes how prosecutors rely on the penal techniques of marking, procedural hassle, and performance to determine what type of plea to offer a defendant.[86]

In this universe, criminal procedure and penal law have a role to play, of course. But "[t]he rules of criminal law and procedure are not a manual that tells legal actors specifically what to do," but rather a set of rules that establish "a menu of authorized actions" from which court actors may select to achieve their goals.[87] However, what is missing from this portrait is an understanding of the court system as a more complex ecosystem with its own rules and policies that, unlike criminal procedure law, do act as a manual and guide for judges, advising judges on what they can do in particular situations. As Elizabeth Nevins-Saunders has argued, courthouses are analogous to administrative agencies in that, "[j]ust like in an agency, there are a host of policies and rules that get made, or not, at the administrative level in the courthouse."[88] These include written rules on determining eligibility for appointment of counsel and on when defendants' appearances may be

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83. *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 15 (2020) (describing racial and class disparities in the criminal legal system); KOHLER-HAUSMANN, *supra* note 23, at 79.

84. KOHLER-HAUSMANN, *supra* note 23, at 72, 79.

85. Similarly, Alexandra Natapoff has observed that "each stage of the misdemeanor process—from stop-and-frisk to arrest to prosecution—operates to single out and criminalize based on group membership," thus making misdemeanors "one of the concrete mechanisms through which the US criminal legal system engages in the group criminalization of disadvantaged populations." Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 263 (2015). Risk management as a goal has always disadvantaged Black and Latinx people. *See* Mayson, *supra* note 57, at 2282 ("Scholars have long argued that a criminal justice system designed to incapacitate the risky will perpetuate racial injustice.").

86. KOHLER-HAUSMANN, *supra* note 23, at 81.

87. *See id.* at 102–03 ("Power-conferring rules enact a menu of legal options from which actors can choose as they do their work, such as authorizing a range of sentences by conviction type . . . .").

88. *See* Nevins-Saunders, *supra* note 22, at 368. As Nevins-Saunders notes, legal scholarship has largely overlooked what occurs *inside* courts through an administrative lens, instead focusing on how courts have delegated their power to entities outside of court. *See id.* at 368 nn.222–23 (noting that an exception is Owen Fiss' work on the federal judiciary as a bureaucracy).

waived and unwritten rules, including those that require defendants in a certain courtroom to "check in" with the prosecutor before having their case heard.[89] Sometimes these rules and policies infringe on criminal defendants' due process rights, such as where defendants end up negotiating directly with the prosecutor because court officials failed to assign them lawyers or advise them of their right to counsel.[90]

Of course, the administrative rules and policies that govern a courthouse also come from outside the courthouse—from actors who are part of the larger administrative bureaucracy of the state court system. These include rules and policies that not only direct how resources should be utilized but also guide or instruct judges on how to apply the law.[91] Ultimately, these rules act as a manual or guide as to how judges should interpret the "power-conferring rules" of criminal procedure and penal law. They thus both constrain judicial decision-making in ways legal scholarship has previously not accounted for, and, in doing so, also shape the development of precedent.

With the exception of Nevins-Saunders' examination of how administrative rules contribute to the "judicial drift" away from due process norms, legal scholarship has largely overlooked these court administrative rules. Nor have these rules been scrutinized through the lens of the managerial model of justice or the new penology. This means that many questions about how administrative rules and policies constrain and shape the decision-making of court actors—especially judges—remain unanswered. For instance, to what extent do court administrative rules and actions reinforce the "presumption of the need for social control"?[92] How do they shape judges' use of penal techniques? And how does the relationship between court administrative actions and judicial decision-making challenge some of the managerial literature's assumptions about how the traditional courtroom workgroup operates?

Court administrative rules and policies are often hidden away from the public and may not be challenged by defense counsel, even when they affect defendants' rights—and on a much larger scale than the practices of an individual judge. Thus, it is all the more important to examine what lessons they hold for how we understand how criminal courts—and criminal law—work on the ground.

I argue that court administrative rules and policies also put forward a vision of "what criminal law is good for"[93]—a vision that aligns and with and reinforces the overall shift in criminal courts away from adjudication and towards social control.

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89. *See id.* at 332–33, 371, 386.
90. *See id.* at 332–33.
91. *See infra* Section II.C.
92. KOHLER-HAUSMANN, *supra* note 23, at 77.
93. *Id.* at 76 (quoting Packer, *supra* note 23, at 4–6).

II. INTRODUCING THE COURTEAUCRACY

A. The Courteaucracy: A Definition

While this Article utilizes New York as a case study, every court system in the United States has some type of administrative component, ranging from a single presiding judge and a few administrative staff to a complex statewide hierarchy of administrative judges, supervising judges, court attorneys, clerks, and other nonjudicial staff.[94] "Courteaucracies," are ultimately responsible for supervising the day-to-day operations of courts and ensuring that the way criminal courts operate in practice comports with due process. The courteaucracy that oversees a given courthouse typically includes both actors within the courthouse and actors outside of it who are part of the larger administrative hierarchy of the state judiciary. The next Part will introduce the courteaucracy in New York, beginning with its hierarchical structure and the scope of its legal authority, then proceeding to a typology of the various administrative actions it may implement.

B. The Courteaucracy in New York

1. Hierarchical Structure

In New York, the chief court administrator is a judge—the chief administrative judge of the Unified Court System —who is appointed by the chief judge[95] of the Court of Appeals, New York's highest court.[96] The chief administrative judge is part of a hierarchical administrative structure that includes both the Office of Court Administration ("OCA"), the centralized administrative arm[97] of the New York

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94. For example, in California, the Judicial Council is responsible for administering the "policymaking body" of the state court system and is directed by the California Constitution to "provide policy guidelines to the courts, make recommendations annually to the Governor and Legislature, and adopt and revise California Rules of Court in the areas of court administration, practice, and procedure." JUD. COUNCIL CAL., FACT SHEET: CALIFORNIA JUDICIAL BRANCH 14 (2022), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf. And in Texas, the Office of Court Administration is a "unique state agency" in the judicial branch that supports the efficient administration of justice under the supervision and direction of the Supreme Court of Texas and its Chief Justice. *Office of Court Administration*, TEX. JUD. BRANCH, https://www.txcourts.gov/oca/ (last visited Feb. 25, 2024). Texas also has a Judicial Council which studies the court system and makes policy recommendations to the Texas Supreme Court, as well as the legislative and executive branches. *Texas Judicial Council*, TEX. JUD. BRANCH, https://www.txcourts.gov/tjc/ (last visited Feb. 25, 2024). In Michigan, the State Court Administrative Office, an administrative agency of the Michigan Supreme Court, provides administrative oversight over the state court system. *SCAO About Us*, MICH. CTS., https://www.courts.michigan.gov/administration/offices/scao-main/scao-about-us/ (last visited Feb. 25, 2024).

95. The chief judge is appointed by the governor of New York with the advice and consent of the state Senate. N.Y. CONST. art. VI, § 2.

96. *Id.* § 28(a). The appointment of the chief administrative judge is subject to the "advice and consent" of a separate administrative board. *Id.*

97. *Office of Court Administration*, NYCOURTS.GOV, https://ww2.nycourts.gov/Admin/oca.shtml (last visited Feb. 28, 2024).

State court system,[98] and a hierarchy of judicial and nonjudicial administrators who are together responsible for the administration of justice across New York's vast and complex court system. The chief administrative judge is also advised by the Counsel's Office, which provides legal assistance on administrative matters affecting the court system.[99]

The top level of the administrative structure, just under the chief administrative judge, consists of four deputy chief administrative judges ("DCAJs"): a DCAJ for courts outside New York City, a DCAJ for courts inside New York City, a DCAJ for Justice Initiatives, and a DCAJ for Management Support.[100]

Below the level of the DCAJs, administrative judges[101] supervise each judicial district (comprised of several counties) and each major court in New York City.[102] Administrative judges "are responsible for on-site management of the trial courts."[103] Finally, supervising judges assigned to each trial court are responsible for assisting administrative judges in the "on-site management of the trial courts, including court caseloads and personnel and budget administration."[104]

The courteaucracy also includes local non-judicial administrators—district executives (outside of New York City) and chief clerks (inside New York City)—who "assist the local Administrative Judges in carrying out their responsibilities for supervising the day-to-day operations of the State's trial courts."[105] For

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98. New York Judiciary Law specifically grants the Chief Administrator the power to "[e]stablish an administrative office for the courts." N.Y. COMP. CODES R. & REGS. tit. 22, § 80.1(b)(8) (2024); *see also* N.Y. CONST. art. VI., § 28(b) (noting the Chief Administrator "shall supervise the administration and operation of the unified court system"); Luis Ferré-Sadurní, *Can New York Overhaul its Complex Antiquated Court System?*, N.Y. TIMES (Feb. 16, 2022), https://www.nytimes.com/2022/02/16/nyregion/new-york-court-system.html (describing Chief Judge Janet DiFiore's proposal to overhaul the court system and how it has been criticized as consolidating too much power in the Office of Court Administration and subverting the will of voters by moving elected judges to different courts than the courts they were elected to serve).

99. *OCA Support Units*, NYCOURTS.GOV, http://ww2.nycourts.gov/Admin/supportunits.shtml#su7 (last visited Feb. 28, 2024). The Counsel's Office is the law department of the Office of Court Administration. *Id.* Among its many responsibilities are preparing the court system's legislative program, providing comments to the legislature and the governor on proposed legislation, and assigning staff attorneys to the various committees that propose legislation and rules affecting practice and procedure in the courts. *Id.*

100. N.Y. JUD. LAW § 212(1)(d) (McKinney 2023); *Court Leadership: Executive Officers*, NYCOURTS.GOV, https://ww2.nycourts.gov/Admin/directory.shtml#exec (last visited Feb. 29, 2024).

101. New York Judiciary Law grants the Chief Administrator the power to "delegate to any deputy, administrative judge, assistant or court any administrative power or function delegated to the Chief Administrator [by the Chief Judge]." N.Y. COMP. CODES R. & REGS. tit. 22, § 80.1(b)(4) (2024); *see also id.* § 80.2(a)(1–2) (establishing where the chief administrator for the courts shall designate administrative judges).

102. *Court Leadership: Executive Officers*, NYCOURTS.GOV, https://ww2.nycourts.gov/Admin/directory.shtml#exec (last visited Mar. 1, 2024).

103. *Id.*

104. *Id.* Moreover, these rules are also determined in a coordinated way with the larger courteaucracy. For example, on November 29, 2021, Kings County Supervising Judge Keisha Espinal implemented a rule that requires prosecutors and defense attorneys to confer over discovery. *Infra* Section II.C.4 This rule was explicitly introduced as an "OCA pilot initiative"—indicating that it was being developed in one courthouse, under one supervising judge, with the intention of being expanded across the larger system. *Id.*

105. *Local Administrators*, NYCOURTS.GOV, https://ww2.nycourts.gov/Admin/local-admin.shtml (last visited Mar. 1, 2024).

example, the chief clerk of the New York City Criminal Court is responsible for "[b]udget preparation and control," "[p]ersonnel assignments," "[o]perational directives," "[c]oordination of training," and for serving as a liaison to the administrative judge, supervising judges, borough chief clerks, and the Office of Court Administration.[106]

2. Legal Authority

The chief administrative judge's powers and responsibilities are either specifically delegated by the chief judge or specified by New York's legislature.[107] Among those powers is the authority to make recommendations to the legislature and the governor for laws and programs "to improve the administration of justice and the operation of the unified court system."[108] The chief administrative judge is additionally responsible for "consider[ing] proposed amendments to the civil practice law and rules and the criminal procedure law," recommending changes to those laws and rules,[109] and creating a panel to issue advisory opinions to judges on the exercise of judicial authority.[110]

More relevant for the purposes of this Article, the chief administrative judge is also given statutory authority to "adopt, amend, and rescind all rules and orders necessary to execute the functions of [their] office"[111] and to "[a]dopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts, in accordance with . . . the constitution."[112]

The New York Administrative Code also specifically grants the chief administrative judge "any additional powers [to] perform any additional duties assigned by the Chief Judge,"[113] and the authority to "adopt administrative rules for the efficient and orderly transaction of business in the trial courts, including but not limited to calendar practice . . . ."[114] This grant of power is broad and only vaguely constrained by the requirement that the rules relate to "efficiency." As will be

106. *See, e.g.*, LISA LINDSAY, CRIM. CT. OF THE CITY OF N.Y., 2017 ANNUAL REPORT 55 (Justin Barry ed., 2018), https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf.

107. N.Y. CONST. art. VI, § 28(b).

108. *See* N.Y. JUD. LAW § 212(1)(f) (McKinney 2023). The chief administrative judge may also prepare judicial impact statements on proposed legislation that may affect the court system. *Id.*; *see also* Philip Shenon, *Administrator of Courts Named for State System*, N.Y. TIMES (Aug. 6, 1983), https://www.nytimes.com/1983/08/06/nyregion/administrator-of-courts-named-for-state-system.html.

109. JUD. § 212(1)(g).

110. *Id.* § 212(2)(*l*). These opinions concern "issues related to ethical conduct or proper execution of judicial duties or possible conflicts between private interests and official duties." *Id.*

111. *Id.* § 212(1)(i).

112. *Id.* § 212(2)(d).

113. N.Y. COMP. CODES R. & REGS. tit. 22, § 80.1(b)(17); *see also* tit. 22, § 80.1(a) ("[T]he Chief Administrator shall supervise on behalf of the Chief Judge the administration and operation of the unified court system.").

114. Tit. 22, § 80.1(b)(6). Similarly, per the Chief Judge's delegation, Deputy Chief Administrators may "issue directives and orders necessary to implement" their powers and duties. *Id.* § 81.1(b)(6).

discussed in Part III, actions that promote the conservation of resources can also be motivated by and serve substantive policy goals, such as the goal of preserving judicial discretion to detain "dangerous" defendants.

3. Administrative Actions: A Typology

This section will lay out a typology of administrative actions that may be implemented by various entities in New York's "courteaucracy," including (i) administrative rules; (ii) initiatives, projects, and case management; (iii) operational directives and confidential memoranda; and (iv) unwritten rules.

a. Administrative Rules

Administrative rules are the rare courteaucracy actions that are subject to notice and comment, but they are only the tip of the iceberg of administrative actions. The chief administrative judge has authority to "adopt administrative rules for the efficient and orderly transaction of business in the trial courts."[115] The Rules of the Chief Administrative Judge address a variety of topics, ranging from how court-system employees may bank sick days[116] to when and how a case may be transferred from a local criminal court courtroom to a mental-health court.[117] The rules also address the retention and disposition of court records,[118] electronic court appearances,[119] and mandatory caseload-activity reporting.[120]

As part of that process of amending or promulgating an administrative rule, the Office of Court Administration facilitates requests for public comments on proposed rules.[121] For instance, Rule 200.16/200.27, which requires trial-court judges to issue directives to prosecutors regarding their disclosure obligations under *Brady v. Maryland*,[122] used public notice and comment in the formulation of the rule.[123] The rule, along with a model directive, was first proposed by the New York State Justice Task Force, a permanent task force convened for the purpose of addressing wrongful convictions.[124] Following a public comment period, and with

115. N.Y. CONST. art. VI, § 28(b); tit. 22, § 80.1(b)(6).

116. Tit. 22, § 135.

117. *Id.* § 152.

