# The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems

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**ABSTRACT**

Specialisation of labour has long been regarded as a central mechanism for enhancing the productivity of workers and the economic prosperity of nations. But do these advantages accrue in the judicial resolution of disputes, or should judges be generalists administering the law as an integrated body of rules and principles? Viewing the evolution of courts across the common law world, the rise of judicial specialisation has been relentless—suggesting that it delivers significant benefits. It extends far beyond specialisation by legal subject matter and it is achieved through many modalities beyond the establishment of new courts. However, to understand the proper role of specialisation, it is necessary to ask what impact it has on core values of the judicial system, namely, cost-effectiveness, just outcomes, impartiality, public trust, access to justice, and procedural fairness. This essay argues that judicial specialisation often has competing impacts on these values but that careful institutional design, especially through hybrid specialisation, can deliver significant benefits while minimising costs. Modern judicial systems need to be attentive to the diverse effects of specialisation so they can adapt to the complexities of contemporary dispute resolution.

* This essay is based on a public lecture delivered at the UCL Faculty of Laws, London, in March 2022, while I was Distinguished Visiting Professor for 2021-22. I am grateful for the Faculty's support, and to Gabrielle Appleby, the Hon. Robert French AC, Alex Mills, Paul Mitchell, Peter Renehan, Sharyn Roach Anleu, and the anonymous referees for their incisive comments on a draft.

# 1 Introduction

Judging is a conservative process whose institutions and practices hark back centuries. And yet, within a few generations, there have been remarkable changes to the courts in the common law world and to the personnel who staff them.[1] One of these changes is the relentless rise of judicial specialisation. In this essay, I re-examine judicial specialisation, which is far more prevalent than commonly thought, and consider its implications for core values of the judicial system. Specialisation supports core values in some ways and undermines them in others, suggesting the need for a critical evaluation of arrangements that affect the division of labour in adjudicating legal disputes.

## A. Common Law Heritage

Prior to the great court reforms of the late 19th century, the judicial system of England and Wales (hereafter 'England') comprised a vast tangle of specialised courts, numbering in their hundreds. The sharp jurisdictional lines among the courts produced great injustices for litigants, which were criticised by reformers like Jeremy Bentham and pilloried by writers like Charles Dickens.[2] Following a report of the Judicature Commission, the *Supreme Court of Judicature Act 1873* (Eng) took a major step towards centralising the administration of justice by consolidating the superior courts into a High Court, exercising original jurisdiction, and a Court of Appeal, exercising appellate jurisdiction.[3] These reforms did not wholly abandon the specialisation evident in the prior work of the judges, but they did significantly simplify its exercise.[4] The High Court was established with five, but soon after three, internal divisions, and the Court of Appeal was constituted initially without any internal divisions.

Today, these senior courts are again supplemented by a wide range of specialised units of adjudication. The Court of Appeal now has formal civil and criminal divisions,[5] but the real blossoming has occurred under the umbrella of the High Court, where there is an Administrative Court, Admiralty Court, Commercial Court, Circuit Commercial Courts, Intellectual Property Enterprise Court, Patents Court, Planning Court, and Technology and Construction Court.[6] In the lower tiers of the judicial hierarchy there is also a Youth Court, a Family Court, and a Court of Protection. And this says nothing of specialised

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1 Michael Kirby, 'Australia's Courts: A Quarter Century of Change' (1998) 14 Queensland University of Technology Law Journal 1; Murray Gleeson, 'A Changing Judiciary' (2001) 75 Australian Law Journal 547; Lord Thomas, 'Reflections on the Changing Position of the Judiciary' in Shimon Shetreet, Hiram Chodosh and Helland Eric (eds), *Challenged Justice: In Pursuit of Judicial Independence* (Brill 2021).

2 John Gregory, 'The Centenary of the Judicature Act' (1973) 31 University of Toronto Faculty of Law Review 103, 103-4.

3 AT Carter, *A History of the English Courts* (6th edn, Butterworths & Co 1935) 109-114.

4 Albert Kales, 'The English Judicature Acts' (1921) 4 Journal of the American Judicature Society 133, 135.

5 Senior Courts Act 1981 (UK) s 3.

6 ibid ss 5-7; United Kingdom Judicial Office, 'High Court' <www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/> accessed 4 July 2022.

lists that exist within courts, or the plethora of specialised chambers within the tribunal system. True enough, many courts of yore are gone, yet in terms of the trend towards specialisation it seems that everything old is new again.

England is not alone in reviving judicial specialisation: it can be seen in the legal systems of other common law comparators. Throughout this essay I will also use examples from Australia, Canada, New Zealand, and the United States to provide corroborating evidence of a pervasive legal phenomenon.[7] Judicial specialisation in those jurisdictions includes courts specific to the fields of commerce (intellectual property courts, tax courts, bankruptcy courts, consumer claims courts, environmental courts, and labour courts); interpersonal relations (family courts, and domestic violence courts); vulnerable persons (children's courts, youth courts, mental health courts, homeless courts, and Indigenous courts); and crime (drug courts). Similar trends have also been observed in the states comprising the Council of Europe, which add immigration courts, military courts, land courts, wills and inheritance courts, and public finance courts to the mix.[8] In one field alone—environmental law—it is estimated that there are over 1,200 environmental courts and tribunals across 44 countries, with the majority established only in the past decade.[9]

## B. Generalism versus Specialism in Adjudication

The splintering of occupations is not unique to law, and many scholars have pondered the economic, social, and cultural forces that have driven these changes.[10] Some observers see the division of labour in positive terms. Adam Smith (an economist), writing as the Industrial Revolution got underway, saw it as a constructive force for efficient manufacturing, underpinning the wealth of nations—whether this was the production of steel pins in Smith's England, or motor cars in Henry Ford's American assembly lines 135 years later.[11] Émile Durkheim (a sociologist) regarded it positively as a means of forging social solidarity in the context of social differentiation and increased heterogeneity that accompanied industrialisation and population growth. By contrast, Karl Marx (a philosopher) saw the specialisation of labour in the capitalist system in negative terms, driving a greater wedge between the returns to labour and the returns to capital. It is that negative vision that inspired satires of assembly-line industrialisation in

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7 The patterns of specialisation are not identical across countries, although there has been a degree of cross-fertilisation, as with Indigenous courts, small claims courts, and problem-solving courts (Part 2).

8 Consultative Council of European Judges, *Opinion on the Specialisation of Judges, No 15* (Council of Europe, 2012) 11.

9 George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (United Nations Environment Programme, 2016) 1.

10 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988); Miriam Glucksmann, 'Formations, Connections and Divisions of Labour' (2009) 43 Sociology 878.

11 Henry Ford is often credited with inventing the moving assembly line in the early 20th century, but the rise of industrial mass production was a process of gradual technological diffusion across several industries, including guns, sewing machines, bicycles, and the 'disassembly lines' of meat-packing: David Hounshell, *From the American System to Mass Production, 1800-1932: the Development of Manufacturing Technology In the United States* (Johns Hopkins University Press 1985).

early cinema, such as Fritz Lang's *Metropolis* (1927) and Charlie Chaplin's *Modern Times* (1936).

This difference of opinion is reflected in contemporary discussions about specialisation in adjudication. Some commentators believe that the preferred state of judging is one that gives primacy to the wholeness of law and to understanding it as an integrated system of principles and rules. In so far as this reflects a belief in a set of trans-substantive values, it can be called an ethic of *generalism*. This view is common among appellate judges, who have praised the judiciary as 'the last generalists left in professional life',[12] and decried excessive specialisation as a threat to the strength and independence of the judiciary[13] and a 'sure fire procedure for the sterilisation of large areas of the mind'.[14] This approach is also evident in the advice of the Consultative Council of European Judges, which has proposed that there should be a presumption in favour of generalisation: 'Specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice.'[15]

The ethic of generalism has special significance when one considers the interconnectedness of many areas of law. In particular, the fact that 'the administration of … justice has been engulfed by a relentless tidal wave of legislation'[16] makes the general principles of statutory interpretation critical to the entire corpus of law. If it is accepted that 'the construction of statutes is now, perhaps, the single most important aspect of legal and judicial work',[17] uniformity of approach across all fields of law is a desideratum and is surely aided by judges exercising broad-based jurisdiction.

On the other side of the ledger are those who believe in the value of the division of labour among judges, which can be called an ethic of *specialism*. Much of the scholarship in this vein is promotional, extolling the virtues of specialised adjudication in particular fields and encouraging the creation of specialised courts.[18] Adherents point to the inevitability of specialisation as a product of the complexity of modern life and the growing regulatory role of the state. The growth in the volume and intricacy of statute law and case law ('hyperlexis') is seen as a ubiquitous phenomenon.[19] The argument is made that it is

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12 Howard Bashman, '20 Questions for Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit' <https://howappealing.abovethelaw.com/20q/2004_01_01_20q-appellateblog_archive/> accessed 4 July 2022.

13 Sir Harry Gibbs, 'The State of the Australian Judicature' (1981) 55 Australian Law Journal 677, 683.

14 Jeremy Curthoys, 'In Conversation with Justice Robert French' (2002) 50 Intellectual Property Forum 6, 7.

15 Consultative Council of European Judges (n 8) 4, 11.

16 *R v The Governor of HMP Drake Hall* [2010] UKSC 30, [80].

17 Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 Statute Law Review 95, 96.

18 Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing 2020) 4.

19 Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Review 4.

impossible for legal practitioners to properly advise their clients, or for judges to properly adjudicate disputes, without a degree of specialisation that affords command over all this complexity.[20] Lord Bingham, when he was a judge of the English High Court, once adverted to the challenges of fact-finding by judges at the frontiers of technology. He noted that judges might easily be confronted, over their careers, with highly technical problems in chemical engineering, metallurgy, soil mechanics, brain surgery, naval architecture, computer technology, nuclear radiation, oil refining, navigation, mining engineering, combustion, and international currency markets, and he remarked:

> 'No single man, however sophisticated his education or eclectic his interests or broad his experience, could hope to be familiar with all these fields, and as society becomes more complex and science more specialised, so the role of the amateur is diminished'.[21]

In sum, Leon Battista Alberti's Renaissance ideal of a 'universal man' who 'can do all things if he will' may have fitted the state of knowledge in 15th century Europe, but for those living in the 21st century, the huge 'burden of knowledge' demands division of labour.[22] It is an argument that seems broadly accepted in many professions—such as medicine, dentistry, and engineering—where specialties and sub-specialties are practised without demur.

In assessing the tension between generalism and specialism, it is informative to reflect on what judges themselves think about the matter, and here the survey of attitudes of United Kingdom judges offers valuable insights. In the 2020 survey, 1,891 English judges and United Kingdom tribunal members responded to three questions that bear on judicial specialisation.[23] Overall, 42% of respondents thought it was important to have opportunities to sit in other jurisdictions, while an equal percentage thought this was unimportant. Some 77% of respondents were satisfied with the variety of their work, while 23% were dissatisfied. And 52% were satisfied with their opportunities for cross-deployment, while 48% were dissatisfied. However, the responses varied significantly with the type of judicial position. Court of Appeal judges, who probably have the most diverse workloads of those surveyed, rated the importance of sitting in other jurisdictions the lowest (27% versus 42%), were the most satisfied with the variety of their work (95% versus 77%), and were the most satisfied with their opportunities for cross deployment (83% versus 52%). These statistics suggests that diversity of judicial work is an important aspect of job satisfaction for many judges, but that there are many for whom specialised adjudication is quite acceptable, if not desirable.