118. *Id.* § 104.2.

119. *Id.* § 106.2.

120. *Id.* § 115.2; *see infra* Section II.B.3.ii (discussing the effect of the collection of case management data).

121. *Requests for Public Comment*, NYCOURTS.GOV, http://ww2.nycourts.gov/rules/comments/index.shtml (last visited Mar. 2, 2024).

122. Tit. 22, § 200.16/200.27.6.

123. Memorandum from John McConnel, Off. of Ct. Admin., Request for Public Comment on Proposed Model Orders Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters (Apr. 6, 2017), https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/ModelOrders-DisclosureObligations CriminalMatters.pdf. The directive also confirms the defense counsel's professional obligations to the defendant. *Id.*

124. *See* Press Release, N.Y. State Unified Ct. Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (on file with author) [hereinafter Chief

the approval and consent of Chief Judge DiFiore and the Administrative Board of the Courts, Chief Administrative Judge Marks issued an administrative order amending the Administrative Rules of the Courts.[125]

b. Initiatives, Projects, and Case Management

In addition to administrative rules and orders, the chief judge or chief administrative judge will also periodically coordinate with other administrative and supervising judges on initiatives and reform measures that target particular areas of the court system. Although, unlike the administrative rules, these initiatives and measures are not subject to public notice and comment, they have a powerful effect in shaping the court system's priorities. Through administrative initiatives, and particularly through case management, the courteaucracy exerts normative power over criminal-court practice in a way that ultimately influences the development of substantive law.

Some administrative initiatives are trumpeted in the press. In 2015, Chief Judge of the Court of Appeals Jonathan Lippman announced a package of bail-reform measures, including a pilot electronic-monitoring program and a pathway for automatic judicial review of bail in misdemeanor cases.[126] But court administrators also shape criminal-court practice through smaller initiatives and projects that are announced with less fanfare. Some of these projects involve utilizing the administrative power to set rules regarding calendar practice. For example, in 2021, Chief Judge DiFiore and Chief Administrative Judge Marks tasked the administrative judge for the Queens County Supreme Court for Criminal Matters with developing the Unindicted Felony Project ("UFP") for New York City criminal courts.[127] The

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Judge DiFiore Press Release]; *Mission Statement*, N.Y. STATE JUST. TASK FORCE, http://www.nyjusticetaskforce.com/mission.html (last visited Mar. 2, 2024).

125. Chief Judge DiFiore Press Release, *supra* note 124. Administrative orders are also utilized to accomplish certain tasks required by statute—for example, the New York legislature delegated responsibility to the chief administrative judge to determine when to resume eviction proceedings following a sixty-day hiatus during the COVID-19 pandemic. *See* COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, S.B. S9114A, 2019-2020 Leg., Reg. Sess. (N.Y. 2020). Indeed, administrative orders proliferated during the beginnings of the first precipitous wave of the COVID-19 pandemic in New York, culminating in Administrative Order 3/2020, which closed the court system to all non-essential appearances. ADMIN. ORD. 3/2020, CHIEF JUDGE OF THE STATE OF N.Y. (Mar. 7, 2020), https://www.nycourts.gov/whatsnew/pdf/AO-3-20.pdf. Subsequent administrative orders sought to shape how the court system would function as it addressed essential matters only. For instance, Administrative Order 85/20 prohibited the filing of any motions in non-essential matters and instructed judges to conference non-essential matters remotely and to "maintain availability during normal court hours to resolve ad hoc discovery disputes and similar matters not requiring the filing of papers." ADMIN. ORD. 85/20, CHIEF ADMIN. JUDGE OF THE CTS. (Apr. 8, 2020), https://www.nycourts.gov/whatsnew/pdf/AO-85-20.pdf.

126. Press Release, N.Y. State Unified Ct. Sys., Chief Judge Jonathan Lippman Announces Series of Reforms to Address Injustices of N.Y.'s Current Bail System (Oct. 1, 2015) (on file with author). These reforms also included periodic judicial review of case viability and bail for felony cases and the promotion of the use of alternative forms of bail, such as partially secured surety bonds. *Id.*

127. Queens County Criminal Court's Unindicted Felony Project Protocols (Jan. 5, 2021) (on file with author).

UFP prioritized appearances for unindicted felonies to address a backlog of such cases caused by the pandemic.[128]

Other times, court administrators may achieve their goals simply through communicating case-management goals. This includes directly communicating goals such as when court administrators tell judges to automatically issue arrest warrants for anyone who does not show up to court for their arraignment on a "desk appearance ticket,"[129] as a means of addressing a backlog of these tickets.

However, one of the most powerful ways the courteaucracy exercises power is through the measurement of performance. Court administrators collect and publish data about docket flow, particularized to each courtroom and each judge.[130] The tracking and publication of such information communicates its importance to judges, sending the message that efficiency is prized.[131] Judges have reported that the collection and publication of case management data "create[s] . . . gentle pressure not to be the low boy."[132] Indeed, there can be consequences to being the "low boy": the courteaucracy has unlimited power to reassign judges to less desirable courtrooms[133] and failure to measure up could put a judge's reappointment in jeopardy altogether.[134]

Significantly, prior to the 1990s, court administrators were simply unable to collect such information about court performance.[135] But, as Nancy J. King and Ronald F. Wright have noted, the combination of the financial pressures of the Great Recession of 2008 and increased technological capacity has led courts to shift, over the past several decades, towards a "data-driven regulatory regime for the administration of criminal cases."[136] Only in the last decade did court administrators gain the ability to assess how long it takes a criminal case to move through

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128. *Id.*

129. Instead of a custodial arrest, police in New York can arrest a person and issue a summons that requires them to come back to court at another date to be arraigned. N.Y. CRIM. PROC. LAW § 120.20. The policy change (which I witnessed as a public defender) that required arrest warrants for anyone who failed to show up to their first court date was issued in response to a backlog of desk appearance ticket cases that had accumulated during the COVID-19 pandemic. The Legal Aid Society, an indigent defense organization, objected to the instruction, arguing that a blanket policy prohibited judges from scrutinizing the complaints for reasonable cause before issuing a warrant, as permitted by Criminal Procedure Law, *id.* § 120.20(1)(b), and that a warrant could not be issued "if the court is satisfied that the defendant will respond" to a summons instead. *Id.* § 120.20(3).

130. *See* King & Wright, *supra* note 17, at 359–60 (describing how case tracking measures permit the "comparison of the relative speed of each court within a state, and, when judge-specific information is available, of each particular judge").

131. *See id.* at 361–62.

132. *Id.* Interviewees in King and Wright's study also reported that the presiding judges in their courthouses used the data internally "to encourage speedy disposition and manage judicial assignments." *Id.* Similarly, interviewees reported that they experienced encouragement directly from court administrators and the State Supreme Court to secure pleas earlier in order to reduce time-to-disposition numbers. *Id.*

133. RULES OF THE CHIEF JUDGE § 1.1(a), https://ww2.nycourts.gov/rules/chiefjudge/01.shtml#01.

134. *See, e.g.*, NATAPOFF, *supra* note 18, at 85 (describing how in Chicago felony court, the disposition totals of judges up for retention are published).

135. King & Wright, *supra* note 17, at 359.

136. *Id.* at 327, 361.

the system,[137] which essentially permits court administrators to "track how badly they are wasting resources."[138] This has led to "more aggressive" criminal case management.[139] As the saying goes, "what gets measured gets managed." The National Center for State Courts ("NCSC") and thirty-nine states, as well as the District of Columbia, have adopted some form of model time-to-disposition standards.[140] Many state courts now have programs designed to achieve faster disposition of cases, including early-disposition programs.[141]

The pressure judges feel to resolve cases rapidly is passed on to defendants as judges pressure defendants to plead guilty, either explicitly[142] or indirectly (and perhaps even unconsciously) by mistreating defendants whom they perceive to be wasting their time.[143] Thus, by shaping a perception for judges that "time is a currency,"[144] court administrators directly impact defendants' procedural due process rights. The emphasis on efficiency ultimately undermines litigants' sense of procedural justice, as they come to find that the courthouse is a place where they are "processed" rather than heard.

c. Operational Directives and Confidential Memoranda

Administrative actions are not only the province of judges. Nonjudicial administrators also have the power to issue directives that not only affect the administration of the courts but also have an impact on substantive law.

For instance, nonjudicial actors issue operational directives,[145] which are issued by the chief clerk of the Criminal Court of the City of New York,[146] and confidential

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137. *Id.* at 359.

138. *Id.* at 359 n.203.

139. *Id.* at 356.

140. *Id.* at 360. NCSC and the Conference of State Court Administrators ("CSCA") "offer training, tools, and resources to help state trial courts speed up criminal-case disposition." *Id.* at 357. NCSC has also launched an "Effective Criminal Case Management Project" that will "collect the most broadly based case-level data ever assembled on case processing of felony and misdemeanor cases" and will select courts that have achieved their time-to-disposition goals to "document the specific best practices that underlie their success." *Id.* at 360.

141. *Id.*

142. *See, e.g.*, F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 210 (2002) (describing how judges feel pressure to extract pleas to manage high caseloads and how judges will "often threaten to punish defendants more harshly if a case goes to trial" or force an attorney that resists pleas to "wait the next time he needs something form the clerk or judge"); Joy & Uphoff, *supra* note 43, at 101.

143. *See* Nevins-Saunders, *supra* note 22, at 359–60, 387 (describing how defendants' confusion is ignored by judges and how their time is disrespected as they are forced to come to court again and again for "unproductive" court appearances).

144. *See* GONZALEZ VAN CLEVE, *supra* note 20, at 31.

145. *See, e.g.*, LISA LINDSAY, CRIM. CT. OF THE CITY OF N.Y., 2017 ANNUAL REPORT 55 (Justin Barry ed., 2018), https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf.

146. *See id.* No comprehensive online archive of operational directives was identified for criminal courts in New York City. In contrast, there is an online database for similar "memorandums" issued by the chief clerk for

memoranda, which are issued by OCA's Counsel's Office.[147] Operational directives are not released publicly but are shared with stakeholders, such as the prosecutor's office and indigent-defense organizations.[148] Confidential memoranda are not released publicly or to internal stakeholders but have on occasion been leaked to the press.[149]

Operational directives implement policies and procedures that improve the efficiency of criminal courts. For instance, operational directives have been used to eliminate a monetary cap on how much bail could be paid via credit card,[150] correct an issue relating to the computation of time in custody,[151] establish procedures for electronic monitoring,[152] and create a more efficient procedure for resolving cross-county warrants.[153]

Confidential memoranda are issued by the Counsel's Office to judges to provide "context on cases that have potential significant operational impacts on the courts."[154] Ultimately, these memoranda provide direct guidance on how judges

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New York City Civil Court. *See Directives & Advisory Notices*, NYCOURTS.GOV, https://www.nycourts.gov/courts/nyc/civil/directives.shtml (last visited Mar. 3, 2024).

147. *OCA Support Units*, NYCOURTS.GOV, http://ww2.nycourts.gov/Admin/supportunits.shtml#su7 (last visited Feb. 16, 2024). The Counsel's Office represents judges and nonjudicial employees in court proceedings where the issues raised affect the administration of the courts, appears on behalf of the court system in proceedings before state and federal administrative agencies, and drafts charges and prosecutes all disciplinary proceedings brought against nonjudicial employees. *Id.* It also prepares the court system's legislative program, provides comments to the legislature and the governor on proposed legislation affecting the courts, provides staff counsel to each of the advisory committees that propose to the chief administrator legislation and rules affecting practice and procedure in the courts, and is responsible for drafting the administrative and procedural rules affecting the court system. *Id.* And it also handles Freedom of Information Law ("FOIL") requests for the administrative records of the court system. *Id.*

148. Brief for Appellant at 5–8, N.Y. C.L. Union v. N.Y. State Off. of Ct. Admin., No. 2022-05629, 2023 WL 9659110 (N.Y.A.D. 2023) (describing how confidential memoranda and directives are not distributed to the public). As a staff attorney at the Legal Aid Society, I periodically received copies of directives that were distributed internally within the Legal Aid Society by court administrative officials.

149. *See* Transcript of Record at 3–5, *Crawford* Hearing (on file with author) (quoting a judge as describing the *Crawford* Memorandum as confidential); Mellins, *supra* note 12.

150. Operational Directive 2018-03 from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y., Credit Card Bail — Elimination of Administrative Limit and Implementation of Administrative Fee (July 30, 2018) (on file with author).

151. Operational Directive 2019-02 from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y., $1 Bail — Bail Type Set as Cash and Credit Card (Mar. 18, 2018) (on file with author). This was intended to address the problem of defendants being unintentionally held in custody on what is known as "$1 bail," a nominal amount set only for the purpose of jail time credit, when the defendant is also incarcerated on another case. *Id.* The Directive attempts to solve the issue of defendants being held by "$1 bail" once their other case has resolved. *Id.*

152. Operational Directive 2020-06 from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y., Revised Electronic Monitoring (Aug. 3, 2020) (on file with author). Operational Directive 2020-06 sets in place procedures for all involved parties (including the judge at the defendant's arraignment, the sheriff, the defendant's defense attorney, and the prosecutor) to follow a determination by a judge that a defendant may be a suitable candidate for electronic monitoring. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 500.10(3-a)(j) (McKinney 2023) (defining when a defendant is eligible for electronic monitoring).

153. Operational Directive 2017-01 from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y., Cross Country Warrants (July 17, 2017) (on file with author).

154. Mellins, *supra* note 12 (quoting Lucian Chalfen, spokesperson for the Office of Court Administration).

should interpret substantive law.[155] One example is a memorandum regarding an appellate decision, *Crawford v. Ally*, which will be discussed in greater detail in the next section.

d. Unwritten Rules

While the foregoing sections have detailed a variety of written rules, orders, and directives that govern how courts operate, it is important to recognize the many informal and unwritten rules and policies that govern courts as well. Many of these unwritten rules and policies are enforced by the "street-level bureaucracy"[156] of the courthouse—court officers, court clerks, and clerical staff. These rules vary not only from courthouse to courthouse, but from courtroom to courtroom, although certain practices are nevertheless common across the country.[157]

Examples of these unwritten rules and policies include the common practice of court officers calling the cases of private attorneys before the cases of public defenders or the policy many judges and court officers have of "bumping" the case of any person who is not present the first time their case is called to the back of the line, causing them to wait for hours longer.[158] Another example is the practice of court staff, including judges and court officers, rushing defense attorneys and their clients so that a defense attorney may have only a few minutes to review the file of someone they are assigned to represent or may be asked to simultaneously review a file while representing the person.[159] Another unwritten rule is that the defendants remain silent and only communicate with judges through their attorneys.[160] Many

155. A similar practice occurs in California, where a retired judge has written numerous advisory memoranda that are distributed to judges through the Judicial Council. *See, e.g.*, ALICIA VIRANI, STEPHANIE CAMPOS-BUI, RACHEL WALLACE, CASSIDY BENNETT & AKRUTI CHANDRAYYA, COMING UP SHORT: THE UNREALIZED PROMISE OF *IN RE* HUMPHREY 20–23 (2022), https://www.law.berkeley.edu/wp-content/uploads/2022/10/Coming-Up-Short-Report-2022-WEB.pdf (describing an example of a memorandum written by Judge Richard Couzens distributed through the Judicial Council). On at least one occasion, advocates have raised concerns as to whether these memoranda properly advised judges on the law. *See id.* (describing how the memorandum in question improperly appeared to advise judges that they could set bail whenever the risk to the public was higher than "some risk").

156. LIPSKY, *supra* note 16.

157. One common practice is the practice of court officers calling the cases of private attorneys before the cases of public defenders. *See* GONZALEZ VAN CLEVE, *supra* note 20, at 30.

158. *Id.* at 30–31. This also disciplines the audience into understanding that they will be punished even for going to the bathroom or grabbing a bite to eat.

159. For instance, in some courtrooms in New York, the Legal Aid Society agrees to assign attorneys to represent defendants who are returning on warrants. In this case, the assigned attorney is in the position of having to advocate for a defendant—often in a situation where the defendant's immediate incarceration is one of the possible consequences—with no pre-existing relationship with the defendant. From an effective assistance of counsel perspective, it is crucial that these assigned attorneys have adequate time to speak to defendants. But based on my personal experience and observations, many defense attorneys assigned to this role are rushed by the court or given no time at all to speak to defendants before their cases are called. This is an example of how even adequately funded defense counsel's offices may be stymied from providing effective assistance of counsel because of judicial pressure.

160. *See* CLAIR, *supra* note 83, at 160 (describing how judges regularly penalized defendants for "speaking or making legal arguments at inappropriate times or in inappropriate ways"). *See generally* M. Eve Hanan,

of these unwritten rules focus on "processing" cases at maximum speed, which relates to the pressures judges and court staff are under to meet time-to-disposition standards set by court administrators.[161]

Defense attorneys who push back against these unwritten rules will often be punished, and the punishment can range from rudeness to rulings that harm clients.[162] Judges have stormed off the bench in the middle of proceedings or inflected their speech with sarcasm, none of which is captured in the court record.[163] In other cases, a judge may threaten to impose a harsher sentence after trial if a defendant refuses a plea the judge thinks the defense attorney should have advised the client to take,[164] or a prosecutor may retaliate with a motion to revoke bond if a defense attorney files a motion to suppress in a category of cases where it is atypical in that court culture to litigate suppression issues.[165]

Defense attorneys who develop a reputation for pushing back too often and being "overly zealous," may be punished repeatedly by a range of court actors. A clerk may "lose" their defendant's files, or court officers may refuse to call a defendant's case until the end of the day. Such attorneys may also be "taken less seriously" by judges.[166] Thus, not only are defense attorneys punished, but clients are also punished by being effectively held hostage for hours in a courtroom for what will typically be a one-to-two-minute court appearance, likely resulting in an adjournment. Even defendants whose lawyers are not being punished typically face long waits in criminal court. A former public defender wrote in 2018, "There is simply no regard for [defendants'] time."[167] Defendants "are not told to return in an hour, or that someone will call them when it's their turn, or to take a seat, have a

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Talking Back in Court, 96 WASH. L. REV. 493 (2021) (describing the lack of direct communication between a defendant and judge).

161. *See* King & Wright, *supra* note 17, at 360 ("If an individual judge is going to be accountable to time performance standards, the burden [to move the case] is on the court . . . . [T]he judge has the attitude toward the parties: you're not tanking my numbers.").

162. *See* Richardson, *supra* note 15, at 878–80, 890 (describing how court actors triage their own workloads by attempting to shape the way other court actors manage and use resources, so, for example, an individual judge may seek to disincentivize—through strong language or implicit threats—an individual defense attorney from using their resources to take a case to trial since that will negatively affect the judge's workload).

163. GONZALEZ VAN CLEVE, *supra* note 20, at 92. When I worked as a public defender in New York City, I witnessed and directly experienced judges being rude to defense attorneys who were zealously defending their clients.

164. GONZALEZ VAN CLEVE, *supra* note 20, at 84 (quoting a public defender as stating, "There was one judge I worked with who liked to plead out cases . . . . If you went to trial he would slam the guy if you lost. He did give fair warning about it; he was honest that this is what would happen.").

165. *See id.* at 84 (quoting a public defender as stating, "[T]he prosecution filed a motion to revoke my client's bond because they got mad when they found out that I had submitted a motion to suppress evidence . . . .").

166. CLAIR, *supra* note 83, at 150.

167. *The Waiting Game: NYPD Ripped 1-Year-Old from Mother, but Why Did the Benefits Office Expect Her to Wait for Hours, Standing up, with a Child*, THE APPEAL (Dec. 13, 2018), https://theappeal.org/the-waiting-game-nypd-ripped-1-year-old-from-mother-but-why-did-the-benefits-office-expect-her-to-wait-for-hours-standing-up-with-a-child/.

cup of water and read a book."[168] Rather they must wait for hours and "[t]hey must do so silently, and are not allowed to read a newspaper, let alone check their phone."[169]

These policies are central to the experience defendants and their loved ones have in criminal court, as they come to experience court as a place where they are disciplined into compliance with seemingly arbitrary and inhumane rules, even as they merely wait in the audience.[170] These unwritten administrative rules and policies also conflict with or are in tension with constitutional and ethical rules;[171] they run counter to the ideal of the courthouse as a place where all litigants are treated equally, and where the attorney-client relationship and the right to effective representation are respected.

The on-the-ground reality of criminal-court practice is the result of the intersection of formal administrative rules and unwritten rules and policies, such that any formal administrative rule that seeks to protect a defendant's due process rights may be watered down in practice.[172] It is imperative to view these written administrative rules in the context of these many unwritten rules that shape criminal-court practice.

C. "How Can They Do That?": Administrative Actions in Tension with Statutes, Court Decisions, and Constitutional Rights

What happens when administrative actions conflict with law? Administrative actions may conflict with statutes, court decisions, and the Constitution, resulting in cascading harms for criminal defendants. And yet, a lack of accountability for administrative actions is built into the courteaucracy. Thus, when these conflicts occur, defendants' avenues of recourse remain limited.

1. Operational Directive 2020-04: The Bail Directive

In 2019, New York State passed comprehensive bail reforms that sought to address the crisis of people spending months, and even years, in pretrial detention because they could not afford to pay bail.[173] Kalief Browder, a Bronx teenager

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168. *Id.*

169. *Id.*

170. *See* GONZALEZ VAN CLEVE, *supra* note 20, at 30. *See generally* Hanan, *supra* note 160, at 525–31 (describing how court actors such as judges and court officers exercise disciplinary power over defendants and the courtroom audience through "unwritten and variable" rules).

171. *See, e.g.*, GONZALEZ VAN CLEVE, *supra* note 20, at 75 (describing how defendants were denied indigency hearings to streamline case flow); Nevins-Saunders, *supra* note 22, at 368–71.

172. As Malcolm Feeley has observed, what happens in court is always an outcome of the intersection of law and the "mundane details of implementation." MALCOLM FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 141 (2013). Court actors can always "selectively invoke" rules to protect the status quo. *Id.* at 39–40.

173. *See, e.g.*, German Lopez, *Cash Bail Hurts the Poor. New York's Governor Wants to Greatly Limit It*, VOX (Jan. 3, 2018), https://www.vox.com/policy-and-politics/2018/1/3/16845122/bail-new-york-andrew-cuomo (describing the goal of bail reform as reigning in the use of cash bail in order to "end one of the criminal justice system's worst practices against the poor").

whose story became a symbol for the bail-reform movement, spent three years in pretrial detention for charges that were ultimately dismissed for lack of evidence because his family could not afford his $3,000 bail.[174] He later died by suicide after he was released.[175] The reform created an entire category of offenses that were no longer eligible for bail, including the majority of misdemeanor and nonviolent felonies.[176] These offenses were deemed "nonqualifying" offenses under the legislation.[177] However, the reforms made an exception for defendants who were rearrested on another nonqualifying offense: defendants who would have been at high risk of bail being set before the reform made them ineligible.[178]

In those cases of rearrest, the new legislation permitted judges to revoke a defendant's release status on their initial case and set bail, but only after an evidentiary hearing in which the prosecution could prove that the person committed the second offense by the "clear and convincing" weight of relevant and admissible evidence.[179]

For defendants rearrested for certain violent felony offenses, the legislation permitted judges to order those defendants remanded (detained without bail) for seventy-two hours pending the hearing.[180] However, for all other defendants, the

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174. Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, N.Y. TIMES (Mar. 29, 2019), https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html.

175. *Id.*

176. Bail Elimination Act of 2019, *supra* note 2; N.Y. CRIM. PROC. LAW § 510.10(3)–(4) (McKinney 2023). Instead, with some exceptions, these offenses could only qualify for non-monetary conditions of release such as supervised release or electronic monitoring. *See* Bail Elimination Act of 2019, *supra* note 2; CRIM. PROC. § 510.10(3). For all offenses, including offenses that did qualify for bail (namely violent offenses and sex offenses), the new legislation created a presumption in favor of release and mandated that bail could only be set based on a demonstrated individualized risk of flight to avoid prosecution and that bail or non-monetary conditions of release be made in the least restrictive terms possible to ensure the accused's return to court. *See* CRIM. PROC. § 510.10(1). The reform also mandated that the court, when setting money bail, consider the individual's "ability to post bail without posing undue hardship." *Id.* § 510.10(1)(f). Finally, it mandated that the court set bail in at least three forms, including an unsecured surety bond or partially secured surety bond. *Id.* § 520.10(2)(b).

177. *See* CRIM. PROC. § 510.10(4); *see also* INSHA RAHMAN, VERA INST. OF JUST., NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW (2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf (describing the changes to bail requirements brought by the bail-reform act).

178. CRIM. PROC. § 530.60(2)(b)(iv).

179. *See id.* § 530.60(2)(b)–(c) ("Whenever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty . . . it shall be grounds for revoking such order and imposing a new securing order . . . in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant . . . stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.").

180. *See id.* § 530.60(2)(e) ("Notwithstanding the provisions of paragraph (a) or (b) of this subdivision a defendant, against whom a felony complaint has been filed which charges the defendant with commission of a class A or violent felony offense . . . committed while he was at liberty as specified therein, may be committed to the custody of the sheriff pending a revocation hearing for a period not to exceed seventy-two hours.").

legislation did *not* permit prehearing detention.[181] In other words, rearrested defendants would have to be released pending their bail-modification hearings.

This evidentiary "bail modification" hearing was the subject of Operational Directive 2020-04 (the "Bail Directive")—an administrative action which was not subject to notice and comment and which was issued in March 2020 by the chief clerk of the New York City Criminal Court.[182] The Bail Directive ultimately permits judges, contrary to the bail-reform law, to detain certain defendants pending their revocation hearing; it also instructed judges to conduct certain bail-modification hearings in arraignments in a way that reduced them from substantive safeguards of defendants' constitutional rights to pro forma exercises.[183] To do so, the Bail Directive proposed that judges make pretextual use of their warrant power and conduct immediate hearings with no time for defendants to prepare.[184]

a. Pretextual Use of the Warrant Power

The Bail Directive circumvents defendants' rights to release pending their hearings by misusing the warrant power. Specifically, for any defendant with a prior open indicted felony case who was rearrested but did not qualify for the seventy-two-hour prehearing remand—in other words, a defendant who was set to be released once they were arraigned—the Bail Directive establishes a process through which their arraignment would be delayed while the prosecutor in their prior open case sought a warrant ex parte in the state's Supreme Court.[185]

To do so, the Directive capitalized on the structure of the New York City court system, which divides criminal jurisdiction based on severity. In New York City, the Supreme Court is the criminal trial court with jurisdiction over indicted felonies. A Supreme Court warrant automatically prevents a defendant from being released at arraignments because New York City Criminal Court arraignment judges do not have jurisdiction over Supreme-Court-indicted felony cases.[186] The result is that *all* defendants with indicted felonies who are rearrested are detained, not just the defendants who qualified for seventy-two-hour remand.[187]

What is significant about the Directive is that warrants are normally utilized to compel a person who is *not* in custody to return to court. Here, the defendants are already in custody. In other words, the Directive's use of the warrant power[188] is entirely pretextual; the warrant power is being used to circumvent the bail-reform

181. *See id.* § 530.60(2) (noting the limited circumstances under which a person may be detained before their revocation hearing).

182. Bail Directive, *supra* note 4.

183. *See infra* Section II.C.1.i–iii.

184. *See* Bail Directive, *supra* note 4.

185. *Id.*; Petrigh, *supra* note 7.

186. N.Y. CONST. art. VI, § 15(c).

187. Even a few days of pretrial detention can cause mental and physical trauma, and significant collateral consequences, including the loss of a job, the loss of housing, or family separation.

188. Bail Directive, *supra* note 4.

legislation. By definition, these defendants are merely accused of crimes and are presumed innocent.

The Directive cites the bail-reform legislation itself to justify this decision. It cites Criminal Procedure Law § 530.60(1), which states: "[When] the court considers it necessary to review [a securing] order, whether due to a motion by the people or otherwise, the court may . . . by a bench warrant if necessary, require the defendant to appear before the court."[189] However, the intent of this language is to permit the court to issue a bench warrant to compel a defendant who is not in custody to appear before the court, not to compel a defendant already in custody to appear.[190]

And yet, even if one could argue that warrants may properly be issued for a person in custody to keep that person in custody, there is no reason to believe a warrant is "necessary" to compel attendance at a hearing to review the securing order. Even if the prosecution could point to a reason, such as a pattern of missing court dates, the Directive allows for the warrant to be issued ex parte, where the defense cannot contest the reasoning.[191]

Moreover, this use of the warrant power is inconsistent with the rest of the bail-reform legislation. Given that the legislation provides for a seventy-two-hour pre-hearing remand for defendants rearrested for certain violent felonies, principles of statutory construction would indicate that the legislation did not intend courts to remand defendants arrested for other offenses prior to their hearings.[192]

Ultimately, this pretextual use of the warrant power wrongfully detains defendants who were not intended to be detained under the legislation. And, by ordering their detention pending a bail hearing, the Directive creates a presumption that bail will be set and the detention will be continued.

b. Ordering Hearings Without Adequate Notice

The Directive put a separate process in place for unindicted felonies, likely because criminal court arraignment judges have jurisdiction over unindicted felonies.[193] For these cases, the Directive simply orders the arraignment judge to

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189. N.Y. CRIM. PROC. LAW § 530.60(1) (McKinney 2022); Bail Directive, *supra* note 4.

190. Letter from Def. Orgs. to Lawrence K. Marks, Chief Admin. J., Tamiko Amaker, Admin. J. N.Y. City Crim. Ct., and Justin Barry, Chief Clerk N.Y. City Crim. Ct.; CRIM. PROC. § 1.20(30).