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20 Diane Wood, 'Judge of All Trades: Further Thoughts on Specialised Courts' (2015) 99 Judicature 11, 11.

21 Tom Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' (1985) 38 Current Legal Problems 1, 20.

22 Benjamin Jones, 'The Burden of Knowledge and the "Death of the Renaissance Man": Is Innovation Getting Harder?' (2009) 76 Review of Economic Studies 283.

23 Cheryl Thomas, *2020 UK Judicial Attitude Survey* (UCL Judicial Institute 2021) 46, 53, 56.

## C. Purpose and Structure of this Article

Whatever one's political or philosophical bent, judicial specialisation is a present reality and seems certain to persist in the foreseeable future. But acknowledging specialisation's presence does not imply that we should refrain from critical re-examination of the phenomenon. We need to interrogate the nature, extent, and limits of judicial specialisation to ensure that it fortifies, rather than weakens, the core values underpinning the judicial system. In particular, the expansion of judicial specialisation through incremental changes, each seemingly small and unremarkable, needs to be questioned lest it leads to unsatisfactory outcomes in the long run.

Accordingly, the central contributions of this essay are to: (a) develop a taxonomy for understanding the different types of judicial specialisation; (b) outline a conceptual framework for evaluating those specialisations, and (c) suggest a number of optimal models for judicial specialisation. I argue that judicial specialisation can be justified in many circumstances, but it is not an unalloyed good. The best institutional practices are those that reap the advantages of specialisation while avoiding its most significant costs.

The analysis proceeds as follows. Part 2 develops a taxonomy of judicial specialisation, which is a freighted term, often discussed in simplistic terms. Typically, the term is used to signify a focus on specific legal subject matter, but this is to take too narrow a view of the topic. Material specialisation is supplemented by other dimensions that include personal, scalar, functional, and hierarchical specialisation. With a broader perspective, it becomes apparent that specialisation is a ubiquitous phenomenon in modern judicial systems.

Part 3 examines the modalities through which judicial specialisation is achieved. Most scholarship focusses on structural modes such as the establishment of new courts or the creation of new divisions within existing courts. Again, this view is too narrow and understates the role of specialisation in judicial systems. Whatever the court structures, specialisation in adjudication can also be achieved through the education, training and experience of judges; through the administrative practices by which judges are allocated to cases; and through jurisdictional arrangements by which work is narrowed or concentrated in particular courts, or by which courts compete with each other for business.

Having demonstrated that specialisation is a pervasive feature of common law judicial systems, in Part 4 I turn to examine how specialisation impacts on the core values of those systems. Although academic literature abounds with lists of the pros and cons of judicial specialisation, analysing the effects of specialisation through the lens of core values offers a more meaningful way to reflect on these issues. The essay identifies six core values, namely, cost-effectiveness, just outcomes, impartiality, public trust in the administration of justice, access to justice, and procedural fairness. With these in mind, it is apparent that specialisation affects most but not all core values; some are more significantly impacted

than others; and some are affected both positively and negatively. Specialisation thus produces trade-offs both among and within core values.

Part 5 examines ways in which judicial specialisation can be optimally structured to support the core values of the judicial system. Specifically, I discuss the advantages of establishing new divisions or panels within existing courts rather that new stand-alone courts; giving specialist judges concurrent or consecutive roles in non-specialist areas; creating specialisation at the trial level, subject to generalist review on appeal; and utilising non-judicial specialists in the adjudicatory process to complement the knowledge and skills of the judges. A brief conclusion is offered in Part 6.

Finally, a note on usage. For ease of expression, I use the term 'judges' to include all legally qualified judicial officers, whether they are labelled 'judges' or 'magistrates'. However, the term 'courts' does not include tribunals, notwithstanding the overlap of their adjudicative functions in some jurisdictions.

## 2 A Taxonomy of Judicial Specialisation

No court claims unlimited power to adjudicate matters over all persons, things, or events, wherever in the world they occur. The very notion of jurisdiction—literally a court's power to 'speak the law'—implies that some matters lie beyond a court's vocal reach. These limitations are of varied origin. The rules of public and private international law delimit the competence of domestic courts to adjudicate matters with foreign connections.[24] Courts are also subject to *spatial* limitations that definite their geographical reach. These might be the outer limits of the nation-state; or the borders of subnational polities such as countries, states, or provinces; or the even-narrower boundaries of judicial districts promulgated within a state or province.[25] There may also be *temporal* limitations defining the date from which, or the date until which, legal proceedings may be commenced in a particular court. This essay leaves aside jurisdictional limitations of the kind just mentioned because, although they may narrow a court's caseload, they have little bearing on the topic of specialisation.

The term specialisation (from the Latin, *specialis*) suggests something that forms a distinct class based on common characteristics, in contrast to the general or common. In the literature on judicial specialisation, the characteristic most often used to define this distinct class is the *legal subject matter* of the dispute. Thus, in a respected monograph,

[24] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British Year Book of International Law 187.

[25] For example, the United States District Court comprises 89 territorial districts across the 50 states: Russell Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Federal Judicial Center 1989) 7-10.

political scientist Lawrence Baum defines specialisation as a division 'by fields or areas of legal policy', understood as attributes of cases, such as bankruptcy and tax.[26]

There is no doubt that subject matter, or *material*, specialisation is a central type of judicial specialisation, but to limit the inquiry in this way significantly underrates the breadth and subtlety of specialisation. Accordingly, this Part proposes a taxonomy that helps to illuminate the concept of specialisation as it applies to the process of adjudication. The taxonomy is not intended to be theoretically exhaustive, but rather represents the lion's share of circumstances in which specialisation can be observed in practice in the comparator countries. The principal categories, which are conceptualisations of observed juridical phenomena, are:

i. *material specialisation*– based on the legal subject matter of the claim;
ii. *personal specialisation* – based on the identity of the parties;
iii. *scalar specialisation* – based on the size (i.e. value) of the claim;
iv. *functional specialisation* – based on the role of the judge; and
v. *hierarchical specialisation* – based on the level in the court hierarchy.

In practice, judicial specialisation occurs simultaneously across multiple domains. For instance, the Intellectual Property Enterprise Court, which sits within the English High Court, combines material and scalar specialisation because its jurisdiction is confined to intellectual property matters where less than £500,000 is at stake.[27] The names of specialist courts usually highlight a *single* dimension of their specialisation, but it should be remembered that this is a simplifying designation.

## A. Material Specialisation

The subject matter of a dispute—which looks to the nature of the legal issues in contention between the parties—is the principal way adjudication has become specialised in contemporary judicial systems. Some aspects of material specialisation are so ingrained that lawyers take them for granted. The great divisions of law into civil and criminal matters, or common law and equity, are illustrations of high-order material specialisation. These have long been reflected in court structures such that the contemporary arrangement of English courts is a palimpsest of a much older structure in which 'jurisdictions divide and sub-divide according to sometimes very general, sometimes highly specialised distinctions'.[28] The great English writers of legal treatises, commencing in the 15th century with Littleton's *Tenures* and continuing into the 18th century with Hale's *Analysis of the Law*, contributed significantly to the way we now

[26] Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011) 6. Baum acknowledges that specialisation can also refer to attributes of litigants, which is discussed in Part 2(B) below.
[27] Civil Procedure Rules rr 63.1, 63.17A.
[28] John Flood and others, 'Case Assignment in English Courts' in Philip Langbroek and Marco Fabri (eds), *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia 2007) 133.

conceive legal subject matter, as they systematised the common law into coherent areas of legal principles.[29]

This leads to the question of what subject matters are suitable for judicial specialisation.[30] In some areas, such as family law, specialisation appears to be widespread across common law countries. In contrast, some subject matters are perpetually ignored—one never hears, say, of a contracts court or a torts court. Between these extremes, states vary widely in their assessment of how detailed a specialisation must be, as can be seen by comparing the widening remit of patents courts, intellectual property courts, and commercial courts.

Stephen Legomsky has suggested that specialisation is more easily justified when the subject matter has a high degree of technical complexity, a substantial discretionary component, or rapidly changing content.[31] These criteria might support specialisation in the fields of taxation, family relations, and immigration, respectively. But satisfaction of these criteria is itself a matter of degree, leading to diverse state practices as to whether specialisation is warranted.

Once a subject matter has been selected as suitable for specialisation, it is important to appreciate its continuing connections to other branches of law. No branch of law can thrive in complete isolation from others. In Australia, early opponents of the federal Family Court (established in 1975) argued that family law should not be treated as a specialised field because it involves 'large questions of general law, the law of corporations, taxation, [and] partnerships.'[32] As an illustration, cases dealing with the intersection between the courts' statutory powers to adjust the property rights of spouses and the law of trusts have reached the highest court.[33] Likewise, in New Zealand, opponents of the Employment Court have argued that employment law is not a conceptual subdivision of law, but a contextually defined subject raising questions in 'contract, tort, equity, restitution, public law and even criminal law'.[34]

Recognising that some cases in specialised fields are a bricolage of problems from related areas, Legomsky has also suggested that specialisation is more easily justified when the

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29 AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 University of Chicago Law Review 632, 634, 652; Harold Berman and Charles Reid, 'The Transformation of English Legal Science: From Hale to Blackstone' (1996) 45 Emory Law Journal 437, 485-96. See also Angela Fernandez and Markus Dubber (eds), *Law Books in Action : Essays on the Anglo-American Legal Treatise* (Bloomsbury 2013).

30 Civil law systems face similar questions but have arrived at different solutions, evidenced by the emergence there of parallel court hierarchies in constitutional law and administrative law: John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (4th edn, Stanford University Press 2019) 88-92.

31 Stephen Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (Oxford University Press 1990) 22-32.

32 Frank Hutley, 'What's Wrong with the Family Law Act: A Case for Dismantling the Family Court' (1987) 31 Quadrant 73, 74.

33 *Kennon v Spry* (2008) 238 CLR 366.

34 Bernard Robertson, 'The Arguments for a Specialist Employment Court in New Zealand' (1996) 21 New Zealand Journal of Industrial Relations 34, 36, 44.

subject matter has a degree of isolation from other areas of law because of its discreteness and uniqueness.[35] Fields of law that are creatures of statute may come closer to that state of autarky, but even here the complexity of human and economic relations can generate legal problems that necessitate recourse to other fields.

## B. Personal Specialisation

A second type of specialisation arises from the *personal identity* of the litigants rather than the subject matter of proceedings. This type of specialisation is usually intended to allow the judicial system to better address the legal problems faced by vulnerable litigants, exemplified by the rise of children's courts, homeless courts, Indigenous courts, mental health courts, and youth courts. However, some instances of personal specialisation have different justifications. Military courts offer a parallel system for applying criminal law and military codes to defence force personnel, not because defendants are vulnerable as a class, but because military courts seek to promote good order and discipline in the armed forces, and this may not be attainable in civilian courts whose focus is the dispensation of justice.[36]

Australian Indigenous courts provide an instructive example of specialisation based on personal identity. The first Indigenous court was established in the state of South Australia in 1999 to redress Indigenous peoples' deep distrust of the criminal justice system (where they are grossly over-represented) and to provide a measure of cultural respect for Aboriginal customary law. They have since flourished and can be found in nearly every jurisdiction in Australia, going by demonyms that reflect different communities of Indigenous peoples (e.g., Nunga, Koori, and Murri).[37]

Any specialisation centred on personal identity requires that identity to be defined. In the state of Victoria, Indigenous courts known as Koori Courts have been established as separate divisions of the Magistrates' Court, the Children's Court, and the County Court. Each court is available only to Aboriginal persons, who are legislatively defined by reference to the tripartite criteria of descent, self-identification, and community acceptance.[38]

However, Australian Indigenous courts do not have jurisdiction over every legal dispute that involves an Indigenous person. Their intention was to provide an alternative way of delivering criminal justice by closely involving affected communities and tribal elders in the sentencing process. Consequently, their ambit is confined to specific criminal

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35 Legomsky (n 31) 26-7.