191. Bail Directive, *supra* note 4.

192. Letter from Def. Orgs. to Lawrence K. Marks, Chief Admin. J., Tamiko Amaker, Admin. J. N.Y. City Crim. Ct., and Justin Barry, Chief Clerk N.Y. City Crim. Ct., *supra* note 190. "Before revoking an order . . . the court must hold a hearing." CRIM. PROC. § 530.60(2)(c). In contrast, Criminal Procedure Law § 530.60(2)(a)—the section that addresses bail-modification hearings for rearrest for certain violent felony offenses—permits a judge to order a defendant to be remanded for seventy-two hours pending a hearing. *Id.* § 530.60(2)(a). Applying the whole text and surplusage canons of statutory interpretation, the contrast between these two provisions therefore indicates that the legislature knew how to give the courts authority to detain a person pending their bail authorization hearing for § 530.60(2)(b), and it chose not to.

193. *See* Bail Directive, *supra* note 4; Letter from Def. Orgs. to Lawrence K. Marks, Chief Admin. J., Tamiko Amaker, Admin. J. N.Y. City Crim. Ct., and Justin Barry, Chief Clerk N.Y. City Crim. Ct., *supra* note 190. The Directive stated at the outset that it permitted judges to hold the modification hearings in arraignments for any

conduct the bail-modification hearing as part of the defendant's arraignment.[194] On the surface, this order might not seem to pose any issues. However, practically speaking, the order implicates defendants' constitutional right to effective assistance of counsel[195] and right to be represented by counsel under the bail-reform statute.[196] First, the Directive necessarily requires both the prosecution and defense to be ready for a complex hearing with very little notice. The nature of the arraignment courtroom permits defense attorneys mere minutes, not hours, to prepare each case.[197]

Second, the defense counsel in arraignments has not only little notice to prepare for the hearing but also no knowledge of the prior felony case that is the subject of the bail-modification hearing. This is because the bail-modification hearing, by its nature, pertains to a prior open case. At arraignment, the majority of defendants (including those who eventually retain private counsel) are represented by public defenders who have just met their clients and have no information regarding their prior open cases.[198] Even in cases where the defendant is represented by a public defender from the same indigent-defense organization as in their prior open case, the chances are remote that the same public defender would be present at the arraignment for the case in which they were rearrested. New York City public defense organizations staff arraignments in shifts.[199] Individual lawyers are not notified by the court or police department when their clients are rearrested, nor can defendants request that their public defenders be present for any arraignment on a

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unindicted felony and later stated that judges "will set an appropriate securing order on both matters." Bail Directive, *supra* note 4.

194. Bail Directive, *supra* note 4.

195. Under the Sixth Amendment, a defendant has "the right to have counsel present at all 'critical' stages of the criminal proceedings." Missouri v. Frye, 566 U.S. 134, 140 (2012) (internal citations and quotation marks omitted). "Critical stage" of the proceedings has been interpreted to include "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Id.*

196. Under the bail-reform statute, the defendant has the right to representation by counsel whenever their securing order is being reviewed for possible modification or revocation. CRIM. PROC. § 510.10(2) ("A principal is entitled to representation by counsel . . . when a securing order is being considered and when a securing order is being reviewed for modification, revocation or termination."). Under New York's Judicial Code of Conduct, New York judges are required to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." 22 NYCRR 100.3(B)(6).

197. The arraignment courtroom in New York City is a fast-paced and hectic court part. "A typical arraignment part may have between one hundred and two hundred cases to be arraigned on a shift that has about six hours of operational court time." KOHLER-HAUSMANN, *supra* note 23, at 125. Public defenders experience extreme pressure to interview and arraign defendants quickly. *See id.* at 126.

198. *See* Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (describing how "[r]oughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers"). This is also based on my personal experience of representing criminal defendants at arraignments roughly two times per month for six years in New York City.

199. *See* Rachel Vick, *Public Defenders Decry OCA Decision to Forge Ahead in Person*, QUEENS DAILY EAGLE (Jan. 6, 2022), https://queenseagle.com/all/public-defenders-decry-oca-decision-to-forge-ahead-in-person (referencing public defenders as staffing arraignments in shifts).

new case.[200] Consequently, the lawyer responsible for the bail-modification hearing is likely a virtual stranger to the defendant.

Under Criminal Procedure Law § 530.60(2)(c), at the bail-modification hearing, "[t]he defendant may cross examine witnesses and may present relevant, admissible evidence on his own behalf."[201] However, the defense counsel in arraignments simply does not have the ability to investigate the case. Thus, they cannot call witnesses, prepare cross-examination questions, or develop "relevant" and "admissible" evidence on a case they know nothing about. By requiring the hearing to be held immediately, during a defendant's arraignment, the Directive deprives the defense of the right to present evidence in the hearing, rendering the hearing feckless.[202]

c. Impact on Defendants

The Directive harms defendants by either subjecting them to illegal pretrial detention or forcing them to proceed with crucial hearings without effective counsel. In both cases, the Directive harms defendants' chances of prevailing at the hearing. In the latter case, the setting of arraignments also harms defendants' chances of prevailing at the hearing, thus also increasing their chances of being detained pretrial. And, in the former case, by detaining defendants before the hearing, the Directive creates a presumption of detention.

The immediate hearings also circumvent the high burden the legislature placed on prosecutors arguing for an increase in a defendant's bail. The legislation requires the prosecution to prove that the defendant committed both the prior and the current offenses by the high standard of "clear and convincing evidence"[203] and with "relevant, admissible evidence."[204] However, in practice, most arraignment prosecutors attempt to meet their burden based solely on the complaints for both cases—despite

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200. This is based on my personal experience of representing criminal defendants at arraignments. In rare situations, a defendant may be aware that the police are seeking to arrest them and may arrange with the assistance of their attorney to turn themselves in to the police. In those situations, the attorney can then communicate with their colleagues or with public defenders at other organizations to arrange to be notified when the defendant is arraigned. But the court system itself does not notify attorneys when their clients are rearrested. And as a practical basis, even if there was a formal or informal notification system in place, it is not possible for attorneys to be available to be contacted about a case from 8:00 a.m. to 1:00 a.m. seven days a week (the hours the arraignment courtroom is open in New York City).

201. CRIM. PROC. § 530.60(2)(c).

202. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

203. Under Criminal Procedure Law § 530.60(2)(b)(iv), the court may set bail on a case with a bail ineligible offense, if, after an evidentiary hearing, there is "clear and convincing evidence, that the defendant . . . committed a felony while at liberty" on another felony matter. CRIM. PROC. § 530.60(2)(b)(iv). An evidentiary hearing is defined as a hearing where the evidence is admissible, meaning non-hearsay or testimonial evidence, particularly given the legislative history of the statute. *See* People v. Leyva, 151 N.Y.S.3d 833, 834 (Sup. Ct. 2021) (describing how the 2019 legislature was concerned about "prosecutors using hearsay allegations to persuade the court under CPL [§] 530.60(1)" and thus "demanded a more substantive inquiry to ensure that neither side was merely talking through their hat").

204. CRIM. PROC. § 530.60(2)(c).

the fact that the complaints are hearsay and likely not admissible at trial.[205] Judges conducting these immediate hearings typically excuse the prosecution's shortcuts as necessary under the time constraints. In the vast majority of cases, judges deem this strategy acceptable, rule defendants bail-eligible, and set bail—all in record time. The stated purpose of the Directive—to conduct the bail-modification hearings "expeditiously"[206]—is thus achieved on the backs of defendants and against the requirements of the bail-reform statute.

Pretrial incarceration is a harm itself, which exposes the detained person to a high risk of violence, trauma, disease, and medical neglect. At the time of the Directive, Rikers Island, New York City's notorious jail complex, was in the depths of a particularly severe crisis. In the first nine months of 2021, ten people died in the jail—a record number—and chronic understaffing led to delays in people receiving food and medicine and to gangs running parts of the jail.[207] Lawmakers who toured the jail in 2021 described "dozens of people without masks packed into cells with overflowing toilets, unable to see their lawyers because they have yet to be booked.[208] In certain intake units, people were being held in showers and relieving themselves in plastic bags."[209]

Pretrial incarceration may also increase defendants' likelihood of pleading guilty—even if innocent.[210] Detrimental outcomes for defendants do not end with their sentence but include a multitude of collateral consequences, such as loss of employment, loss of housing, family separation, and negative immigration consequences.[211]

The defendants harmed by the Directive are also more likely to be Black and/or Latinx, given the overrepresentation of Black and Latinx people in the criminal

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205. Less than twenty-four hours after arrest, it is unlikely that the prosecution will even have access to the kind of evidence needed to meet the burden of proof.

206. Bail Directive, *supra* note 4.

207. Jonah E. Bromwich & Jan Ransom, *10 Deaths, Exhausted Guards, Rampant Violence: Why Rikers Is in Crisis*, N.Y. TIMES (Sept. 15, 2021), https://www.nytimes.com/2021/09/15/nyregion/rikers-island-jail.html; *see also* Jan Ransom & Bianca Pallaro, *Behind the Violence at Rikers: Decades of Mismanagement and Dysfunction*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/nyregion/rikers-island-correction-officers.html (describing how the rate of slashings and stabbings was "hitting levels not seen since the crack epidemic in the early 1990s").

208. Bromwich & Ransom, *supra* note 207.

209. *Id.*

210. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1138 (2008).

211. It is not uncommon for defendants, particularly in misdemeanor and lower-level felony cases, to suffer greater collateral consequences from the fact of an arrest and an open case, than from the final disposition of the case. *See generally*, Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 826–44 (2015) (describing the collateral consequences of arrest for immigration, public housing, employment, child protective services, foster care, and education). For instance, a taxi driver charged with assault in the third degree will not be permitted to work by the Taxi and Limousine Commission in New York City, but as soon as they enter a plea to the reduced charge of disorderly conduct, they are permitted to work again. *See* MELISSA S. ADER, EMPLOYMENT CONSEQUENCES OF ARRESTS AND CONVICTIONS 8–16 (2019) (on file with author).

legal system in New York.[212] Black people are more likely to be arrested for drug offenses than white people, even though white people use drugs at higher rates.[213] Black and Latinx people are more likely to live in neighborhoods where policing resources are concentrated.[214] And bail is already more likely to be set on Black and Latinx defendants compared to their white counterparts.[215] For all of these reasons, data show that, across the country, individuals with multiple arrests in one year—in other words, those most likely to be subjected to the Directive—are more likely to be poor and Black.[216] Thus, the Directive does not just undermine bail reform and defendants' constitutional rights. It also multiplies the effect of already existing racial disparities in the system—disparities bail reform was intended to remedy.[217]

d. Lack of Accountability

Indigent-defender organizations objected to the Directive as soon as they learned of it—one week prior to implementation, when it was announced to

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212. A study of racial disparities in misdemeanor arraignments—which account for most criminal charges—in New York found that Black New Yorkers accounted for fifty percent of people charged in 2019 and 2020, which is more than twice their share of the city's population. FRED BUTCHER & MICHAEL REMPEL, CTR. FOR CT. INNOVATION, RACIAL DISPARITIES IN MISDEMEANOR JUSTICE 3 (2022), https://www.innovatingjustice.org/sites/default/files/media/document/2022/NYC_Misdemeanor_Justice_Data_Report_NYC.pdf. Racial disparities were highest for charges that did not involve a civilian complainant, like unlicensed vending, resisting arrest, false personation, and obstructing governmental administration in the second degree. *Id.* These charges typically stem from interactions with the police, where the police exercise significant discretion. *Id.* at 3–4. These disparities, which are well documented not just in New York but across the United States, have been shown to be related to residential segregation, racial profiling, and greater police surveillance of Black and Latinx communities. These disparities have accumulated effects over time: fifty-five percent of Black people with pending misdemeanor charges had a prior conviction compared to forty-six percent of Latinx New Yorkers facing misdemeanor charges and forty-two percent of white New Yorkers. *Id.* at 5. Ultimately, there were 2.1 times as many jail sentences for Black New Yorkers as would have been predicted based on their share of the population. *Id.* at 6.

213. *See* Jesse Barber & Simon McCormack, *A Racial Disparity Across New York That Is Truly Jarring*, NYCLU (Dec. 16, 2022, 2:00 PM), https://www.nyclu.org/en/news/racial-disparity-across-new-york-truly-jarring#:~:text=In%20the%20ten%20most%20populous,convicted%20for%20felony%20drug%20offenses (stating that while white people are more likely to use drugs compared to people of color, Black people in Manhattan are more than twenty times more likely to be arrested and convicted of felony drug offenses); *Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019*, PEW (Feb. 15, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019 ("Black people made up 12% of the U.S. adult population but more than twice that share of adult drug arrests in 2019.").

214. *See supra* note 82 (describing policing strategies that target neighborhoods of color).

215. *See* OLIVE LU & MICHAEL REMPEL, TWO YEARS IN: 2020 BAIL REFORMS IN ACTION IN NEW YORK STATE 20 (2022), https://datacollaborativeforjustice.org/wp-content/uploads/2022/12/Two_Years_In_Bail_Reforms_New_York.pdf (describing how fifty-six percent of Black defendants charged with violent felony offenses in 2021 had bail set compared to forty-three percent of white defendants and describing an even larger gap for nonviolent felony offenses).

216. Forty-nine percent of people with multiple arrests in the past year had "incomes below $10,000 per year." *See* Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html. And data shows that sixty-six percent of those with multiple arrests "had no more than a high school education" and that they were "[four] times more likely to be unemployed." *Id.*

217. *See* RAHMAN, *supra* note 177, at 6 (discussing how the bail-reform movement sought to change a cash bail system that predominantly impacted poor people of color).

stakeholders. The organizations sent a letter to Chief Administrative Judge Marks, Administrative Judge of New York City Criminal Court Amaker, and Chief Clerk Barry,[218] arguing that the Directive conflicted with the bail-reform statute,[219] the Sixth Amendment right to effective assistance of counsel,[220] and ethical rules[221] and that it impermissibly delayed arraignment.[222]

However, short of writing letters, placing objections on the record, and litigating a multi-courthouse policy on a case-by-case basis,[223] there is no other method for defendants and defense attorneys to challenge the Directive. Unlike administrative rules, the Directive was not subject to notice and comment. It was not even made available to the general public at all.

As Elizabeth Nevins-Saunders observed in her case study of criminal-court administrative rules in Nassau County on Long Island, when the source of the due process violation is an individual judge's decision, that decision may be litigated.[224] But when the source of the due process violation is a *courthouse* (or multi-courthouse) administrative policy, litigation is ineffective. [225] The majority of court administrative rules and policies are not subject to public input or judicial review.[226] At most, they may be discussed in advance at a stakeholders meeting,

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218. Letter from Def. Orgs. to Lawrence K. Marks, Chief Admin. J., Tamiko Amaker, Admin. J. N.Y. City Crim. Ct., and Justin Barry, Chief Clerk N.Y. City Crim. Ct., *supra* note 190.

219. *Id.* "Before revoking an order . . . the court must hold a hearing." N.Y. CRIM. PROC. LAW § 530.60(2)(d) (McKinney 2022). In contrast, Criminal Procedure Law § 530.60(2)(a)—the section that addresses bail-modification hearings for rearrest for certain violent felony offenses—permits a judge to order a defendant to be remanded for seventy-two hours pending a hearing. *Id.* § 530.60(2)(a). The contrast between these two provisions therefore indicates that the legislature knew how to give the courts authority to detain a person pending their bail authorization hearing for § 530.60(2)(b), and it chose not to.