36 David Schlueter, 'The Military Justice Conundrum: Justice or Discipline?' (2013) 215 Military Law Review 1.

37 Elena Marchetti and Thalia Anthony, 'Sentencing Indigenous Offenders in Canada, Australia, and New Zealand' in *Oxford Handbook on International and Comparative Criminology* (Oxford University Press 2016) 13.

38 Magistrates' Court Act 1989 (Vic) ss 3, 4D; Children, Youth and Families Act 2005 (Vic) ss 3, 504, 518A; County Court Act 1958 (Vic) ss 3, 4A, 4E.

offences committed by Aboriginal defendants in circumstances where the defendant has already pleaded guilty (thus demonstrating a combination of personal and material specialisation). In other jurisdictions, Indigenous courts are not so tightly confined: some First Nations Courts in Canada have jurisdiction that extends also to family relations, child safety, and civil disputes.[39]

### C. Scalar Specialisation

Many courts have financial restrictions on their civil jurisdiction. Occasionally, these are monetary *minima* and serve to concentrate high-value claims in superior courts. For example, New York courts may hear certain claims against foreign defendants only if the value of the claim exceeds USD $1,000,000 (approximately £825,000), leading to the selection of New York courts in large cases.[40] More commonly, the restrictions are monetary *maxima* and serve to concentrate low-value claims in lower courts, where justice can be dispensed more quickly and at lesser cost.[41] For example, in the United States, state courts of limited jurisdiction have 'amount-in-controversy' limits that range from USD $4,000 to $200,000.[42] In the case of both minima and maxima, the restrictions produce a scale effect, as a proxy for the seriousness of the case, by excluding low-value claims from superior courts and high-value claims from lower courts. While this represents a narrowing of each court's jurisdiction, on their own they do not satisfy any reasonable understanding of the term 'specialisation'.

However, taking this logic further, many jurisdictions have established small claims courts, or small claims divisions within existing courts, which do represent a genuine type of specialisation. This specialisation can be conveniently described in terms of the low monetary value of claims, but it is typically associated with a cluster of other attributes, such as the subject matter of the dispute (often minor contractual and personal property matters), and streamlined court procedures that allow for expeditious adjudication. It is those features, in combination, that fairly attract the description of specialisation.

Small claims have a long history in Canada and the United States, where they have been seen as a distinct class of cases, handled by a distinct set of courts.[43] In the early 20th century, Roscoe Pound remarked that one of the central problems for the administration of justice in American cities was making adequate provision for 'petty litigation' to

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39 Shelly Johnson, 'Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence +' (2014) 3 Journal of Indigenous Social Development 1.

40 New York Consolidated Laws, General Obligations Law, GOB § 5-1402.

41 Brian Opeskin, 'Rationing Justice: Tempering Demand for Courts in the Managerialist State' (2022) 45 University of New South Wales Law Journal (advance).

42 Paula Hannaford-Agor, Scott Graves and Shelley Spacek-Miller, *The Landscape of Civil Litigation in State Courts* (National Center for State Courts 2015) 10-12.

43 Eric Steele, 'The Historical Context of Small Claims Courts' [1981] American Bar Foundation Research Journal 293, 296.

provide for the quick, inexpensive, and just disposition of litigation of the poor.[44] This need has never abated but it attracted resurgent interest in the 1960s and 1970s, when small claims courts became part of early movements to promote access to justice for the disadvantaged poor. Many such courts continue today, often known by the sobriquet of 'The People's Court' after a long-running television series from the 1980s.[45]

An illustration of scalar specialisation is the Small Claims Court in the Canadian province of Ontario, which traces its origins to 1792.[46] In its current incarnation, the Small Claims Court is a branch of the Superior Court of Justice, which is the middle tier of the Ontario judicial system.[47] The Small Claims Court has jurisdiction over actions for the payment of money or the recovery of possession of personal property up to CAD $35,000 (approximately £22,000).[48] The court is directed to hear and determine all questions of law and fact 'in a summary way', and to make such orders as is considered 'just and agreeable to good conscience'. To that end, it uses simplified procedures and relaxed rules of evidence, and it has limits on the costs that can be awarded against a party. Moreover, the rules of court are to be 'liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.'[49] These features have made the Court of great practical relevance to the administration of justice: it handles nearly half of all civil claims in Ontario and sits in over 90 locations.[50]

### D. Functional Specialisation

A fourth type of specialisation arises from the diverse functions that judges perform, and the prospect that they might specialise by concentrating on a subset of them. There have been many attempts to identify the core functions of the judicial role and the competencies necessary to support them.[51] Many accounts purport to be of universal relevance across the judicial system, and yet the circumstances of judging differ markedly by subject matter, geography, court level, and judicial position. A magistrate sitting in a remote rural community undertakes disparate functions to a judge sitting in an apex court, despite both being labelled 'judicial officers'.

There are many examples of functional specialisation in adjudication. One arises from the contrasting roles of trial and appellate judges, and I examine this separately below as an aspect of hierarchy (Part 2(E)). A second example is the functional responsibility for

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44 Roscoe Pound, 'Administration of Justice in the Modern City' (1912-1913) 26 Harvard Law Review 302, 315.

45 *The People's Court* (Ralph Edwards Productions, Stu Billett Productions 1981).

46 Shelley McGill, 'Business Dominance in the People's Court: An Empirical Assessment of Business Activity in the Toronto Small Claims Court' (2016) 33 Windsor Yearbook of Access to Justice 69, 72.

47 *Courts of Justice Act*, RSO 1990, c. C43, ss 22-29.

48 ibid s 23; *Small Claims Court Jurisdiction*, O Reg 626/00, r 1.

49 *Rules of the Small Claims Court*, O Reg 258/98, r 1.03.

50 Ontario Superior Court of Justice, *Enhancing Public Trust: Report for 2017 and 2018* (2019) 14-15.

51 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer 2019).

court administration vested by statute or custom in chief judicial officers and their delegates.[52] These roles can occupy a substantial portion of a judge's time, making those judges functionally specialised as judicial administrators. A third example is the specialised functions performed by a range of allied court personnel, who may not be judges in their own right but yet exercise judicial or quasi-judicial powers.[53] Going by a variety of names (including masters, associate judges, judicial registrars, and commissioners), these personnel typically dispose of procedural matters, consent orders, and simpler contested applications, to assist the judiciary in managing its workload in a cost-effective way.

Beyond these examples, functional specialisation has also become a keen issue because of the expansion of 'problem-solving courts' over the past 30 years, where judges take on different roles to those traditionally expected of them. Beginning with the creation of the first drug court in the United States in 1989 at the peak of the crack cocaine epidemic, problem-solving courts have flourished in other areas of law, and in other countries, in an effort to find novel ways to address the underlying causes of criminality.[54]

Problem-solving courts signal a shift away from the judge as a neutral arbiter meting out punishment in an adversarial process, to a model that valorises a therapeutic or restorative approach to criminal justice. Key features of problem-solving courts include a focus on long-term outcomes through intensive judicial monitoring of offender behaviour; use of multi-disciplinary teams to inform decision making; calibrated incentives and sanctions for offenders; and close collaboration with support services.[55] These features are reflected in the shifting functions performed by problem-solving judges, who 'are being pushed to unprecedented extremes with new responsibilities',[56] demanding a delicate interplay of care and control.[57] Problem-solving approaches bring the emotional labour of judging to the fore, requiring judicial skills such as patience, humour, empathy, proactivity, and a holistic understanding of various social maladies.[58] As one commentator has remarked, while problem solving judges are first and foremost arbiters of fact and law, 'in this new

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52 Anne Wallace, Kathy Mack and Sharyn Roach Anleu, 'Work Allocation in Australian Courts: Court Staff and the Judiciary' (2014) 36 Sydney Law Review 669, 672-3; Marin Levy and Jon Newman, 'The Office of Chief Circuit Judge' (2021) 169 University of Pennsylvania Law Review 2425.

53 Brian Opeskin, 'The Supply of Judicial Labour: Optimising a Scarce Resource in Australia' 7 Oñati Socio-Legal Series 847, 870-72; Linda Silberman, 'Masters and Magistrates: The English Model' (1975) 50 New York University Law Review 1070.

54 James Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press 2009).

55 Bruce Winick and David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press 2003).

56 Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2005) 50 Criminal Law Quarterly 224, 252.

57 Dawn Moore, 'The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court' (2011) 15 Theoretical Criminology 255.

58 Joyce Plotnikoff and Richard Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions, DCA Research Series 3/05* (United Kingdom Department of Constitutional Affairs, 2005) 31-2; Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge 2021).

environment a judge may also need to wear the hat of lawyer, sociologist, psychologist and even psychiatrist'.[59] Judges who take on problem-solving roles are thus required to embrace a measure of functional specialisation that distinguishes them from their peers.

In the context of problem-solving courts such as drug courts, functional specialisation of judges is observed in conjunction with material specialisation arising from specific criminal offences and personal specialisation arising from the vulnerability of defendants. However, these types of specialisation should not be conflated because they can exist independently of each other, and they focus on different attributes of the adjudicatory process.

### E. Hierarchical Specialisation

A fifth type of specialisation arises from court hierarchy, which here refers to the institutional structures by which cases proceed from first instance to appeal, and then to possible further appeal. Court hierarchy interacts with specialisation in different ways, but the key issue in the present context is the extent to which hierarchy is itself a basis of judicial specialisation. In short, should some judges specialise in trial work and others in appellate work?[60] There are clear points of difference. Trial work requires a range of forensic skills, including detailed knowledge of rules of evidence, court procedure, and case management, as well as the capacity for quick judgment to allow for the efficient dispatch of court business. Appellate work requires skills in abstract legal reasoning, extensive judgment writing, and a sound understanding of general legal developments. The contrast is stark when comparing magistrates' courts with apex courts, but is less so when comparing trial and appellate roles in middle tier courts.

The value of specialisation in appellate work is a debated issue, and this is reflected in diverse state practices. Most jurisdictions conform to one of three models of appellate courts, namely: (a) those constituted as permanent bodies staffed exclusively by specialist judges of appeal; (b) those formed from the general pool of trial judges sitting in rotation; and (c) those formed as a hybrid of the preceding models, with some permanent appellate judges and some trial judges sitting in rotation.[61] The first of these models is standard practice for apex courts, with some variations.[62] However, for intermediate courts of

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59 James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, Is Three a Crowd?' (2011) 32 Melbourne University Law Review 394, 395.

60 The literature on the psychology of judging suggests that trial and appellate judges face a different set of goals, and this impacts their decision making as they seek to maximise their goal satisfaction: Jennifer Robbennolt, Robert MacCoun and John Darley, 'Multiple Constraint Satisfaction in Judging' in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (Oxford University Press 2010).