220. Letter from Def. Orgs. to Lawrence K. Marks, Chief Admin. J., Tamiko Amaker, Admin. J. N.Y. City Crim. Ct., and Justin Barry, Chief Clerk N.Y. City Crim. Ct., *supra* note 190.

221. The letter argued that the Directive violated ethical rules by requiring ex parte communications between the prosecutor and the court. *Id.*

222. The Directive also delays the accused person's arraignment on their new case. *See* People *ex rel.* Maxian v. Brown, 77 N.Y.2d 422 (1991) (holding that persons detained for over twenty-four hours without being arraigned may be entitled to release).

223. An appeal of the issue of detention can also become moot before it is adjudicated. *See* Petrigh, *supra* note 7, at 136, 152 (discussing the challenges of appealing detention). Moreover, the majority of criminal cases resolve in a plea of guilty, *see* William T. Pizzi, *The Failure of the Criminal Procedure Revolution*, 51 U. PAC. L. REV. 823, 832 (2020) ("The plea-bargaining rates also hover close to 98% in most states and trials have become rare."), which may require waiver of the right to appeal. Barbara Zolot, *The Government Tool You've Never Heard of that Conceals Police Misconduct*, N.Y.L.J. (Sept. 18, 2020), https://www.ils.ny.gov/files/NYLJ.Appeal%20Waivers.pdf (describing the widespread practice of defendants being required to waive their rights to appeal as a condition of a guilty plea).

224. Nevins-Saunders, *supra* note 22, at 367 ("For instance, a defendant who felt coerced to plead guilty because she had not received the advice of counsel and the judge and prosecutor were pressuring her could have appealed her conviction on due process grounds.").

225. *See id.* at 367 n.217 (describing the limits of litigation and the ways in which case-by-case litigation obscures the larger phenomenon of "judicial drift").

226. *Id.* at 375–76. Nevins-Saunders points out that if the courthouse were structured like an administrative agency, there would be "police-patrol oversight" and "fire alarm oversight" measures to constrain the agency from diverging from the interests it is meant to serve. *Id.* at 373–75, 375 n.258.

where the highest-ranking judge sets the agenda of the meeting and objections may simply fall on deaf ears.[227]

2. The *Crawford* Memorandum

The *Crawford* Memorandum, a confidential court memorandum issued by the Office of Court Administration's Counsel's Office and leaked to the press in 2021,[228] advised judges to severely curtail a due process hearing mandated in *Crawford v. Ally*.[229] In that case, the Appellate Division held that whenever a temporary order of protection might cause a defendant to "suffer the deprivation of a significant liberty or property interest," due process requires that the court conduct an evidentiary hearing to determine whether the order should be issued.[230]

Crawford itself was a response to the practice of criminal-court judges in New York routinely "rubber-stamping" prosecutors' requests for full "stay-away" temporary orders of protection, which prosecutors requested "essentially by default" in any case with a civilian complainant.[231] This "rubber-stamping" occurred even where the protected party did not want an order of protection or preferred a "limited" order of protection that permitted contact instead.[232] And even where there was strong evidence that an order of protection was not necessary, judges were extremely reluctant to decline prosecutors' requests.[233] In addition to separating a defendant from the protected party, orders of protection can separate defendants from their source of housing—if they lived with the protected party—or their

227. *Id.* at 375–76. Moreover, stakeholders—even defense attorneys—may be incentivized to turn a blind eye to the conflicts between administrative rules and policies and procedural justice. As Nevins-Saunders notes, "[T]he judges and prosecutors still got to move dockets. They got convictions. They got elected. They got money for the county and other government agencies." *See id.* at 376. Even defense organizations can be incentivized to avoid acting as a check in this circumstance, if doing so will only earn them additional work without more funding. *See id.* at 377. ("If [defense organizations] sought to check the drift, they could reasonably fear being compelled to do more with less, finding themselves obliged to cover a whole new set of cases under already strained budgets and manpower."). And yet, even in cases when defense attorneys do sound the alarm, as occurred with Operational Directive 2020-04, which prompted multiple letters from defense organizations raising concerns about the Directive, there is nothing to compel the court system to respond.

228. Mellins, *supra* note 12.

229. 150 N.Y.S.3d 712, 717–18 (App. Div. 2021).

230. *Id.* The Appellate Division also held that criminal courts must find "an articulated reasonable basis" for the issuance of a full order of protection and must consider multiple factors, including whether the accused poses "a danger of intimidation or injury to the complainant," as well as the factors outlined in Criminal Procedure Law § 530.12(1)(a). *Id.* at 717 (internal quotations omitted). *Crawford* is binding in all Departments of the Appellate Division. *See* People v. Turner, 5 N.Y.3d 476, 481–82 (2005) (citing Mountain View Coach Lines v. Storms, 476 N.Y.S.2d 918, 918 (App. Div. 2d Dep't 1984)).

231. *See* KOHLER-HAUSMANN, *supra* note 23, at 209; *see also* Siya U. Hegde, *I Am Not A Nuisance: Decriminalizing Domestic Violence Across New York's Civil Housing & Criminal Justice Systems*, 29 GEO. J. ON POVERTY L. & POL'Y 1, 29–30 (2021); Andy Newman, *A Judge's Order Left Her Homeless. A New Ruling Will Help Others Like Her*, N.Y. TIMES (June 25, 2021), https://www.nytimes.com/2021/06/25/nyregion/order-of-protection-domestic-violence.html.

232. *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 48 (2006).

233. *See* KOHLER-HAUSMANN, *supra* note 23, at 209–11.

children, if they had children with the protected party.[234] Shamika Crawford, the appellant in *Crawford v. Ally*, was homeless for three months following a judge's decision to issue an order of protection on behalf of her boyfriend, with whom she shared a home.[235] The *Crawford* Court sought to end the practice of reflexively imposing orders of protections in favor of individualized assessments that considered the impact on the defendant.

In response to *Crawford*, the Office of Court Administration's Counsel's Office issued the *Crawford* Memorandum, which is addressed to the deputy chief administrative judges.[236] The Memorandum describes the decision and advises judges on how to interpret it.[237] Specifically, the Memorandum states that *Crawford* "*should not be read* as to require live witnesses and/or non-hearsay testimony" and that "courts should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing" because such hearings would endanger the safety of domestic-violence victims and have "significant negative operational impact."[238]

While it's true that the *Crawford* Court stated that "[the] Court need not articulate the precise form of the evidentiary hearing required,"[239] the Memorandum effectively instructs judges to follow the narrowest interpretation of the decision. And while there is no precise definition of "evidentiary" hearing, an evidentiary hearing is typically one in which the parties are allowed to present evidence, including the testimony of witnesses.

Moreover, concluding that the prosecution is not required to meet its *Crawford* burden through witness testimony further encourages the practice—common before *Crawford*—of prosecutors relying on nothing more than the same bare allegations included in the criminal-court complaint.[240]

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234. *See* Newman, *supra* note 231.

235. *Id.* Notably, the judge issued the order of protection despite the fact that the domestic violence reports that prosecutors cited in support of the order were all actually issued against the complainant on behalf of Ms. Crawford. *Id.*

236. Mellins, *supra* note 12.

237. *Id.*

238. *Id.* (emphasis added). The memorandum also specifically affirms that "what would be considered normal best practices in issuing a TOP," which it describes as "a thoughtful and thorough analysis of all the facts before and readily available to the Court" and not "a full-blown hearing with live testimony," "could potentially address the deprivation concerns this unique fact pattern raised for the Appellate Division." *Id.* And it states that the hearing Crawford received on January 30, 2022 where her temporary full order of protection was modified to a limited order of protection, which involved nothing but the prosecutor's proffer, "arguably would satisfy the due process requirements the First Department is attempting to impose and does not appear to have included any live testimony." *Id.*

239. *Crawford*, 150 N.Y.S.3d at 717.

240. *See, e.g.*, People v. Riley, 181 N.Y.S.3d 873, 875 (Crim. Ct. 2023) ("The People argued that a full 'stay away' TOP was necessary to ensure the safety of the complaining witness, and in support of this assertion, the People relied on the unconverted complaint and assumptions."). In *Riley*, the court ruled that while evidence need not be "competent," it should be "material, relevant, and legally introduced." *Id.* However, the court also stated that "on a case-by-case basis, the severity of the allegations in the complaint, alone, may, *in certain circumstances*, suffice to sustain the People's burden." *Id.* at 876. This is an example of courts being open to basing decisions on the bare allegations of the complaint.

a. Impact on Defendants

After the *Crawford* decision, a group of public defenders[241] and advocates formed a coalition to monitor the implementation of the decision.[242] Following the issuance of the Memorandum, the coalition observed that judges were routinely rejecting requests for live witnesses, including in a case where the prosecutor acknowledged that the complaining witness had retracted her statements and the complaining witness was present and ready to testify.[243] In accordance with a part of the Memorandum that advises judges that "normal best practices" could satisfy *Crawford*, the coalition also observed judges permitting the prosecution to meet their burden at the hearing with unauthenticated evidence, or with mere proffers, despite the fact that *Crawford* calls for, at a minimum, a "prompt evidentiary hearing."[244] In addition, the coalition observed that many judges were holding *Crawford* hearings at arraignment,[245] thus appearing to follow a portion of the Memorandum that explicitly states that hearings may be conducted "or at least commenced" at arraignments,[246] despite the fact that the Appellate Division specifically requires the hearing to be "on notice."[247]

These practices disadvantage defendants—contrary to the spirit of *Crawford*—and make them more likely to lose their hearings and experience homelessness or be separated from their families. Homelessness and family separation are extreme harms in and of themselves, and it is important to recognize that these harms occur to defendants who are presumed innocent and, in many cases, where the protected party is also objecting to the order of protection.[248]

Defendants who are homeless or separated from their children due to temporary orders of protection are also more likely to plead guilty. This is because many district attorneys' offices will outright offer to consent to a *limited* order of protection,

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241. The coalition included public defenders from Neighborhood Defender Services, Bronx Defenders, Brooklyn Defender Services, the Legal Aid Society, and New York County Defender Services. Affirmation of Meghna Philip at 2, N.Y. Civil Liberties Union v. N.Y. State Off. of Ct. Admin., No. 154792/2022 (N.Y. Sup. Ct. June 1, 2022), ECF No. 13.

242. *Id.* at 1–2.

243. *Id.* at 2–3.

244. *Crawford*, 150 N.Y.S.3d at 717–18. In other due process hearing contexts, "evidentiary" has been interpreted to mean more than a prosecutor's proffer, and yet the coalition observed prosecutors prevail at many *Crawford* hearings through proffers alone. *See* Affirmation of Meghna Philip, *supra* note 241, at 2–3.

245. *Id.* at 2.

246. Mellins, *supra* note 12.

247. *Crawford*, 150 N.Y.S.3d at 717. The coalition also observed judges ruling that separation from family members who were not children was not sufficient to trigger a *Crawford* hearing, despite the fact that the decision was not limited to children alone. *See id.* at 717–18; Affirmation of Meghna Philip, *supra* note 241, at 2.

248. The practice of blanket issuance of orders of protection must also be viewed in the context of mandatory-arrest and no-drop policies that define domestic violence prosecutions in many states today. Many advocates for victims of domestic violence have critiqued these policies as disempowering and even potentially endangering victims. *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1678, 1684 (2004) (describing how mandatory-arrest and no-drop policies disempower victims, discourage them from calling the police for help, or trigger severe collateral consequences such as removal of their children based on "failure to protect" charges).

but only if the defendant pleads guilty, in which case a final limited order of protection would then become a part of their sentence.[249] Defendants are thus faced with the choice of going to trial and being forced to comply with a full "stay away" order of protection for months (and often more than a year)—or pleading guilty and immediately being able to have contact with the protected party, as well as access to their home or children.

As explained above, a *limited* order of protection permits a defendant to have contact with the protected party, except that they may not assault, harass, threaten, or intimidate the protected party. In other words, the same office that refused to consider anything but a "full stay away" order while the defendant was fighting their case readily consented, as a matter of policy, to a limited order of protection once the defendant pleaded guilty.[250]

b. Lack of Accountability

Unlike directives, initiatives, or pilot projects, confidential memoranda like the *Crawford* Memorandum are never circulated to stakeholders, or anyone outside the court system at all. Thus, there is no way for stakeholders to object to the guidance court administrators are providing judges, despite the fact that such guidance undoubtedly impacts case outcomes.[251]

Even when stakeholders do learn of these memos through leaks to the press, as occurred in the case of the *Crawford* Memorandum, it is impossible to address them in an individual case. One defense attorney attempted to challenge the Memorandum as an incorrect interpretation of *Crawford* on the record during a *Crawford* hearing, but he was not permitted to discuss the Memorandum on the record at all.[252]

> The Court: May I ask how you obtained a copy of that since that is supposed to be confidential and for the internal use of the court system only?
>
> [Defense]: Your Honor, it was provided to our office.
>
> The Court: By whom?
>
> [Defense]: I don't have that information. To the extent that this court is relying on the memo of this individual, I would urge the court to take certain things into account that are actually incorrect, factually, within this memo and also

249. This is based on my personal experience litigating cases with orders of protection in New York City.

250. There is an obvious dissonance here. Why refuse to permit a defendant to have contact with the protected party while they are fighting their case, but allow it as part of the sentence? What about the defendant's admission of guilt renders them less likely to be a danger to the protected party? Sometimes prosecutors have justified this dissonance when domestic violence classes are also part of the sentence, reasoning that these classes will keep the complainant safe. But, in many cases, these types of dispositions are offered without any classes at all. Thus, it appears more likely that this practice reveals the way orders of protection can be weaponized to serve other ends, such as the end of pressuring the defendant to take a plea.

251. *See supra* notes 228–38 and accompanying text.

252. Transcript of Hearing at 4–5, Crawford v. Ally, 150 N.Y.S.3d 712, 717–18 (App. Div. 2021) (on file with author).

> the legal conclusions that are drawn from it. As an initial matter, this memo indicates that—
>
> . . .
>
> The Court: I have a copy of the memo and it states, on the top, that it is confidential and for the internal use of the court system only. I am not going to let you discuss this memo any further.[253]

The refusal of the court to permit a defense attorney litigating a *Crawford* hearing to even reference the *Crawford* Memorandum illustrates how difficult it is for defense attorneys, much less members of the public, to challenge court administrative actions.

Crawford itself was the result of defense attorneys[254] seeking to challenge the "unwritten rule"[255] that criminal-court judges should always approve prosecutors' requests for temporary orders of protection absent extreme circumstances. Crawford's underlying criminal case was dismissed and her order of protection was vacated, so Crawford's appeal was initially dismissed as moot, but the Appellate Division reversed and ruled on the merits.[256] But if the defense attorneys who litigated *Crawford* hoped the decision would end the practice of judges rubber-stamping orders of protection, then the existence of the *Crawford* Memorandum, and the fact that order-of-protection practice has largely stayed the same post-*Crawford*, suggest otherwise. Thanks to the courteaucracy, litigating an unlawful policy and winning simply generated another unlawful policy in the form of the *Crawford* Memorandum.

At the moment, there is no way of knowing how many other confidential memoranda like the *Crawford* Memorandum exist. However, in response to the controversy surrounding the leak of the *Crawford* Memorandum, OCA's chief spokesperson, Lucian Chalfen, defended the Memorandum as part of the "normal practice" of the courts to issue internal memoranda "with context on cases that have potential significant operational impacts on the courts."[257] Thus, Chalfen seemed to indicate that court administrators had potentially written *many* memoranda instructing judges on how to interpret cases with "operational impacts on the courts."[258]

Following the leak of the *Crawford* Memorandum to the press and Chalfen's response, the New York Civil Liberties Union ("NYCLU") submitted a Freedom of Information Law ("FOIL") request for all of OCA's confidential memoranda and directives and won access to copies of all memos and directives issued since 2011 that provide guidance to state court judges on how to interpret court decisions

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253. *Id.*

254. *See* Mellins, *supra* note 12.

255. *See supra* Section II.B.3.iv.

256. *See Crawford*, 150 N.Y.S.3d at 714–16 (ruling (i) there was a likelihood of repetition; (ii) the issue typically evades review; and (iii) there were substantial and novel legal issues at stake).

257. Mellins, *supra* note 12.

258. *Id.*

and statutes.[259] However, OCA has strenuously fought this decision, and the NYCLU has not received any additional memoranda to date.

3. The Gun Initiative

In 2021, Chief Judge DiFiore and Chief Administrative Judge Marks announced a "multi-prong[ed] initiative . . . to expedite the handling of felony gun cases" in New York City ("the Gun Initiative").[260] A press release stated that the purpose of the initiative was to reduce the backlog of 4,000 felony gun-possession cases it described as having arisen due to the pandemic[261] and to ensure "that swift action is taken on all new arrests for . . . gun possession."[262]

The elements of the Initiative include 1) increasing the number of grand juries; 2) designating judges in each borough to adjudicate newly-indicted felony gun-possession cases, including through expediting pretrial hearings and giving trials priority status; 3) fast-tracking already-indicted gun-possession cases; and 4) closely monitoring cases at every stage "with case management data evaluated to ensure cases are processed as quickly and efficiently as possible in accordance with due process."[263] The press release announced the Initiative as a collaboration of the court system, the District Attorneys' Offices in each of the five boroughs, and "other stakeholders, including the Citizens Crime Commission."[264] It also stated that the collaborators had "consulted with members of the local defense bar regarding the program."[265]

a. Impact on Defendants and Lack of Accountability

Like the Bail Directive, the Initiative was not subject to judicial review or any kind of public input. Indigent-defense organizations objected to the Gun Initiative because the short timelines for hearing and trial place impossible pressure on them to provide effective assistance of counsel, especially for complex cases that often involve DNA evidence.[266] This created a risk that defendants could be pressured into plea deals that did not accurately reflect the strength of the cases against them,

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259. Press Release, NYCLU Granted Access to Undisclosed Memos to Judges From Office of Court Administration (Oct. 20, 2022), https://www.nyclu.org/en/press-releases/nyclu-granted-access-undisclosed-memos-judges-office-court-administration.

260. Press Release, Court System to Expedite Resolution of Gun Cases in NYC (Aug. 10, 2021) (on file with author).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See* George Joseph, *NYC Courts Issue Rules to Ram Through Gun Cases, Under Political Pressure*, THE CITY (Mar. 8, 2022, 10:21 AM), https://www.thecity.nyc/2022/03/08/nyc-courts-gun-case-fast-track/ (describing how defense attorneys view the Gun Initiative as "push[ing] . . . clients to suppression hearings, trial, and into incarceratory plea deals often before we even have complete discovery" and "limit[ing] their ability to come to plea agreements that take into account . . . complex social realities").

or even wrongfully convicted altogether.[267] Given that Black people are disproportionately arrested for gun possession,[268] the Initiative also exacerbates racial disparities. Moreover, the Initiative forces defense attorneys and the court system to deprioritize older cases where the defendants are incarcerated, in order to concentrate resources on gun-possession cases. Particularly in the wake of the pandemic and the accompanying suspension of speedy trial laws, this disadvantages defendants who have already spent far too long waiting for trial. However, these objections have failed to result in any concrete changes to the Initiative.[269]

4. The Kings County Discovery Order

Various levels of the courteaucracy, such as administrative judges and supervising judges, will sometimes coordinate on certain initiatives. For example, on November 29, 2021, Brooklyn Supervising Judge Espinal issued a court order on discovery that was framed as a pilot initiative that could be expanded to "other boroughs."[270] The court order responded to the 2019 discovery reforms that overhauled New York's particularly restrictive discovery law, which was known as the "blindfold" law given how little access it gave the defense to the prosecution's discovery.[271] The 2019 reforms required prosecutors to provide the defense with discovery early in the case and tied discovery obligations to the speedy-trial clock.[272] The result was that defense attorneys could move to dismiss any case where the prosecutor had failed to comply with discovery by the speedy-trial deadline.[273]

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267. Indigent defense organizations also objected because the short timelines made it difficult to connect defendants who might benefit from plea deals including mental health services to those services and to investigate related "mitigated circumstances." *Id.*

268. *See* Lakeidra Chavis & Geoff Hing, *The War on Gun Violence Has Failed. And Black Men Are Paying the Price*, MARSHALL PROJECT (Mar. 23, 2023, 6:00 AM), https://www.themarshallproject.org/2023/03/23/gun-violence-possession-police-chicago (describing how in New York City, Black people make up seventy percent of gun-possession arrests, despite comprising twenty percent of the population). Scholars and advocates have also questioned whether the tactic of increasing gun-possession arrests is effective in terms of reducing gun violence. The majority of people arrested for gun possession do not go on to commit violent crime, and as the rate of gun-possession arrests has climbed, arrests for shootings remains stubbornly low. *See id.* (describing how an arrest occurred in only one in five shooting cases in the previous year in Chicago, even as arrests where the most serious charge was gun possession soared).

269. *See* Molly Crane-Newman, *NYC Courts Fast-Track Gun Suspects to Prison, State Data Show—Countering Mayor Adams' Gripe That 'Laughingstock' Justice System at Fault for Shootings*, DAILY NEWS (June 20, 2022, 5:36 PM), https://www.nydailynews.com/2022/06/20/nyc-courts-fast-track-gun-suspects-to-prison-state-data-show-countering-mayor-adams-gripe-that-laughingstock-justice-system-at-fault-for-shootings/ (describing how ten months after the Initiative began, defendants charged with gun possession were still required to report to court every two weeks and the court system had tripled the number of gun-possession cases it was resolving each week from January to June 2022).

270. George Joseph, *Brooklyn Judge Curbs Defendants' Rights to Challenge DAs on Evidence Sharing*, GOTHAMIST (Nov. 30, 2021), https://gothamist.com/news/brooklyn-judge-curbs-defendants-rights-to-challenge-das-on-evidence-sharing.

271. *See* Donna Lieberman & Isabelle Kirshner, *Take off the Blindfold: Reform NY Discovery Law*, NYCLU (Mar. 11, 2019), https://www.nyclu.org/en/publications/take-blindfold-reform-ny-discovery-law-commentary.

272. Joseph, *supra* note 266.

273. *See id.*; N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2022).

Directly responding to the discovery reforms, Judge Espinal's order required prosecutors and defense attorneys to meet after the prosecution's certification of compliance with discovery and write a joint letter outlining any discovery disputes that may exist.[274] Significantly, the order states that "[f]ailure by the parties to confer and file the aforementioned letter will be deemed by the court as notice that there were no issues raised with the Certificate of Compliance [with discovery] filed and will constitute a waiver of any such issues at a later date."[275]

a. Impact on Defendants and Lack of Accountability

Notably, the discovery-reform legislation placed no burden on the defense to notify the prosecution regarding missing discovery prior to the deadline.[276] Indeed, notice was provided by the statute itself, which enumerated more than twenty types of material that prosecutors must turn over to defense counsel.[277] The statute also placed the burden on the prosecution to certify that discovery was complete prior to the deadline.[278] Thus, the Discovery Order contradicted the text of the discovery-reform law and improperly shifted the burden from the prosecution to the defense. Shifting the burden to defense counsel was particularly sophistic given that all mandatory discovery was, by definition, in the possession of the prosecutor. Thus, the defense was now legally required to guess what discovery could be missing in a case, while the prosecution was absolved from withholding any discovery the defense could not anticipate—even if that discovery was explicitly enumerated by statute. Moreover, the Discovery Order also made defendants more likely to lose critical discovery-violation-related motions to dismiss, as they are required to explain to prosecutors how to cure the basis for their motion.

Indigent-defense organizations and elected officials who voted for the discovery reform immediately criticized the Order, arguing that it conflicted with the statute because it 1) impermissibly shifted the burden of identifying missing discovery from the prosecution to the defense; 2) protected prosecutors for failing to provide missing discovery or providing it too late; and 3) lacked authority to find that the defense had waived their discovery rights by failing to file the requested letter.[279]

In response to this criticism, a spokesperson for the Office of Court Administration responded with his own pointed critique:

> If all the self-appointed judicial scholars and armchair judges sought to come to Brooklyn Criminal Court and see Judge Espinal's innovative initiative in

274. *See* Joseph, *supra* note 266 ("The order launches a pilot initiative that court officials said is intended to cut down on delays spurred by the landmark discovery reforms passed by the New York state legislature in 2019.").

275. *See id.*

276. *See* CRIM. PROC. § 245.10.

277. *See id.* § 245.20.

278. See *id.* § 245.50.

279. Joseph, *supra* note 266.

> action before declaring it improper and subject to reversal, then they would be a part of our continuing efforts for *normalization of court operations and eradication of case backlogs*, not an impediment.[280]

The order remained in effect.

III. DANGEROUS DEFENDANTS, DANGEROUS BACKLOGS

What motivates these administrative actions? A closer examination of three of the administrative actions highlighted in Part II reveals that they do not arise in a vacuum or even solely based on resource constraints, as is frequently the claim with many policies in the criminal-court context. This is not to say these rules have no relationship to resource constraints—indeed, many of them explicitly reference the need to conserve court resources. And it is, of course, no surprise that court administrative rules would be motivated by resource conservation. Moreover, at least arguably, exerting control over resources is exactly what court administrators are meant to do.

But these actions also reflect a concern with dangerousness and public safety as well. Sometimes, as in the case of the *Crawford* Memorandum, that concern is explicit on the face of the rule or action. Other times, the connection between the administrative rule or action and concerns regarding dangerousness—or the perception of dangerousness—is only evident based on an understanding of the political context of the rule and its impact on practice.

Moreover, even when court administrative rules appear to be solely referring to issues of resource conservation and allocation, such concerns are often interrelated with concerns about dangerousness. Indeed, court actors often explicitly depict resource issues, such as case backlogs, as posing a threat to public safety themselves.

This Part will analyze how the administrative actions detailed in the preceding Part reflect the complex relationship between concerns about resources and concerns about dangerousness. It will also examine how such concerns are relied on to justify the increased detention and monitoring of criminal defendants perceived to be dangerous.

A. The Bail Directive

The Bail Directive explicitly connects its issuance with a need to conserve resources. The Directive states: "The following mechanism has been developed to permit a judge to expeditiously review a securing order pursuant to [Criminal Procedure Law] § 530.60(2)(b)(iv)."[281] Certainly, if judges had to accommodate

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280. George Joseph, *Lawmakers Accuse Brooklyn Judge of Subverting NY's Landmark Discovery Reforms*, GOTHAMIST (Dec. 2, 2021), https://gothamist.com/news/lawmakers-accuse-brooklyn-judge-of-subverting-nys-landmark-discovery-reforms (emphasis added).

281. Operational Directive from Justin A. Barry, Chief Clerk, Crim. Ct. of the City of N.Y. (Mar. 9, 2020) (on file with author) (emphasis added).

bail-modification hearings for rearrested defendants—particularly with live witnesses—on the regular court calendar, there would be a significant impact on court dockets.

And yet, an exploration of the context in which the Directive arose and was enforced—in the middle of a heated public debate on bail reform—suggests that it was also motivated by concerns about dangerousness.[282] This Section will first explore the connection between bail and dangerousness before analyzing how the Directive reflects concerns about dangerousness and how it enables increased detention of criminal defendants in response.

1. Bail and Dangerousness

First, it is important to note that New York is unique in that, even prior to reform, it was the only state in the country that did not permit dangerousness to be considered as a basis for bail or detention.[283] However, it was widely acknowledged that New York judges frequently considered dangerousness as a reason to set bail without putting their reasoning on the record.[284]

Indeed, Kohler-Hausmann's case study of New York criminal courts suggests that judges assess the governability of defendants when they choose whether or not to set bail—in other words, not simply looking at the person's risk of flight but also "who this person is."[285] Defendants with long records or records of rearrest are viewed as posing a risk to the community, whether because they are dangerous or because they threaten the social order through their "ungovernability."[286]

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282. *See, e.g.*, Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO (Apr. 23, 2020, 5:08 AM), https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299; Noah Goldberg, *Bail Reform Advocates Urge Cuomo and Lawmakers Not to Tweak New Laws*, NY DAILY NEWS, https://www.nydailynews.com/new-york/ny-bail-reform-dangerousness-judge-discretion-racism-20200211-hzuwv5jbzfg5hb32jxuufgpfzm-story.html (Feb. 11, 2020, 10:46 PM); Jon Schuppe, *Fair or Dangerous? Days After Ending Cash Bail, New York Has Second Thoughts*, NBC NEWS (Jan. 7, 2020, 4:30 PM), https://www.nbcnews.com/news/crime-courts/fair-or-dangerous-days-after-ending-cash-bail-new-york-n1111346.

283. *See* CRIM. PROC. § 510.10(1) (listing factors and criteria that may be considered when deciding an application for an order of recognizance and excluding public safety or dangerousness); Patrick Lakamp & Aaron Besecker, *'Dangerousness' Still Not a Bail Consideration, but Judges No Longer Bound By 'Least Restrictive' Option*, BUFFALO NEWS (Sept. 13, 2023), https://buffalonews.com/news/local/crime-courts/dangerousness-still-not-a-bail-consideration-but-judges-no-longer-bound-by-least-restrictive-option/article_4283a2c8-e919-11ed-b14b-37a434a1873c.html#:~:text=New%20York%20remains%20the%20only,remand%20an%20individual%2C%20he%20said.

284. *See* JAMIE FELLNER, HUM. RTS. WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 3, 26, 46–47 (discussing bail as a form of *sub rosa* "preventive detention").

285. *See* KOHLER-HAUSMANN, *supra* note 23, at 108 (quoting a judge as stating, "The other major component [other than the complaint] would be *who* we are dealing with . . . . You know, are we dealing with an eighteen-year-old and this is the eighteen-year-old's first time . . . ? Or are we dealing with someone who is fifty and has eighty-seven prior misdemeanor convictions . . . ."). In this regard, judges are not simply considering risk of flight, but the person's governability, which is entangled with their perceived level of risk to the community and to social order.

286. *Id.* at 108, 177, 263.