61 Brian Opeskin, *Appellate Courts and the Mangement of Appeals in Australia* (Australian Institute of Judicial Administration 2001) 11-16.

62 The United Kingdom Supreme Court, as an apex court, has an unusual arrangement whereby its appellate panels may include 'acting judges' from the intermediate courts of appeal in England, Northern Ireland, and Scotland (known as senior territorial judges): Constitutional Reform Act 2005 (UK) ss 38, 42.

appeal the acceptance of hierarchical specialisation has been a lengthier journey. It was not until the reforms of the *Supreme Court of Judicature Act 1873* (Eng) that a permanent Court of Appeal was established for England, staffed by dedicated Lord Justices of Appeal.[63] Elsewhere in the British dominions, the most common arrangement was the second, rotational, model, whereby intermediate courts of appeal were formed from the pool of trial judges sitting temporarily *en banc* or in panels. These arrangements created difficulties, and in time they gave way to the widespread but not universal establishment of permanent intermediate courts of appeal in Canada, New Zealand, and later Australia.[64]

The mere existence of a permanent intermediate court of appeal does not, however, indicate the *degree* of hierarchical specialisation because it is consistent with both the fully specialised model and the hybrid model identified above. In practice, hybrid arrangements are common. The English Court of Appeal presently comprises 39 Lord and Lady Justices of Appeal (plus a number of *ex officio* members), but judges of lower courts (namely, High Court judges and, in criminal cases, Circuit judges) are also authorised to sit in the Court of Appeal upon request.[65] Similar hybrid arrangements exist in the New South Wales Court of Appeal, prompting its retiring Chief Justice to praise the cross-fertilisation between trial and appellate divisions as not only enlarging the breadth of the judges' experience but leading 'to a greater appreciation of the different challenges faced at both appellate and trial level'.[66] Presumably, this promotes a spirit of collegiality among members of the Bench, notwithstanding the hierarchical structures in which they operate.[67]

Appellate judges have been described as just another 'species of specialist',[68] and so it is unsurprising that the justifications for hierarchical specialisation echo those used to support other specialisations. These include claims that appellate work involves skills different in kind from those performed by trial judges; appellate judgeships attract higher-calibre appointees and thus improve judicial performance; dedicated appeals courts promote public confidence in the judiciary; principled development of the law is better secured by a small cohort of judges operating in repeated interaction with each other; and permanent courts of appeal are more likely to secure consistency between appellate

63 Before those reforms, judicial review, rather than appeal, was the chief means of holding inferior courts to account for their decisions: CH O'Halloran, 'Right of Review and Appeal in Civil Cases before the Judicature Acts 1875' (1949) 27 Canadian Bar Review 46.

64 Michael Kirby, 'Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal' (2008) 30 Sydney Law Review 177, 186-7.

65 Senior Courts Act 1981 (UK) ss 2, 9. Conversely, a judge of the Court of Appeal may sit in the High Court and the Crown Court.

66 TF Bathurst, 'Farewell Ceremony' (Supreme Court of New South Wales, Sydney, 28 February 2022) 3.

67 Sarah Murray, 'Judicial Collegiality' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press 2021).

68 Curthoys (n 14) 10.

decisions.[69] The disadvantages of hierarchical specialisation also echo the arguments made in opposition to other specialisations. These include the cost of establishing separate appellate courts; the risk that appellate judges could 'drift off into a virtual reality' if divorced from current trial experience;[70] and the loss of prestige and job satisfaction for judges who have rotating appellate work removed from their dockets. These arguments are considered more fully in Part 4 as part of a broader appraisal of the effect of judicial specialisation on core values of the judicial system.

### F. Recapitulation

In this Part I have proposed a taxonomy of judicial specialisation based on the observed practice of courts in several common law countries. All specialisations restrict the range of matters that can be adjudicated by the court, but they are conceptually distinct from spatial or temporal limitations on a court's jurisdiction because the latter have no real nexus with the concept of specialisation. The most frequently invoked category of judicial specialisation relates to the legal subject matter of the parties' dispute, which I have called material specialisation. However, judicial specialisation can also arise from the identity of the parties, the scale of the dispute, the functions performed by the judge, and the level of the court hierarchy at which the case is heard. A central purpose of articulating these categories is to promote greater appreciation of the variety of circumstances in which specialisation occurs, with its implications for the way specialisation is achieved (discussed immediately below in Part 3) and how it should be evaluated (discussed in Part 4). Yet, as numerous examples have illustrated, specialisation is a complex phenomenon that often involves multiple overlapping classifications.

## 3 Modalities for Achieving Judicial Specialisation

Whereas the previous section outlined a conceptual classification of the *types* of judicial specialisation, in this Part I examine the *means* by which those specialisations are achieved in practice. One means of achieving specialisation is by establishing new courts, or new divisions within courts, focussed on one or more of the types of specialisation considered above. However, altering court structures is only the best known among several modalities for achieving specialisation. It can also be achieved through the knowledge and experience of its judges; through the administrative assignment of judges to courts, and cases to judges; and through statutory rules regulating a court's jurisdiction. These four modalities—*structural*, *personnel*, *administrative*, and *jurisdictional*—are discussed below, while their implications for core values of the judicial system are considered in Part 4.

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69 Raymond Evershed, 'The History of the Court of Appeal' (1951) 25 Australian Law Journal 386; David Malcolm, *Report of the Committee to Examine the Feasibility of the Establishment of a Court of Appeal and How it Should be Structured and Constituted* (Western Australia Department of the Attorney General, 2001).

70 Curthoys (n 14) 10.

## A. Structural Modes

As noted in Part 1, over the past decades there has been a proliferation of entities that are described as 'specialist courts', whether they be family courts, juvenile courts, drug courts, environment courts, or others. But it is important not to confuse labels with structures. Sometimes the name of a court is nothing more than that. For instance, the High Court of Australia sits as the 'Court of Disputed Returns' when hearing disputes about the validity of federal elections, yet it is still the High Court and enjoys no greater degree of specialisation because of that statutory designation.[71]

Court structures can be used to promote judicial specialisation in two ways. The first is to establish a separate specialist court that stands apart from the generalist courts in the judicial system, although typically connected to other courts through channels of appeal. The second, which is more common, is to establish formal specialist divisions within an existing court.[72] There is a third channel, namely, the informal establishment of lists, panels, or chambers for specific types of disputes, but this possibility blends into the administrative modality and is discussed below (Part 3(C)).

The name given to a specialised court does not always reveal which of these paths has been taken, but several factors can assist. These include whether the specialised court is established under its own statute; has its own jurisdiction, procedures, and rules; comprises judicial officers appointed specifically to that court; and is serviced by dedicated court staff. There are no hard and fast rules. In the state of New South Wales, the Drug Court is constituted as a stand-alone court under its own statute. In the states of Victoria and Western Australia, the Drug Court is established, not as a stand-alone court, but as a formal division within the existing Magistrates' Court. And in the state of South Australia, the Drug Court is established only informally as a program within the Magistrates' Court, allowing judges to grant bail to persons charged with drug offences on condition they enter an intervention program.[73]

Despite this structural fluidity, the choice between establishing new stand-alone courts or new divisions within existing courts has consequences, largely because of the way those bodies are separated from, or integrated with, existing institutions. Specifically, it has ramifications for how specialisation affects core values of the judicial system, such as cost-effectiveness, impartiality, and just outcomes (Part 5(A)).

A useful illustration of the role of new courts in securing judicial specialisation is the case of the Tax Court of Canada. For many decades, challenges to federal tax assessments were heard in the generalist Exchequer Court (the predecessor of the Federal Court of

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71 Commonwealth Electoral Act 1918 (Cth) s 353.

72 Consultative Council of European Judges (n 8) 6.

73 Drug Court Act 1998 (NSW) s 19; Magistrates' Court Act 1989 (Vic) s 4A; Magistrates Court Act 2004 (WA) s 24; Bail Act 1985 (SA) s 21B. See David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15 Current Issues in Criminal Justice 136.

Canada), and later in a variety of administrative tax tribunals. In 1966, a royal commission recommended that these administrative bodies be replaced by a new tax court,[74] but it was not until 1983 that the Tax Court of Canada was established as a new federal court with nationwide operation.[75] Today, the Tax Court is a superior court of record that has exclusive original jurisdiction under a broad range of federal tax laws, with appeals going to the Federal Court of Appeals.[76] The Tax Court is staffed by 24 federally-appointed judges who hold office to the age of 75 years. It makes its own rules of procedure, and its operations are overseen by a dedicated court administrator.[77]

Of particular relevance to the issue of judicial structures is a proposal made by the Canadian Auditor General in 1997 to merge the judicial functions of the Tax Court with the generalist Federal Court of Canada, for the purpose of making cost savings from their joint administration.[78] However, the merger was rejected for fear of losing the efficiency gains from having a specialised Tax Court, and instead Parliament established a single administrative body to provide court services to a range of federal courts, including the Tax Court.[79] Thus, for nearly 40 years, Canada has maintained a separate trial court in federal tax matters in service to the notion that specialised courts can deliver benefits that may be unattainable in generalist courts.

## B. Personnel Modes

It is routinely assumed that judges who sit in specialised courts, or in specialised divisions of courts, are legal specialists. This is not necessarily so. Court structures and court personnel are different issues and, while they often coincide, it is possible to appoint generalist judges to specialist courts or specialist judges to generalist courts. Specialisation of judicial *personnel* thus requires independent consideration. There are many facets to the question of how judges become specialists.

### *i. Educational qualifications*

One means of facilitating judicial specialisation is through prior formal education. Although law students have limited capacity to specialise when obtaining their first legal qualification, postgraduate study offers a suite of opportunities for specialisation. These qualifications need not be limited to law. In the United States, judges who run problem-

74 Canada, Royal Commission on Taxation, *Report: Sales Tax and General Tax Administration (vol. 5)* (Ottawa: Queen's Printer, 1966) 164-7.
75 Tax Court of Canada Act, RSC 1985, c T-2 s 3.
76 Federal Courts Act, RSC 1985, c F-7 s 27.
77 Tax Court of Canada Act, RSC 1985, c T-2, ss 4, 7, 12, 20, 23.
78 Ian MacGregor and others, 'The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature' (2010) 58 Canadian Tax Journal 87, 97-8.
79 Courts Administration Service Act, SC 2002, c 8.

solving courts often have degrees in non-legal fields appropriate to their caseload, such as social work and psychology for those in mental health courts.[80]

*ii. Legal practice*

Beyond their formal education, lawyers 'learn by doing' as legal practitioners. For solicitors, specialisation might be acknowledged through professional accreditation. For barristers, specialisation can be accommodated despite the 'cab-rank rule' that requires them to accept instructions from *any* professional client. For example, the rules of the English Bar Standards Board require acceptance of client instructions only if they 'are appropriate taking into account the experience, seniority *and/or field of practice*' of the barrister.[81] Today, the vast bulk of the senior Bar are specialists, suggesting that many judges (who are largely but not exclusively selected from the Bar) will start their judicial careers as specialists, even if they are appointed to generalist courts.[82] These prior specialisations can have continuing relevance for the dispatch of court business. Thus, one empirical study has argued that the United Kingdom Supreme Court is a 'court of specialists' and that this has a bearing on who gets to sit on particular panels and who gets to write lead opinions.[83]

*iii. Judicial selection criteria*

Considering the great rise of specialised courts, one might expect that possession of specialised knowledge and skills would be a formal prerequisite for appointment to a specialised judicial role. Occasionally this is so. For instance, a person may not be appointed to the Federal Circuit and Family Court of Australia unless 'by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence'.[84] But this is an exception. Usually, the formal criteria for appointment are not circumscribed in this fashion, leaving it to the discretion of the executive to appoint individuals whom they consider best suited to the specialised role.

*iv. Repeated experience as judges*

Judges who lack a specialisation at the time of their appointment can acquire one while holding office. This process is hastened by hearing a critical mass of cases in a defined

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80 Plotnikoff and Woolfson (n 58) 32.

81 Bar Standards Board, *The BSB Handbook (ver 4.6)* (Bar Standards Board 2020) r C29.

82 John Katz, 'Access to Justice from the Perspective of the Commercial Community: Judicial Specialisation' (2012) 18 Auckland University Law Review 37, 38. In most common law counties, a small proportion of judges are selected from the ranks of solicitors or legal academics.

83 Chris Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (Oxford University Press 2020) 268-9. However, lack of specialisation (e.g. in criminal matters) may also affect panel composition on the Supreme Court through the practice, noted above, of appointing senior territorial judges as acting judges on a temporary basis.

84 Federal Circuit and Family Court of Australia Act 2021 (Cth) ss 11, 111.

field so that judges can increase their knowledge and skills over time, including by repeated engagement with the specialised advocates who practise in that field.[85]

*v. Judicial education*

There is also an important role for judicial education in enhancing specialisation after appointment. Ideally, this should commence before the judge takes a specialised assignment, as is the practice with the English 'ticketing' system whereby, for example, a case in the family jurisdiction must be dealt with by a judicial officer who has received prior training to deal with that type of case.[86] Yet, in many jurisdictions prior training is seldom delivered in practice.[87] Later specialised education is more common, but here too there is considerable variability as to the extent of training. In Australia, a national standard for judicial education, adopted in 2006, recommended a minimum of five days each year. But a survey found that one-third of judges did not meet this standard due to workload pressures, lack of court funding, remoteness, or other factors.[88]

*vi. Non-judicial appointments*

Finally, judges may hold, or have held, non-judicial appointments that deepen their understanding of their areas of specialisation. This might stem from a term as a law reform commissioner, a head of a public inquiry, or a tribunal member. An example can be seen in the judges of the Federal Court of Australia, many of whom hold concurrent commissions on the Administrative Appeals Tribunal, Australian Competition Tribunal, Copyright Tribunal, or Fair Work Commission (a workplace relations tribunal).[89] Judges who exercise non-judicial functions over subject matter related to their judicial functions are likely to bring to bear on the latter a breadth of experience that enhances the quality of their judicial work.[90]

## C. Administrative Modes

The preceding sections have discussed specialisation in court structures and judicial personnel, but it is necessary to link the two. It is here that administrative arrangements come to the fore in facilitating specialisation in adjudication. The issue arises in two ways: how judges are assigned to specialised divisions within a court,[91] and how judges are allocated to cases. Central to both questions is the role of the head of jurisdiction, or chief

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85 Brian Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental Law Review 396, 425.

86 Flood and others (n 28) 171-2.

87 Plotnikoff and Woolfson (n 58) 33-4.

88 Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (National Judicial College of Australia 2010) 16-22.

89 Federal Court of Australia, *Annual Report 2019-2020* (Federal Court of Australia 2020) 4-7.

90 Brian Opeskin, 'Federal Jurisdiction in Australian Courts: Policies and Prospects' (1995) 46 South Carolina Law Review 765, 779-80.

91 I leave to one side the related question of how specialisation figures in the selection and appointment of judges to stand-alone specialised courts.

judicial officer, in organising court business. With some exceptions,[92] a head of jurisdiction typically bears formal responsibility for the administration of his or her court, often with the power to delegate functions to other judges or court staff. For example, in the English High Court, the Lord Chief Justice is responsible 'for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts.'[93] The discharge of such responsibilities typically entails two tasks relevant to judicial specialisation.

i. *Assigning judges to specialised divisions*

One implication of this power is that a head of jurisdiction, or their delegate, can assign judicial officers to specialised divisions within the court over which the head has authority. To continue the example of the English High Court, judges may be attached to one of the Court's three divisions (Chancery, Queen's Bench, or Family) on the direction of the Lord Chief Justice, and may be transferred to another division in similar fashion with the consent of the transferee and the head of the receiving division.[94] In a survey of ten problem-solving courts in Australia, Canada, and the United States, it was similarly found that assignment of judges to court divisions was generally made by the judicial head of the court, following the appointee signalling their interest in undertaking the role.[95] Self-nomination does not ensure that the person will be the most suitable for the specialist role.

*ii. Allocating judges to cases*

Another implication is that a head of jurisdiction can allocate judicial officers to particular cases, and thus achieve a degree of *de facto* specialisation regardless of whether the court is organised into specialised divisions. Of course, this is not the case for appellate courts sitting *en banc*, since the inclusion of all members of a court on the Bench precludes the selective allocation of judges to cases.[96] But for appellate courts that sit in panels (as most do), and for trial courts, case allocation is an important dimension of specialisation.

The methods used by heads of jurisdiction and court staff to allocate judges to cases is something of a 'black box' in many jurisdictions.[97] It is an internal process undertaken by court staff in consultation with the head of jurisdiction or their delegate, probably applying multiple criteria that relate both to the case (location, subject matter, complexity)

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92 Administration of a court can be vested collectively in the corpus of judges, as is the case under the High Court of Australia Act 1979 (Cth) s 17. This is impractical beyond small apex courts.

93 Constitutional Reform Act 2005 (UK) s 7.

94 Senior Courts Act 1981 (UK) s 5.

95 Plotnikoff and Woolfson (n 58) 31.

96 The United States Supreme Court sits *en banc*—an accepted implication from the constitutional provision vesting the judicial power of the United States 'in *one* Supreme Court': Ross Davies, 'The Other Supreme Court' (2006) 31 Journal of Supreme Court History 221.

97 Hanretty (n 83) 110, noting that the issue is seldom addressed in the literature on judicial behaviour. See also Levy and Newman (n 52) 2455-6.

and to the judge (availability, efficiency, expertise). In an empirical study of Australian magistrates, Mack and others found two opposing views about this practice.[98] Many magistrates took the generalist stance that everyone appointed to a court should be competent to adjudicate any case within the court's jurisdiction. This approach allows for random allocation of magistrates to cases and enhances public confidence in the impartial administration of justice. However, other respondents recognised that case allocation should reflect the different skills and expertise of magistrates. This may give rise to the possibility of bias in case allocation. But even in the United States, where there is a sizeable literature on the neutral assignment of cases as an antidote to 'panel packing', it is accepted that specialised court lists do not conflict with the goal of neutrality.[99]

An illustration of specialisation by administrative fiat is the internal arrangement of the trial and appellate caseload of the Federal Court of Australia. The Court has a broad jurisdictional base with respect to matters arising under federal law,[100] but in practice the bulk of its caseload falls into a small number of discrete fields.[101] These are reflected in the establishment of nine 'National Practice Areas' (NPAs), which include administrative law, admiralty, corporations, industrial law, intellectual property, and taxation. The arrangements governing the NPAs place high value on specialisation.[102] As the Federal Court's Chief Justice has explained, 'The aim is to see the operation of the Court focus on development of the deep skill of its judges and registrars in what are … very specialised areas of practice.'[103] This is supported by the Chief Justice's statutory power to 'assign particular caseloads, classes of cases or functions to particular judges'.[104] The arrangement of the trial caseload by subject area spills into the organisation of appeals. The Federal Court does not have a standing court of appeal but constitutes appellate panels on rotation from the corpus of trial judges (see Part 2(E)). Internal arrangements for the constitution of these panels generally secure the participation of judges with specific experience in the subject area in dispute.[105] And so—without establishing new courts or new divisions within the Federal Court—administrative practice has produced virtual specialised courts: 'a commercial court, a tax court, an intellectual property court, a labour court, a maritime court etc'.[106]

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98 Kathy Mack, Sharyn Roach Anleu and Anne Wallace, 'Caseload Allocation and Special Judicial Skills: Finding the Right Judge' (2012) 4 International Journal for Court Administration 68.

99 Petra Butler, 'The Assignment of Cases to Judges' (2003) 1 New Zealand Journal of Public and International Law 83, 102.

100 Judiciary Act 1903 (Cth) s 39B.

101 Jeremy Kirk, 'The Federal Trajectory of Australian Law' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law* (Federation Press 2018) 331.

102 Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)* (2019).

103 James Allsop, 'The Role and Future of the Federal Court within the Australian Judicial System' (2017) 44 BRIEF 10, 12.

104 Federal Court of Australia Act 1976 (Cth) s 15.

105 Michael Kirby, 'Hubris Contained: Why a Separate Australian Tax Court Should be Rejected' (2007) 42 Taxation in Australia 161, 163.

106 Allsop (n 103) 12.

## D. Jurisdictional Modes

The final modality for achieving judicial specialisation is the statutory regulation of jurisdiction. As noted above, jurisdiction refers to a court's power to 'speak the law'. By regulating which matters fall within a court's adjudicatory authority, the legislature can help or hinder judicial specialisation. This modality embodies three different specialising processes, which I call *exclusion*, *duplication*, and *filtration*.

### i. *Jurisdictional exclusion*

Consider the role of *jurisdictional exclusion*. Baum has argued that specialised courts typically share two qualities—their caseload is *narrow* (specialised courts do little or no work outside the specialty); and their caseload is *concentrated* (the specialised work is done in specialised courts and not elsewhere).[107] Alternatively expressed, these qualities reflect two types of jurisdictional exclusion: narrowness excludes the specialised court from adjudicating matters outside the speciality, while concentration excludes other courts from adjudicating the specialised matters.

An example is afforded by the Tax Court of Canada, which was discussed in Part 3(A). The Tax Court's jurisdiction can be said to be *narrow* because the Court is a creature of statute, and statute excludes it from adjudicating matters other than those arising under 16 named federal tax Acts.[108] The Tax Court's jurisdiction is also *concentrated* because, in making the Court's original jurisdiction over those matters 'exclusive', statute expressly excludes other courts from determining such matters. However, the Tax Court's jurisdiction is not wholly concentrated because some tax-related disputes must still be heard in other courts (e.g., judicial review of tax decisions by executive government).[109] The latter point demonstrates that jurisdictional exclusion (whether by narrowness or concentration) is a matter of degree, leading one observer to remark that the boundary between specialist and generalist courts 'is not nearly so bright as commonly assumed'.[110]

### ii. *Jurisdictional duplication*

Next, consider the role of *jurisdictional duplication*. Specialisation can be the outcome not only of exclusion but also of duplication. If two courts have concurrent jurisdiction over the same dispute, an applicant can elect to commence litigation in either of them. Competition between the courts (based on cost, speed, or reputation) might drive litigants to one court or another. Specialisation may thus be a market-based solution—the by-

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107 Lawrence Baum, 'Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?' (1991) 74 Judicature 217, 218.