Thus, bail-setting practices that account for the risk to public safety as well as flight risk have an important role in the shift from adjudication to managing risk that scholars of the new penology have identified. Put simply, bail-setting based on risk to public safety allows judges to detain defendants based not on the strength of the evidence against them or their flight risk but based on their perceived levels of dangerousness.

2. The Directive and Dangerousness

The Directive was issued at a time when the bail-reform statute, though less than three months old, was being hotly contested in the public discourse. Many critics of the reforms warned of a return to the "dangerous, old days" of past decades and deployed racialized rhetoric.[287] Critics included criminal-court judges who declared in the media that the bail reform was a "threat to public safety."[288] Two criminal-court judges publicly set bail on ineligible cases in defiance of the statute.[289] Critics were most angry that bail reform limited judicial discretion to set bail: judges could no longer set bail at all on a wide range of offenses,[290] and although a section of the law, Criminal Procedure Law § 530.60, provided an exception for rearrested defendants, it limited judicial discretion in that category as well.[291]

Significantly, a provision to permit judges to detain defendants based on dangerousness had been part of an earlier version of bail reform and was the subject of intense debate. The provision was ultimately rejected in favor of the compromise of permitting money bail for the serious offenses most likely to signify a potential threat to public safety and in certain situations where the defendant was rearrested and received a bail-modification hearing pursuant to § 530.60.[292]

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287. *See, e.g.*, Zach Williams, *Political Extremists Have Found a Home on This GOP-Backed Facebook Group: Far Right Comments Crop up Among the 160,000 Members of Repeal Bail Reform*, CITY & STATE (Feb. 3, 2020), https://www.cityandstateny.com/politics/2020/02/political-extremists-have-found-a-home-on-this-gop-backed-facebook-group/176449/; Vincent M. Southerland, *The Racist Fearmongering Campaigns Against Bail Reform, Explained*, THE APPEAL (June 7, 2021), https://theappeal.org/the-lab/explainers/the-racist-fearmongering-campaigns-against-bail-reform-explained/; Karen DeWitt, *Racism Accusations Rise During NY Bail Reform Debate*, WAMC NE. PUB. RADIO (Feb. 4, 2020, 6:37 PM), https://www.wamc.org/new-york-news/2020-02-04/racism-accusations-rise-during-ny-bail-reform-debate.

288. Andrew Denney & Bruce Golding, *NYC Judge Slams Bail Reform as 'Significant Threat to Public Safety,'* N.Y. POST (Feb. 6, 2020, 7:46 PM), https://nypost.com/2020/02/06/nyc-judge-slams-bail-reform-as-significant-threat-to-public-safety/.

289. *See* Petrigh, *supra* note 7, at 135–37; *see also* Zamir Ben-Dan, *When True Colors Come Out: Pretrial Reforms, Judicial Bias, and the Danger of Increased Discretion*, 64 HOW. L.J. 83, 111–13 (2020). Judges also resisted the reforms in other ways, including by setting partially secured bond higher than cash bail, thus undermining a potential avenue for defendants to seek release and contravening the intentions of the bail reform. Petrigh, *supra* note 7, at 137.

290. *See id.* at 109–11 (describing critics as lambasting the reform for limiting judicial discretion and thus endangering public safety).

291. N.Y. CRIM. PROC. LAW § 530.60(2)(b)(iv) (McKinney 2022).

292. RAHMAN, *supra* note 177, at 6–8. In the end, even though the progressives succeeded in excluding dangerousness from the bail-reform bill, the compromise two-tiered structure that resulted—with some offenses

In a sense, bail reform in New York opened up a Pandora's box, as critics of bail reform continued to rally around the goal of eliminating New York's unique status as the only state to not consider dangerousness and called for reforms to the reforms.[293] Rather than continue a *sub rosa* practice, the argument went, why not bring it out into the open? And why not join other states whose bail-reform efforts had similarly focused on replacing cash bail with detention based on dangerousness?[294] Tellingly, the connection between bail and dangerousness was so taken for granted—even after bail reform sought to correct the overuse of bail in this manner—that when courts sought to reopen after the first wave of the COVID-19 pandemic, the Office of Court Administration listed the inability to review custody orders as one of the reasons that keeping courts closed led to "mounting concern for public safety."[295] This suggests a view that the inability to review custody orders was itself dangerous to the public—which implies a legally impermissible connection between bail and dangerousness.

Ultimately, regardless of whether court-system actors such as judges and court administrators personally viewed dangerousness as relevant to bail, the political pressure to consider it relevant was undeniable. The Bail Directive was issued amid this politically-charged environment. Many critics, both within the court system and outside it, labeled the bail reform dangerous and called for a new reform

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qualifying for bail and others not qualifying—arguably reinforced the fact that dangerousness mattered. Meanwhile, the fearmongering campaign to rollback bail reform continues to periodically gather steam and has succeeded in several revisions to the bail statute. The most recent legislation passed removed the language requiring judges to impose the "least restrictive" conditions necessary to assure the defendant's return to court. *See generally* Peter Sterne, *A (Not So) Brief Guide to New York's Bail Reform Evolution*, CITY & STATE (May 5, 2023), https://www.cityandstateny.com/policy/2023/05/not-so-brief-guide-new-yorks-bail-reform-evolution/385379/.

293. *See, e.g.*, *id.* (describing three waves of rollbacks to the 2019 reforms).

294. *See* Charles McKenna & John Koufos, *Legal Experts: Data Shows that New Jersey's Bail Reform Works*, NJ.COM (Sept. 19, 2022, 7:22 AM), https://www.nj.com/opinion/2022/09/legal-experts-data-shows-that-new-jerseys-bail-reform-works-opinion.html (critiquing New York and praising New Jersey for this difference).

295. Brief for Defendant at 4, Bronx Defs. v. Off. of Ct. Admin., 1:20-CV-5420 (ALC) (S.D.N.Y. 2020). In litigation over its reopening plans, OCA was sued by the Legal Aid Society and other defense organizations over whether its reopening plans complied with public safety due to the risk of COVID-19. *See generally id.* In its response, OCA argued that courts needed to be open to respond to "mounting concerns for public safety" and to review custody orders. *See id.* at 4. Interestingly, at the same time, courts were being criticized for reopening too slowly. Many commentators blamed extended court closures for increases in crime following the onset of the pandemic. *See* Michael Gartland, *DeBlasio and NYPD Shea Show United Front After Weeks of Distance*, NY DAILY NEWS (July 17, 2020, 8:44 PM), https://www.nydailynews.com/news/politics/ny-de-blasio-nypd-dermot-shea-violence-shootings-20200717-cgkxchajzjdkjlwou6xt3klgxm-story.html. This narrative was not unique to New York; in many other states, court actors and politicians blamed court closures for the post-COVID increase in crime. *See, e.g.*, Alec MacGillis, *The Cause of the Crime Wave Is Hiding in Plain Sight*, THE ATLANTIC (July 19, 2022), https://www.theatlantic.com/ideas/archive/2022/07/covid-court-closings-violent-crime-wave/670559/. MacGillis argues that court closures and trial backlogs caused a perception that there would be no consequences to violent crime. *Id.* Notably, his article also cites examples of how court closures led to much more severe consequences: defendants who were incarcerated pretrial spent longer incarcerated than they would have otherwise waiting for trial, and due process requirements were frequently "glossed over." *Id.*

to permit dangerousness to be explicitly considered.[296] Thus, although the Bail Directive did not mention public safety or dangerousness explicitly, the Directive permitted judges who were inclined to set bail on defendants they viewed as dangerous to do so without any "gap" where the defendant would be out of custody pending a hearing.

The Directive not only unlawfully permitted the detention of certain defendants pending their hearings, but also—where hearings were instead held in arraignment—enabled defendants to be detained earlier than the statute would have permitted otherwise, and in a context of weakened due-process protections.[297] Thus, the Directive preserved judges' discretion to act when they perceived the defendants before them to be dangerous.

Viewed from this perspective, the Directive became even more important when courts closed to all but the most essential operations (namely, arraignments) during the first wave of the COVID-19 pandemic. This meant that if bail-modification hearings were not held in arraignments, they could be adjourned to virtual court only, where the court could not assert physical jurisdiction over the defendant. Defense attorneys reported that when they raised objections to the Directive during this period, many judges responded by asking "how else" they could hold the hearing, indicating they were not necessarily disputing the validity of the attorneys' concerns but that they found the alternative of not being able to set bail at all to be unacceptable.[298]

Thus, despite the fact that the Directive nowhere explicitly refers to dangerousness or risk to safety, it is related to dangerousness both in terms of the political context in which it arose and the impact it had on judges' ability to set bail. And the Directive must be viewed as not simply connected to a desire to conserve court resources, but also in the context of ongoing concerns about the dangerousness of multiple-arrest criminal defendants and the corresponding need to preserve judges' ability to detain them through bail. Through the Directive, the courteaucracy thus both implicitly communicated that rearrested defendants with open felony cases were a target of concern—in other words, potentially dangerous—and how they should be managed—through detention and bail.

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296. *See, e.g.*, McKenna & Koufos, *supra* note 294. Even before the bail-reform debate, of course, bail decisions have always been controversial. Criminal court judges are routinely excoriated in the press when they release defendants who later go on to re-offend, particularly for violent crimes (and conversely, are almost never excoriated for setting bail too high). Indeed, the backlash judges receive from the press and certain segments of the community undoubtedly contributes to the support many judges in New York express for permitting dangerousness to be considered. *See* W. David Ball, *The Peter Parker Problem*, 95 N.Y.U. L. REV. 879, 894 (2020) (describing how judges fear failing to detain someone who goes on to commit a violent crime far more than wrongfully detaining someone); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494 (2018) (describing how "elected judges suffer much greater political costs when released defendants commit high-profile crimes than when they fail to show up for court").

297. *See supra* Section II.C.1.

298. This is based on a sampling of conversations I have had with various defense attorneys who worked in New York City criminal courts during the summer of 2020.

B. The Crawford *Memorandum*

Like the Bail Directive, the *Crawford* Memorandum explicitly referenced the need to conserve court resources. It stated that "full testimonial hearing[s]" regarding orders of protection would have "significant negative operational impact." [299] Considering the number of cases that involved orders of protection, and the number of orders of protection that potentially impaired a property or liberty interest, the *Crawford* decision clearly presented a "threat" to court dockets.

However, unlike the Bail Directive, which did not mention public safety on its face, the *Crawford* Memorandum *explicitly* references the safety of domestic violence complainants. The Memorandum states:

> Although a more robust record is advisable where the defendant pleads a significant personal/property interest, courts should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing due to the significant negative operational impact *and real safety (physical and psychological) concerns for most domestic violence complainants.*[300]

The language in the Memorandum is stark: it instructs judges to "resist" testimonial hearings unless "absolutely necessary," portraying such hearings as a threat to the physical and psychological safety of domestic violence complainants.[301] The message to judges, in other words, is, "do not conduct testimonial hearings, otherwise you put victims at risk."[302] In other words, not only are defendants potentially dangerous, but their dangerousness justifies erring on the side of interpreting *Crawford* to require a lower level of protection for them.

Moreover, the *Crawford* Memorandum, like the Bail Directive, must be viewed in the context of the inclination judges already have to utilize orders of protection to monitor criminal defendants they perceive as dangerous. Significantly, Criminal Procedure Law § 530.12 requires judges to conduct an analysis to determine whether a "stay away" temporary order of protection is appropriate, indicating that the intent of the legislature was never that such orders of protection be issued in every case with a complainant.[303] However, as in the bail context, judges already face enormous pressure to err on the side of issuing orders of protection. Failure to issue an order could land judges on the front page of the newspaper if the defendant later

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299. *See* Mellins, *supra* note 12.

300. *See id.* (emphasis added).

301. *See id.*

302. Interpreting *Crawford* to require the prosecution to prove their burden through live testimony does not necessarily mean the prosecution must call the complainant as a witness for the hearing. The prosecutor may also choose to call a police officer as a witness.

303. *See* N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 2020) (stating that courts should assess whether an order of protection is "likely to achieve its purpose" in the absence of being a full stay away order, as well as any "conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons").

commits an act of violence against the complainant.[304] Thus, in practice, orders of protection are issued in practically every case with a complainant in New York, to the point that it is rare and noticeable whenever a judge fails to issue a full order of protection.[305]

An order of protection is also more than a tool of protection for the protected party.[306] Orders of protection permit prosecutors and judges to utilize the penal techniques of procedural hassle and performance. An order of protection gives "the prosecution and judge an opportunity to observe if the defendant respects the order, or at least if the complainant decides to notify the authorities of a violation."[307] It is thus "a method of testing and assessing the defendant's capacity to follow directives and his or her capacity for harmful behavior."[308]

In this context, judges who were inclined to err on the side of issuing orders of protection—even in cases where the defendant had a significant liberty or property interest at stake—could have seen *Crawford* as a threat to their discretion to issue orders of protection. Such judges would have preferred the status quo of enforcing a much lighter burden on the prosecution.

For these judges, the *Crawford* Memorandum reinforced their discretion to continue with the status quo. In other words, the *Crawford* Memorandum effectively insulated judges from *Crawford*'s restrictions, enabling them to continue exerting a level of social control not necessarily warranted by the order-of-protection statute but viewed as justifiable on the basis of defendants' dangerousness.

Whereas the Bail Directive enabled judges to exert social control by protecting their ability to detain rearrested defendants, the *Crawford* Memorandum enabled judges to exert social control by protecting their ability to blanket issue orders of protection as a form of monitoring. Again, the courteaucracy was permitted to define who was dangerous in the broadest possible scope: anyone who was accused of committing a crime against a civilian.

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304. *See* Isabelle Leipziger, *The Collateral Effects of Criminal Orders of Protection on Parent Defendants in Cases of Intimate Partner Violence*, 91 FORDHAM L. REV. 273, 294 (2022) ("When evaluating whether to issue an order of protection, criminal court judges consider the practical and political ramifications of not granting [an order of protection]. For many judges, declining to issue an order of protection is perceived as extremely risky."); KOHLER-HAUSMANN, *supra* note 23, at 209 ("Prosecutors and judges always reference the fact that they would not want to be on record failing to issue an order of protection least [sic] the defendant ends up committing a serious act of violence.").

305. *See* KOHLER-HAUSMANN, *supra* note 23, at 211 (quoting a criminal court judge as stating, "Every once and a while, you know, you'll get a defense attorney that—for whatever reason—they just truly believe this complaining witness or the defendant, and will push it to try to get a modification. I would say most of them don't try, because it is so rare that there's a modification.").

306. *Id.*

307. *Id.*

308. *Id.* at 211–12.

C. The Gun Initiative

The Gun Initiative is explicitly connected to both concerns about resources and concerns about dangerousness. It is also an example of how court administrative actions can reflect a narrative that resources and dangerousness are interconnected.