108 Tax Court of Canada Act, RSC 1985, c T-2 s 12.

109 David Jacyk, 'The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts' (2008) 56 Canadian Tax Journal 661.

110 Jeffrey Stempel, 'Two Cheers for Specialization' (1995) 61 Brooklyn Law Review 67, 91.

product of a competitive process in which bottom-up choices of the parties concentrate matters of a particular type in their preferred forum.[111]

An illustration can be seen in English patent cases. Since 1876, English patent actions have been heard in the Chancery Division of the High Court, and since 1949 there has been a specialised subdivision known as the Patents Court.[112] In 1990, a new court was launched to provide an alternative venue for patent claims by small to medium size claimants. The new body, known as the Patents County Court (PCC), was a response to the high cost of patents litigation in the High Court.[113] Although statute permitted the jurisdiction of the PCC to be limited to smaller monetary claims, initially this was not done.[114] The consequence was to convert the exclusive jurisdiction of the High Court in patent matters into concurrent jurisdiction with the PCC, and thus enliven the possibility of competition. Tensions between the courts soon arose from procedural reforms in the PCC to make patents litigation speedier and cheaper.[115] This might have attracted cases to the PCC, but competition soon stimulated greater efficiencies in the High Court.[116] Procedural differences between the courts were then narrowed further following Lord Woolf's civil justice reforms,[117] and the High Court appears to have retained the lion's share of English patent litigation.[118] More recently, the PCC has been folded into the High Court, renamed the Intellectual Property Enterprise Court (IPEC), and had its damages awards capped at £500,000. Although greater differentiation has now tempered competition between the Patents Court and the IPEC, their historically competitive relationship lends a fresh perspective to the possibility of specialisation by jurisdictional duplication.[119]

iii. *Jurisdictional filtration*

Finally, consider the role of *jurisdictional filtration*. Some courts have power to filter the type of cases they adjudicate, giving them capacity to promote specialisation in their court, or in other courts. A prime example is the widespread power of apex courts to choose their docket through the grant or refusal of leave to appeal. In Australia, Canada, New Zealand, and the United Kingdom, an appeal lies to the apex court only with the

111 Ellen Jordan, 'Specialized Courts: A Choice?' (1981) 76 Northwestern University Law Review 745.
112 William Cornish and David Llewelyn, 'The Enforcement of Patents in the United Kingdom' (2000) 31 International Review of Industrial Property and Copyright Law 627, 628.
113 John Pegram, 'Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?' (2000) 82 Journal of the Patent and Trademark Office Society 765, 774.
114 Copyright, Designs and Patents Act 1988 (UK) s 288.
115 Pegram (n 113) 775.
116 Cornish and Llewelyn (n 112) 631; Susan Glazebrook, 'A Specialist Patent or Intellectual Property Court for New Zealand?' (2009) 12 Journal of World Intellectual Property 524, 531-2.
117 Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).
118 Christian Helmers and Luke McDonagh, 'Patent Litigation in the UK: An Empirical Survey 2000–2008' (2013) 8 Journal of Intellectual Property Law & Practice 846.
119 For Australian examples of federal-state court competition, see Opeskin, 'Federal Jurisdiction in Australian Courts: Policies and Prospects' (n 90) 786-800; Allsop (n 103) 12.

permission of that court, or in some jurisdictions with the permission of the court below.[120] Such powers are granted 'to winnow out those cases which are unworthy of [the apex court's] attention', thus allowing better use of the court's resources.[121] In practice, this means that certain types of cases are seldom accepted by the apex court. In Australia, tax cases almost never attract a grant of special leave by the High Court, making the Full Court of the Federal Court the last resort on technical questions of federal tax law.[122] A similar reticence is seen in the highly discretionary context of family law matters. The manner in which jurisdictional filters are used to winnow out specific subject matters from apex courts may not amount to specialisation in *those* courts, but it does concentrate these matters in intermediate courts of appeal, which promotes judicial specialisation at that level.

## 4 Specialisation and Core Values of the Judicial System

To this point, I have provided a taxonomy of the types of judicial specialisation (Part 2) and an account of the means by which specialisation is achieved in practice in common law jurisdictions (Part 3). This Part proposes a conceptual framework for evaluating the merits and demerits of judicial specialisation.

Many accounts of judicial specialisation include a discussion of its costs and benefits. This is an important undertaking, but the lists on each side of the ledger are typically long and difficult to evaluate. Faced with this mélange, Legomsky has proposed 12 criteria for determining whether a given class of case should be assigned to specialist adjudicators.[123] In this Part, I offer a different lens through which to evaluate the gains and losses from specialisation by asking what impact specialisation has on *core values* of the judicial system. This allows us to see how specialisation imposes trade-offs within and among core values. In focussing on values, I utilise a common distinction between rules, principles, and values, which is not merely about increasing levels of abstraction, but about identifying the ultimate justifications that specific rules are intended to serve.[124]

The values that underpin the judicial system have been extensively discussed, especially in the context of civil justice. Although such typologies are contestable, there is substantial accord about much of the content. In the context of civil matters, Neil Andrews has identified four cornerstones of the civil justice system, which he lists as access to justice; fairness of process; speed and effectiveness; and just outcomes; with each value harbouring a cluster of lower-order tenets.[125] Shimon Shetreet has proposed a five-point

120 Judiciary Act 1903 (Cth) ss 35, 35AA, 35A; Supreme Court Act, RSC 1985, c S-26 ss 37, 37.1, 40; Senior Courts Act 2016 (NZ) ss 73, 74; Constitutional Reform Act 2005 (UK) s 40.

121 Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15 University of Tasmania Law Review 1, 6.

122 Kirby, 'Hubris Contained: Why a Separate Australian Tax Court Should be Rejected' (n 105) 161.

123 Legomsky (n 31) 20-32.

124 Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009) 13-35.

125 Neil Andrews, 'Fundamental Principles of Civil Procedure: Order Out of Chaos' in Xandra Kramer and C van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press 2012).

typology, which overlaps with Andrews' list in many respects but differs in others.[126] Shetreet's values comprise fairness of the adjudication process; efficiency of the justice system; access to justice; public confidence in the courts; and independence of the judiciary. Richard Devlin and Adam Dodek, in a more conceptual evaluation, focus on the regulation of judges rather than on attributes of an entire judicial system (which is a significant point of difference) and they hypothesise six values: impartiality, independence, accountability, representativeness, transparency, and efficiency.[127]

In finding common ground among these accounts, and with some modifications of language, I proceed on the basis that a system of justice should strive to respect six core values.[128]

1. *Cost-effectiveness*—how well the justice system converts resource inputs into outcomes for individuals and the community.
2. *Just outcomes according to law*—outcomes based on the merits of the case (rather than chance or might), where merit is assessed by legal standards.
3. *Impartiality*—decision making that treats all parties fairly, and free from bias, prejudice, or preference, within the limits of ordinary of human frailty.
4. *Public trust in the administration of justice*—made necessary because the efficacy of the courts depends on the continuing acceptance of their authority by the community.
5. *Access to justice*—the extent to which persons are able effectively to understand their legal rights, protect those rights, obtain an outcome, and have the result enforced.
6. *Procedural fairness*—processes and practices that give disputants a genuine voice, with respectful treatment, through institutions that demonstrate an ethic of care.

Notably absent from this list is judicial independence. This is not because it is unimportant—on the contrary, it is vital to the good health of any judicial system. Its absence is because judicial independence is not a core *value*, but a derivative *principle*, that helps to support the core values. It is possible to imagine a well-functioning system of adjudication that is just, although it is not independent, such as a parent resolving arguments between sparring children. A system of justice should not seek the independence of its judges as an end in itself but as a means of securing higher-order values.

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126 Shimon Shetreet, 'Fundamental Values of the Justice System' (2012) 23 European Business Law Review 61.

127 Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016) 9.

128 Opeskin, 'Rationing Justice: Tempering Demand for Courts in the Managerialist State' (n 41).

The following discussion considers the impact of judicial specialisation on each of the six core values. For ease of reference, the core arguments are listed in Table 1 below. The first column lists the core values noted above, the second column identifies key arguments for judicial specialisation alongside the values most affected, and the third column identifies key arguments against judicial specialisation alongside the values most affected.

**Table 1: Judicial Specialisation and Core Values of the Judicial System**

| Value | For specialisation | Against specialisation |
|---|---|---|
| Cost-effectiveness | ▪ Division of labour | ▪ Cost of establishing new courts<br>▪ Managing variable caseloads<br>▪ Boundary disputes |
| Just outcomes | ▪ Consistency in decision making<br>▪ Growth of new jurisprudence<br>▪ Accommodating individual circumstances | ▪ Intellectual isolation<br>▪ Lower quality appointees |
| Impartiality | — | ▪ Less favourable terms of office<br>▪ Regulatory capture |
| Public Trust | ▪ Perceptions of better service delivery | ▪ External influence<br>▪ Ease of abolishing courts<br>▪ Undermines unity of judiciary |
| Access to justice | ▪ Builds dispute resolution hubs | ▪ Limited numbers and locations of courts and judges |
| Procedural fairness | — | — |

## A. Cost-Effectiveness

One of the strongest arguments for judicial specialisation is an economic one that recalls Adam Smith's advocacy for the division of labour during the Industrial Revolution (Part 1). In *The Wealth of Nations*, Smith opened with a description of pin-making in 18th century England.[129] He explained that one person, working on their own, could barely produce 20 steel pins per day, but if the tasks were divided into 18 distinct operations assigned to different people, together they could make 4,800 pins per person per day. In

[129] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Project Gutenberg 2001 [1776]) Book 1, ch 1.

Smith's view, division of labour can enhance productivity through the repetition of specialised tasks, with concomitant gains in speed and quality of outputs.

Speed and efficiency are also vital qualities of judicial systems. Cost-effectiveness has moral weight because public funds saved in one sector can be used to improve human welfare in another.[130] Governments must therefore think carefully about the expenditure of public resources in supporting the legal resolution of social conflict. Judicial specialisation affects this calculus positively and negatively. On the positive side, it has been said that specialisation allows judges to identify the real points in dispute more quickly and to reduce time spent on wasteful discovery procedures;[131] allows judges to grasp technical details more rapidly;[132] gives judges an enhanced ability to evaluate the credibility of frequent expert witnesses;[133] and reduces the time litigators must spend educating judges about basic principles in the specialised area.[134] This can make adjudication quicker and cheaper for litigants, and hence reduce backlogs and promote cost-effectiveness in the system at large.

However, specialisation can also impact cost-effectiveness negatively in several ways. First, where specialisation is achieved by creating new courts, there are *capital and recurrent costs*—buildings, registries, security, libraries, judges, and staff—that might be averted if specialisation were avoided altogether or achieved by a different modality.[135] Relatedly, given the intense competition for resources in the justice system, there is also a danger that 'the creation of evermore specialised courts, each with its own start-up and operating costs' will become a drain on existing courts.[136]

Second, specialisation can limit a court's flexibility in assigning judges to cases, especially for smaller courts that need to *manage variable caseloads*, locations, and judicial competencies.[137] Separate courts are only feasible if there is sufficient caseload to warrant them (which may be a difficulty for smaller jurisdictions), but even then fluctuations in demand may lead to judges being too busy or too idle, with resultant inefficiencies.[138] Generalist courts, by contrast, are better placed to absorb cyclical variations in demand by allocating different types of work to judges, depending on the case mix pending at that time.[139]

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130 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing 2019) 13-15.
131 Katz (n 82) 39.
132 Glazebrook (n 116) 537.
133 Legomsky (n 31) 9-10.
134 ibid 17.
135 Michael Moore, 'The Role of Specialist Courts: An Australian Perspective' [2000-2001] Lawasia Journal 139, 142.
136 Antony Altbeker, *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* (South African Institute for Security Studies, Monograph Series No 76, 2003) 25-6.
137 Mack, Roach Anleu and Wallace (n 98) 71.
138 Glazebrook (n 116) 548; Legomsky (n 31) 18.
139 Mack, Roach Anleu and Wallace (n 98) 76.

Third, there may be *boundary disputes*. There is broad agreement that litigants should be given the opportunity to have all the matters in issue determined in the one court and in the one proceeding.[140] But specialisation can jeopardise this goal if spheres of authority are divided among a mix of generalist and specialist courts, especially where 'concentration' is achieved by giving exclusive jurisdiction to a specialised court (Part 3(D)).[141] The problem can operate in both directions: a specialist court may be called on to decide an issue of general law that is allied to the specialist claim, or a generalist court may be called on to decide an issue of specialist law that is allied to the generalist claim. If both issues are determined in the one court in which proceedings originated, there may be fragmentation in the law over time as specialist and generalist courts diverge in their approaches. If, on the other hand, the issues are separated to be determined in different courts, there may be wasted public and private costs as proceedings are continued in two forums. New Zealand's labour law is a case in point. Despite the conferral of exclusive jurisdiction on the Employment Court in labour law matters, there was a period when jurisdictional conflict with the generalist High Court continued to erupt because of inconsistent rulings in the two courts.[142] Similar boundary disputes have been noted in the Tax Court of Canada.[143] These undesirable consequences can be partially alleviated by legal doctrines allowing specialised courts to adjudicate related claims,[144] but the persistence of boundary disputes undermines the benefits of specialisation in advancing the value of cost-effectiveness.

### B. Just Outcomes According to Law

A central feature of dispute resolution by adjudication is that outcomes are based on the merits of the case (rather than chance or might), and merits are assessed by legal standards.[145] One of the main claims made for judicial specialisation is that it promotes the value of 'just outcomes according to law' by fostering consistency in decision making.

*Consistency in decision making* goes to the heart of the rule of law, namely, the idea that the law should be capable of guiding human behaviour by providing a stable foundation on which individuals can plan their lives.[146] Common law systems use analogical reasoning to ensure that like cases are treated alike, so that adjudicated outcomes do not depend on the capricious assignment of judges to cases. It is here that specialisation plays a significant role. Analogical reasoning is enhanced by the experience and expertise of

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140 Andrews Rogers, 'Federal/State Courts: The Need to Restructure to Avoid Jurisdictional Conflicts' (1980) 54 Australian Law Journal 285, 288.

141 Stempel (n 110) 89.

142 T Goddard, 'Curial Institutions under the Employment Contracts Act: 1991 to 1997' (1997) 28 California Western International Law Journal 103, 106.

143 Jacyk (n 109).

144 Examples include the statutory doctrine of ancillary jurisdiction (see e.g. Land and Environment Court Act 1979 (NSW) s 16) and the judicial doctrine of accrued jurisdiction (see e.g. *Fencott v Muller* (1983) 152 CLR 570).

145 McIntyre (n 51) 33-46.

146 Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 Law Quarterly Review 195.

judges, who are thereby better placed to see similarities and differences between cases.[147] By narrowing and concentrating jurisdiction, specialisation exposes judges to a limited class of matters on a repetitive basis. This permits better appraisal of the factual and legal nuances of each case, and with that comes better legal reasoning and consistency of decision making—both between cases and between judges.[148]

Related to the notion of consistency is the idea that judicial specialisation can aid the *rapid development of a coherent body of law* in new fields by concentrating decision making in one place. Wholly new areas of law do not arise frequently, but they do occur when new rights are created by statute or when countries undergo fundamental transitions in political regimes. In South Africa, for example, the desire to transform social relations in the post-apartheid era encouraged calls for specialist courts to address land claims, sexual offences, and juvenile justice as a means of swiftly developing a new jurisprudence in these areas.[149]

A further benefit of specialisation, especially personal and functional specialisation, is that it promotes just outcomes through its deeper appreciation and *accommodation of the individual circumstances of the parties*. For instance, the inclusion of tribal elders in the sentencing of offenders in Indigenous courts brings to that task a better understanding of the cultural context of the offender and the offending. Similarly, drug courts can be more effective than traditional criminal courts in meeting some objectives of the criminal justice system (e.g., deterrence and rehabilitation) by reason of a finely calibrated system of rewards and punishments, together with drug treatment plans tailored to each offender.

However, specialisation may also have adverse impacts on the value of just outcomes. One of these arises from *intellectual isolation* if specialised areas become secluded pockets of law, disconnected from others. As Justice Kirby has remarked, 'The danger of a specialist court is that it may be cut off, in personnel, physical propinquity and attitudes from general developments that are happening in the law more broadly'.[150] Isolation might lead to unchallenged assumptions, idiosyncratic interpretations, or petrification of the law. Thus, while expertise contributes to consistency of outcomes, 'non-expertise' fulfils a different but equally important role by facilitating cross-fertilisation of legal concepts.[151]

Another issue that has negative implications for this system value is the claim that the *quality of specialist judges is lower* than that of their generalist counterparts. The argument is put in different ways—specialist judicial roles attract less capable candidates

147 Frederick Schauer and Barbara Spellman, 'Analogy, Expertise, and Experience' (2017) 84 University of Chicago Law Review 249, 264-5.
148 Legomsky (n 31) 12-14.
149 Altbeker (n 136) 3, 23, 28.
150 Kirby, 'Hubris Contained: Why a Separate Australian Tax Court Should be Rejected' (n 105) 164.
151 ibid 163.

because they may offer less favourable conditions;[152] a steady diet of a single type of case deters capable individuals from accepting appointment;[153] and judges become deskilled when deprived of a variety of stimulating work.[154] These arguments may be true in some circumstances but they are unreliable simplifications when viewed across all types of specialisation. To take an obvious example, apex courts (which embody hierarchical specialisation) attract the highest status, best conditions, and most talented judges. But even in relation to material specialisation, one suspects that claims about the lower quality of specialist judges are in truth perceptions about the status of different branches of law in the eyes of some observers—say, family law versus competition law.

## C. Impartiality

Impartiality describes the value that inheres in decision making that is 'free from personal, social, cultural, economic or institutional bias, and which fairly assesses the rights and interests of the parties involved'.[155] Specialisation does not promote impartiality, but it may jeopardise it in two ways. One threat is that specialist judges may be *engaged on less favourable terms* than generalist judges in circumstances that raise apprehensions about their impartiality or indebtedness to the government that appoints them. An early Australian example was the legislative attempt to appoint judges to a specialised industrial court for a fixed term of seven years rather than grant them life tenure, as required for other federal judges.[156] However, the legislation was struck down as failing to comport with the constitutional requirement of life tenure for federal judges.[157] This avoided the aspersion that industrial judges were lesser judges than their peers, and the perception that they were dependent on the favour of the government of the day for reappointment. Because of the risk to impartiality, or perceptions of impartiality, posed by such discrepancies, the Consultative Council on European Judges has recommended that 'laws and rules governing appointment, tenure, promotion, irremovability and discipline should … be the same for specialist as for generalist judges'.[158]

Another threat that specialisation poses to impartiality arises from public choice theory and the notion of *regulatory capture*.[159] The central idea is that specialist interest groups have an economic incentive to shape the establishment, composition, and operation of specialist courts in service to their own interests. Special interest groups (say, labour unions or patent attorneys) may leverage their political power to advance the appointment to a labour court or a patents court of judges who are considered sympathetic to their

152 Stempel (n 110) 79-82.
153 Legomsky (n 31) 16.
154 Mack, Roach Anleu and Wallace (n 98) 76.
155 Devlin and Dodek (n 127) 9. See also Australian Law Reform Commission, *Judicial Impartiality: Consultation Paper* (2021).
156 Commonwealth Conciliation and Arbitration Act 1904 (Cth) s 12.
157 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 24 CLR 434.
158 Consultative Council of European Judges (n 8) 8.
159 A classic account is George Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics and Management Science 3. See also Stempel (n 110) 97-105.

cause. This is more easily achieved in a specialist field because it is less complex to identify intellectual biases when the range of legal issues requiring adjudication is narrow.[160] Once a judge is appointed to a specialist role, threats to impartiality remain. Specialisation risks the development of 'excessively comfortable relationships' or 'unhealthy cosiness' between judges and members of a specialist Bar.[161] Similarly, specialist judges may develop too much sympathy for repeat litigators. This has been cited as a reason against establishing tax courts, where the court's most regular client would be the government agency responsible for collecting tax on behalf of the state that appoints the tax judges.[162] The risks to impartiality may be less pronounced in some specialist fields than others, but nonetheless they need to be evaluated.

### D. Public Trust in the Administration of Justice

Public trust is a core value of judicial systems because 'courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously'.[163] The system's efficacy depends on the continued acceptance of its authority by the community—a 'reservoir of goodwill' that allows people to accept the courts' decisions, even if those decisions are unpopular.[164]

The degree to which judicial specialisation affects public trust in the administration of justice is a matter begging for empirical investigation, but the absence of evidence has not deterred pundits from speculating about the relationship. Those assessments have mostly been negative, not because specialisation inherently generates distrust but because it is often associated with a range of features that create public scepticism. Where judicial specialisation is perceived as adversely affecting just outcomes, impartiality, or some other core value, it will also impact negatively on public trust.

Three concerns have attracted comment. One relates to the perceived loss of impartiality of specialist judges flowing from the influence of regulators, on the one hand, and private interests, on the other (Part 4(C)).[165] Another concern relates to the ease with which specialist courts can be dismantled or rendered ineffectual by depriving them of funds.[166] Specialist courts established in socially contentious areas appear to be particularly vulnerable to abolition. This has been the Australian experience, where specialist labour courts have been established on several occasions, only to be disestablished by later

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160 Richard Epstein, 'Employment Law: Courts and Contracts' (1997) 28 California Western International Law Journal 13, 15.
161 Curthoys (n 14) 8; Altbeker (n 136) 4.
162 Kirby, 'Hubris Contained: Why a Separate Australian Tax Court Should be Rejected' (n 105) 164.
163 Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 Monash University Law Review 209, 210.
164 Shiri Krebs, Ingrid Nielsen and Russell Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2020) 43 Melbourne University Law Review 605, 607.
165 Stempel (n 110) 105-7.
166 Plotnikoff and Woolfson (n 58) 56-7.

governments of a different political persuasion.[167] The vulnerability of specialist courts to political boutades can do 'real damage' to public confidence in the judiciary if judges of abolished courts are not dealt with appropriately.[168] A further concern is that specialisation may undermine public perceptions of the unity of the judiciary.[169] By lending colour to the view that some courts are merely technical bodies, specialisation may divorce them from the cloak of protection given to mainstream judicial institutions.

Against these pessimistic assessments, judicial specialisation may increase trust among some sections of the public if it is perceived by court users as delivering a better dispute resolution service. In relation to personal specialisation (Part 2(B)), the disaffection felt by Indigenous communities towards colonial systems of criminal justice has quite likely been improved by the advent of Indigenous courts and the involvement of community elders in those processes. Similarly, one might anticipate that parties who appear in small claims courts, which are instances of scalar specialisation (Part 2(C)), may have greater trust in institutions that deliver speedy and affordable resolution of minor disputes.