The Gun Initiative's official aim is to reduce what it describes as a pandemic-related backlog of felony gun-possession cases, and it is thus explicitly concerned with managing court resources.[309] However, it was also explicitly framed as a "response to the spike in shootings and gun arrests in New York City."[310] Specifically, the Initiative aims to respond to this threat to public safety by ensuring that "swift action is taken on all new [gun-possession] arrests"[311] by (1) allocating additional resources, including grand juries and judges, to gun cases; and (2) fast-tracking gun-possession cases and closely monitoring them at every stage.[312] Thus, the implication is that swift processing of gun-possession cases will protect the public by leading to swifter detention of defendants, because—it is assumed—the processing of gun-possession cases will undoubtedly lead to the conviction and incarceration of defendants. This entails the presumption that all of the defendants in the backlog merit a level of social control.

Unlike the Bail Directive or the *Crawford* Memorandum, which were examples of administrative actions that protected status-quo levels of detention and monitoring of criminal defendants, the Gun Initiative seeks to change the status quo by *increasing* levels of detention and monitoring. Specifically, the Gun Initiative's fast-tracking necessitates frequent court dates—as often as every two to three weeks[313]—which give judges increased opportunities to monitor criminal defendants. In other words, just as court actors utilize orders of protection to assess the capacity of defendants to follow directives, judges in gun-possession cases can utilize short adjournments to monitor the defendant's capacity to follow directives—in this case, the directive to timely attend court at frequent intervals.

In fact, defense attorneys representing defendants in gun-possession cases report judges stating as much to defendants: one defense attorney reported a judge stating to her client that the purpose of the short adjournment was to make sure that he "remembered that the court had jurisdiction over him."[314] In this sense, the Gun Initiative directly contributes to the "procedural hassle" Kohler-Hausmann identified as a penal technique in the managerial model of justice—the "collection of burdensome experiences and costs attendant to arrest and case processing."[315]

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309. Press Release, Court System to Expedite Resolution of Gun Cases in NYC (Aug. 10, 2021) (on file with author).

310. *Id.*

311. *Id.*

312. *Id.*

313. Normally, criminal cases with defendants who are not incarcerated are adjourned for four to six weeks.

314. This is based on a conversation with a defense attorney.

315. *See* KOHLER-HAUSMANN, *supra* note 23, at 183.

As Kohler-Hausmann has argued, these costs enable court actors to assess a defendant's governability based on how they respond to the hassle. For instance, using the example given in the preceding paragraph, if the defendant had begun to miss court, the judge would be able to conclude that the defendant was ungovernable—that he was forgetting, or even willfully resisting, the court's jurisdiction. This would inform the judge that the defendant merited greater penal intervention, whether a harsher plea offer or even the reconsideration of his bail status.

Even without the Gun Initiative, of course, a judge could choose to set a short date for a defendant to monitor the defendant's ability to comply with the court's orders. Or a judge could deny an overburdened defense counsel's request for an adjournment to effectively prepare for trial to increase the chances that the defendant, whom the court perceives as "dangerous," will accept a plea. But, in the case of the Gun Initiative, such actions are effectively ordered across the board in the name of eradicating backlogs and protecting public safety. The result is coordinated, systemic "procedural hassle."[316]

D. The Discovery Order

Out of the four administrative actions, the Discovery Order is unique in that it does not target a group of defendants perceived to be dangerous, such as repeat-arrest defendants (the Bail Directive), defendants accused of harming civilians (the *Crawford* Memorandum), or defendants accused of gun possession (the Gun Initiative). However, the Discovery Order also epitomizes the way concerns about resources and dangerousness are intertwined.

As discussed above, discovery reform permitted a defendant to move to dismiss their case pursuant to their right to a speedy trial if the prosecution did not timely provide discovery. The immediate result of this reform was that many cases were dismissed through this avenue, regardless of the severity of the crime or the perceived dangerousness of the defendant. The Discovery Order effectively put up a roadblock to these types of dismissals in the name of "normaliz[ing] court operations" and "eradicat[ing] case backlogs."[317] But frustrating the ability of the defense to move forward with viable motions to dismiss when discovery is not timely provided (as intended in the statute) actually *increases* backlogs. Thus, this logic does not make sense unless one understands that conserving resources at the expense of the prosecution, and potentially permitting "dangerous" defendants to have their cases dismissed, is implicitly unacceptable to the courteaucracy. Instead, the Discovery Order *spends* additional court resources to keep cases open that might otherwise be dismissed. And it co-opts *defense* attorney resources in the process, ordering defense attorneys to essentially do prosecutors' jobs for them by spotting missing discovery. Yet, by keeping cases open that might otherwise be dismissed, the Discovery Order, like the Gun Initiative, places a thumb on the scale

316. *Id.* at 80.

317. Joseph, *supra* note 280.

in terms of incentivizing higher rates of plea deals. In that sense, it "normalizes court operations" in the only way that is acceptable to the courteaucracy, by increasing the detention and control of criminal defendants.

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It is already acknowledged that individual court actors such as prosecutors and judges utilize the tools of the court system—bail, orders of protection, adjournments, and discovery—not simply for their "textbook" purposes but also to sort, test, monitor, and sanction defendants perceived to be "ungovernable" and "dangerous."

However, as the above analysis has shown, these decisions to utilize the tools of the court system for the goal of social control are not made in isolation, but in the context of administrative actions. These administrative actions facilitate and protect those decisions and, in some cases, even order them.

The Bail Directive facilitates and protects the use of bail as a sanction for "ungovernable" and "dangerous" defendants. The *Crawford* Memorandum protects the use of blanket orders of protection as a means of monitoring "dangerous" defendants. The Gun Initiative orders court actors to impose procedural hassle through frequent court dates. As an administrative action that officially aims to protect public safety by eradicating backlogs, the Gun Initiative also reinforces the presumption that all criminal cases will end in some form of social control. Finally, the Discovery Order prevents defendants from having their cases dismissed regardless of the severity of their charges. Because it actually expends resources to do so, the Order asserts the primacy of the need for social control, even over resource conservation.

IV. CONTESTING THE SOCIAL-CONTROL FRAMEWORK

Administrative decision-making is an underrecognized source of power in criminal court. Whereas a single judge may influence only the outcome of the cases before them, administrative rules have the power to affect the functioning of the entire system. Administrative rules and actions also indirectly communicate the priorities of the court system's administrators to criminal-court judges who rely on those same administrators for assignment and re-appointment.[318] Grappling with administrative decision-making adds texture to our traditional understanding of how the courtroom workgroup operates—exposing new avenues of constraint that affect the way judges exercise their discretion. Thus, it also matters a great deal what principles animate and underlie administrative decision-making in criminal court.

This case study has shown how administrative actions in New York criminal courts either directly ordered judges to engage in greater levels of detention and monitoring of criminal defendants or created the conditions for judges to exercise

318. *See supra* notes 133–34 & accompanying text.

wider discretion to do so. Despite the ways these actions conflict with statutes, higher-court decisions, and the Constitution, the actions were subject to minimal oversight and transparency, and attempts to challenge them have failed. This case study also tells a story about the way court administrative actions have become the mechanism through which a criminal court both responds to and reinforces concerns about criminal defendants perceived as dangerous—through facilitating, protecting, and ordering higher levels of social control for those defendants.

I call this guiding principle of court administrative action the "social-control framework" in order to distinguish it from other frameworks that could potentially animate decision-making. The social-control framework produces administrative rules and actions that preserve and facilitate the use of judicial power to detain and surveil. This framework also views resource concerns, including case backlogs, as intimately connected to concerns about dangerousness.

Imagine, as a thought experiment, if instead of a Gun Initiative, court administrators created a *Crawford* Initiative that assigned additional judges to specialized *Crawford* hearing courtrooms. This would not be a far-fetched response to a higher-court opinion that rebuked the status quo of judges "rubber-stamping" prosecutor requests and held that hearings were necessary to protect important liberty and property interests. Or imagine a Bail Modification Initiative where court administrators poured additional resources into creating bail-modification hearing courtrooms that were adequately staffed to permit full-fledged hearings rather than rushed affairs in arraignments. These types of initiatives would reflect court administrators proceeding under a "procedural-rights" framework, rather than a social-control framework.

A social-control framework is not coextensive with a "resource framework," because a true resource framework would prioritize docket control above all other concerns. A true resource framework would welcome and even fast-track defense motions to dismiss cases due to discovery violations because such motions would help eradicate backlogs. Instead, the social-control framework embraces the Discovery Order, which reduces the chances of such motions succeeding.

Ultimately, we should be troubled by the social-control framework not only because it facilitates levels of detention and monitoring of criminal defendants that conflict with statutes, higher-court decisions, and defendants' constitutional rights, but also because of the way the framework impacts judges and criminal law itself. Administrative actions threaten to usurp the judicial function by shaping how judges interpret new statutes and court decisions, thus influencing the development of precedent. Yet these actions are not subject to any public input or judicial review. In other words, even if one believes that court administrative actors should be able to pursue measures that ostensibly protect public safety, the lack of transparency and accountability for those measures is deeply concerning.

The fact that the social control framework is oriented around managing categories of "dangerous" defendants is also troubling. Concerns about dangerousness already infuse all sorts of criminal justice decision-making—sometimes explicitly,

for example, where a bail statute (other than New York's) may call for a consideration of dangerousness. Concerns about dangerousness also infuse hundreds of discretionary decisions: what plea offers get made, what policies are set by a prosecutors' office regarding which crimes to prosecute, and who has access to treatment court.

And yet, even when dangerousness is an explicit factor in legal decision-making, it is fraught with problems. Black defendants are more likely to be detained pretrial[319] because of the way racial bias infects judicial assessments of dangerousness. Indeed, the very fact that the vast majority of bail statutes now permit dangerousness to be considered can be traced to the second wave of bail reform. As Sean Hill has argued, the transformation of the role of bail—from a means to ensure the defendant's return to court in the 1960s to a means of detaining defendants who pose a risk to public safety by the 1980s—both coincided with and facilitated the war on drugs and deepening racial disparities in the criminal legal system.[320]

Thus, criminal justice decision-making regarding dangerousness is inherently suspect in any context. It is even more suspect in the context of administrative rules, which do not explicitly refer to dangerousness and exist "off the record" or, at least, beyond the "appealable" record.

Even more concerningly, the social-control framework is flexible enough to respond directly to political and media pressures. So, as concern about crime increases, as it did in 2021 following the 2020 spike in crime,[321] court administrators can respond with new initiatives that target the group of defendants in the media spotlight with higher levels of social control.

Because of the lack of accountability and transparency around these initiatives, defendants who are perceived to be dangerous, and thus subject to greater levels of detention and monitoring, can only "fight back" through the assertion of procedural rights—such as bail modification hearings or *Crawford* hearings. But when the right to a hearing has been watered down by a court administrative rule that cannot be appealed or even spoken about on the record, what options are left?

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319. NICK PETERSEN & MARISA OMORI, ACLU FLORIDA GREATER MIAMI, UNEQUAL TREATMENT: RACIAL AND ETHNIC DISPARITIES IN MIAMI-DADE CRIMINAL JUSTICE 21–22 (2018), https://www.aclufl.org/sites/default/files/6440miamidadedisparities20180715spreads.pdf.

320. Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 931–38 (2021) (applying a critical race theory lens to risk assessment instruments in the bail context). Hill also notes how the Supreme Court paved the way for dangerousness provisions to be cemented in jurisdictions across the country with *U.S. v. Salerno*, holding that, subject to certain procedural requirements being met, pretrial detention is "regulatory, not penal" and fulfills the government's legitimate interest in protecting public safety. *Id.* at 937–38, 938 n.109.

321. Megan Brenan, *Crime Fears Rebound in U.S. After Lull During 2020 Lockdowns*, GALLUP NEWS (Nov. 10, 2021), https://news.gallup.com/poll/357116/crime-fears-rebound-lull-during-2020-lockdowns.aspx#:~:text=After%20experiencing%20a%20general%20downturn,did%20so%20two%20years%20ago. A study in California found that the COVID-19 pandemic was itself associated with individuals' increased fear of crime. *See* Nicole Kravitz-Wirtz, Amanda Aubel, Julia Schleimer, Rocco Pallin, & Garen Wintemute, *Public Concern About Violence, Firearms, and the COVID-19 Pandemic in California*, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774531.

Given the prevailing politics of criminal justice, there will continue to be pressure on criminal-court actors to adhere to the social-control framework. But the status quo is not inevitable. Greater awareness of the role of court administrative actions in shaping the outcomes of criminal cases could generate changes that rein in the discretion of court administrators. This Part will conclude by discussing a few potential changes.

Already, the New York Civil Liberties Union has shone a spotlight on confidential memos with its Freedom of Information Law request. At a bare minimum, memoranda that advise judges on key court decisions should be accessible to the public. And attorneys should be permitted to discuss the content of these memoranda on the record. But, even more significantly, such memoranda should refrain from advising judges on how to interpret key court decisions because such advice threatens to usurp the judicial function.

Directives should be subject to a formalized process of review by stakeholders and the public before they go into effect. Unlike confidential memoranda, defense attorneys are currently permitted to object to directives on the record. However, for the reasons discussed in this Article, judges are incentivized to reject arguments against the validity of directives in individual cases where the eligibility of a rearrested defendant for bail is at stake.[322] A formalized process of review for directives would hold the court system accountable to the public for how its directives adhere to both the intent of elected legislators and the due process norms courts are obligated to protect.

Of course, it is possible that such changes could become "window dressing" for court administrative actions and serve to ultimately further entrench the legitimacy of the social-control framework.[323] Thus, while establishing processes of review for administrative actions is undoubtedly important in terms of reining in court administrative power, it is even more important for advocates to pull back the curtain on administrative power to shift the public understanding of how criminal courts operate.

This, in turn, calls for more case studies and a deeper understanding of the data-driven case management regime that has increasingly shaped court administration over the past several decades.[324]

CONCLUSION

Court administrators—typically overlooked in a literature that focuses on the triumvirate of the judge, prosecutor, and defense attorney—wield enormous discretionary power with minimal oversight. This Article has examined court

322. *See supra* Section III.A.

323. *See, e.g.*, Akbar, *supra* note 82, at 1814 ("[T]he danger of the conventional reform agenda is not simply that it advances ineffectual solutions to police violence. It invites investments in police and, therefore, builds the power and legitimacy of police, including their discretion for violence.").

324. *See* King & Wright, *supra* note 17, at 361.

administrators in one particular jurisdiction during a particularly tumultuous period involving numerous statutory reforms and a global pandemic. Still, to the extent that this sampling may not have been representative of the role of court administrators in "quieter" times, it is still revealing that court administrators in New York responded to moments of crisis and attempts at reform by increasing courts' ability to detain and monitor criminal defendants.

Since 2020, bail reform in New York has been amended three separate times, with each amendment restoring discretion to judges, such that the current state of the law is a far cry from the original enactment.[325] Discovery reform has also been amended to reduce the obligations for prosecutors.[326] The reforms to bail reform have now carved out so many exceptions for otherwise bail-ineligible offenses that the exception that was the subject of the Bail Directive is no longer the only option for judges inclined to set bail. And yet, the Directive remains in place, both under the radar of, and squarely in the center of, the political fight that surrounds it.

325. *See* Sterne, *supra* note 292.

326. *See* Chris Gelardi, *How New York State Just Rolled Back Criminal Justice Reforms*, N.Y. FOCUS (Apr. 9, 2022), https://nysfocus.com/2022/04/09/hochul-criminal-justice-budget-roundup.