### E. Access to Justice

The ability of disputants to use the judicial system to enforce their rights can be affected by geographic, economic, social, and cultural barriers to justice. Specialisation can make these barriers higher or lower. On the positive side, specialist courts or divisions can help *build dispute resolution hubs* that attract judicial business and facilitate access to justice for domestic and international litigants. London, for example, has long been a favoured centre for the resolution of global commercial disputes, and more recently Singapore's International Commercial Court has risen to prominence for commercial dispute resolution in the Asia-Pacific region.[170] Conversely, the absence of specialist courts or divisions can be an impediment to accessing justice—a reason, it has been said, that so few patents cases are litigated in New Zealand.[171]

On the other side of the ledger, specialisation can negatively impact access to justice. *Small caseloads* in specialised fields may mean that specialist courts can sit only in a few locations, which might limit geographic access to the courts.[172] Similarly, the small number of specialist judges may mean there are significant backlogs, or that judges are located in places that create spatial inequalities for disputants needing to access the courts.

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167 Robert French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press 2000) 132-8; Moore (n 135) 144-150.

168 Moore (n 135) 150.

169 ibid 142; Consultative Council of European Judges (n 8) 3. Perceptions of unity are probably enhanced in jurisdictions (such as New Zealand and Australia's Northern Territory) where judicial officers are called 'judges', regardless of court hierarchy, in contrast to the bifurcation into 'judges' and 'magistrates' elsewhere. See District Court Act 2016 (NZ) s 7; Local Court Act 2015 (NT) s 50.

170 Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 Melbourne Journal of International Law 219.

171 Katz (n 82) 41-2.

172 Consultative Council of European Judges (n 8) 7.

The strength of these effects will depend on a range of factors, including the type of judicial specialisation in issue and the modality of achieving it.

## F. Procedural Fairness

Procedural fairness relates to the quality of the procedures by which decisions are made, rather than the quality of substantive outcomes. Its importance is reinforced by empirical research indicating that litigants consistently value fairness of process above fairness of outcome.[173] Procedural fairness embraces a bundle of subsidiary principles that include adequate notice, disclosure of critical issues, opportunity to be heard, and absence of bias, but it is a flexible notion that must be adapted to the circumstances of the case. It would seem that specialisation in adjudication does not systematically advance or impede procedural fairness. This is because judicial processes, whether specialised or not, typically observe the principles that underpin procedural fairness.

Yet two observations should be made by way of gloss. One relates to procedural fairness in problem-solving courts. Part 2(D) described how problem-solving courts, such as drug courts, reposition the judge's role from that of neutral arbiter in an adversarial process to that of active participant in a co-operative venture designed to achieve the best outcome for the defendant. In drug courts in the United States, the co-operation required between 'judge, prosecutors, police, sheriffs, and defense lawyers' has been criticised because 'the very instant "cooperation" is achieved, the protections inherent in the adversary nature of our system are put at risk.'[174] In short, procedural fairness may be jeopardised if a judge's detachment from the proceedings becomes compromised by the therapeutic objectives that the specialised court is intended to promote.[175]

The other gloss relates to the impact of specialised procedures on other core values. In practice, specialisation often leads to the development of new procedures tailored to the specialty.[176] For example, the English *Civil Procedure Rules* contain a multitude of provisions customised to areas such as admiralty, intellectual property, and estates and trusts. These rules generally support the value of procedural fairness, but over-proliferation of specialised court procedures can compromise other values, such as access to justice if, say, complex rules can be traversed only by seasoned legal specialists. For this reason, it has been proposed that specialist courts should be subject to general procedural rules unless the distinctive circumstances require otherwise (such as rules safeguarding the interests of children in family proceedings).[177]

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173 Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007) 44 Court Review 4.

174 Morris Hoffman, 'The Drug Court Scandal' (2000) 78 North Carolina Law Review 1437, 1524.

175 Duffy (n 59). In Australia, the co-mingling of judicial and non-judicial functions may have adverse constitutional implications.

176 Glazebrook (n 116) 541; Moore (n 135) 145.

177 Consultative Council of European Judges (n 8) 5.

### G. Recapitulation

Several observations can be made from the preceding consideration of the impact of specialisation on core values of the judicial system. First, not all core values are equally affected by specialisation. Thus, specialisation usually neither advances nor retards procedural fairness because the principles that underpin that value are widely observed in both specialist and generalist settings.

Second, specialisation pulls in both directions *within* any given value, advancing it in some respects and retarding it in others. In relation to just outcomes, for instance, how should one weigh the benefits of consistent decision making against the cost of intellectual isolation that makes consistency more likely? Unless there is an accepted metric for measuring the strength of opposing forces, it is difficult to say where the net impact lies.

Third, specialisation can impose trade-offs *among* core values. Thus, division of labour promotes cost effectiveness by enhancing productivity through the repetition of specialised tasks, but it simultaneously detracts from public trust by undermining perceptions of the unity of the judiciary and by exposing specialist courts to the risk of external influence or abolition.

Fourth, nearly all the critique of judicial specialisation, positive or negative, springs from the twin assumptions that specialisation is *material* specialisation and the mode for achieving it is *structural* (especially through the establishment of stand-alone courts). Once we retreat from these confining assumptions, the calculus changes but in ways that have not yet been thoroughly examined in the literature.

Finally, some of the disadvantages of specialisation can be tempered by intelligently choosing how it is implemented. For instance, specialist courts need not jeopardise impartiality if they are made to look like generalist courts, with the all the usual trappings of independence.[178] In the next Part, I take up the question of how to optimise specialisation in adjudication.

## 5 Optimal Models of Partial Specialisation

To this point, I have argued that there are many kinds of specialisation in adjudication (Part 2), expressed through different modalities (Part 3), and that these variations have disparate impacts on core values of the judicial system (Part 4). This Part seeks to resolve these tensions by examining how specialisation can be optimally crafted to advance the core values while mitigating negative effects. What follows is not an exhaustive account of all possible arrangements but a selection of the most desirable. What they have in common is that they are examples of partial, or hybrid, specialisation. In considering how

[178] Stempel (n 110) 107.

they might be implemented in practice, account must be taken of the circumstances of each court, including its structures, personnel, and jurisdiction.

### A. New Courts, New Divisions, or New Panels?

Any polity that is minded to establish a specialised field of adjudication is typically faced with a choice between creating a new court, a new formal division within an existing court, or a new panel or list within an existing court.[179] These are the most common structures, but it is better to regard them as three points on a spectrum because each can be attended by detailed characteristics that have commonalities with their alternatives. International practice varies widely on this issue, as was illustrated by drug courts in Australia, where different states have chosen different paths in relation to the same criminal subject matter (Part 3(A)). All three structures offer the principal benefits of specialisation, such as economic efficiencies that come with division of labour, improved consistency in decision making, and aiding the development of a coherent body of jurisprudence, but they engender different costs.

Consider, first, the choice between establishing a new stand-alone court or a new division within an existing court. In the case of a new court, the core value of *cost-effectiveness* might be adversely affected by the financial burden of establishing new buildings, libraries, registries, and staff; as well as by the need to manage fluctuating caseloads within the confines of a separate institution that lacks capacity to shift judicial labour and court resources in response to unexpected surges or declines in demand. The establishment of new courts may also lead to jurisdictional boundary disputes, which are absent when specialised cases are retained within the one court. Similarly, *impartiality* might be more at risk with a new specialised court because there is greater danger of regulatory capture when compared with judges appointed to a division of an extant court, who operate as part of a larger team with an overarching judicial culture. An argument can also be made that a new court faces greater challenges in supporting *just outcomes* because of heightened intellectual isolation from mainstream courts and fewer safeguards regarding the quality of appointees. On the latter point, judges appointed to generalist courts are likely to be assessed against general appointment criteria without regard to their potential assignment to specialist divisions. On balance then, interiority appears to minimise the costs of specialisation.

The choice between a new court division and a new panel or list is harder to assess. A panel suggests a degree of concentration, with cases in a particular subject area being assigned to a small group of judges, and only to those judges (Part 3(D)). But it is not necessarily accompanied by narrowness, since judges who sit on, say, a competition panel may also hear other cases within the court's general docket. This flexibility can affect both the benefits and costs of specialisation. If a panel judge has a sizeable non-specialist

[179] Glazebrook (n 116) 548-9, proposing a panel model for intellectual property cases in New Zealand.

caseload, the dangers of intellectual isolation may be lessened (thus improving just outcomes), but at a cost to consistency in decision making in specialised cases (thus impairing just outcomes). Firm conclusions are difficult to draw because much will depend on how the detailed arrangements are implemented in practice.

## B. Concurrent Judicial Roles

Another dimension of optimal model building concerns how, and how much, specialist judges interact with other judicial officers. Separation reinforces the notion of their specialisation; integration reinforces the unity of the Bench in interpreting the entire corpus of law. In the comparator countries, a balance has been found in disparate arrangements that give judges a 'varied legal diet'.[180] One *internal* arrangement, mentioned above, is for judges who sit on specialised divisions or panels to be rostered on other cases within their own court's general docket. The success of this arrangement depends on the administrative processes by which judges are allocated to cases by their head of jurisdiction (Part 3(C)).

A second, *horizontal*, arrangement to alleviate the narrowness of some specialist courts is for their judges to be cross-appointed to a generalist court, or to be authorised by statute to sit on a generalist court.[181] In Australia, judges of the New South Wales Land and Environment Court may sit as judges of the separately constituted New South Wales Supreme Court, and vice versa, for a particular period or in relation to particular proceedings.[182] This was put in place to 'encourage the sharing and transfer of expertise, knowledge and skills between these two courts' for the benefit of judicial officers, court users, and the court system at large.[183] Although modest use is made of these provisions, they can work smoothly because the two courts have coordinate authority, with their judges having the same rank, title, and status.[184]

A third, *vertical*, arrangement has salience for hierarchical specialisation because it enables judicial resources to be shared across court levels. One instance of concurrent trial and appellate roles is where intermediate courts of appeal are *regularly* constituted from the pool of trial judges sitting in rotation or in a hybrid format comprised of some permanent judges of appeal sitting with some trial judges (Part 2E). Another instance is where similar arrangements are made *ad hoc*. In New Zealand, judges of the High Court can sit in the higher Court of Appeal, on the joint nomination of the heads of both courts,

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180 ibid 549; Legomsky (n 31) 37.
181 Legomsky (n 31) 37; Moore (n 135) 147-8.
182 Preston (n 85) 408; Supreme Court Act 1970 (NSW) s 37B; Land and Environment Court Act 1979 (NSW) s 11A.
183 New South Wales, *Parliametary Debates, Legislative Council, 10 June 2010, 24175 (John Hatzistergos)* .
184 Land and Environment Court Act 1979 (NSW) s 9.

for a specified case or a specified period, allowing the near-concurrent exercise of original and appellate jurisdiction by High Court judges.[185]

These arrangements facilitate specialisation in a manner that advances the core values of the judicial system. Mobility of judicial labour can promote *access to justice* by bolstering the number of judges available to specialist courts or divisions, thus minimising court backlogs (a matter that also goes to *cost-effectiveness*). It can promote *impartiality* by reducing the risk of regulatory capture because the membership of specialist courts becomes more fluid. Mobility of judicial labour also has salience for *just outcomes* because it reduces intellectual isolation—exposing specialist and generalist courts alike to each other's ways of thinking—while also encouraging jurisprudential development that is consistent in values, principles, and rules across the legal system. And *public trust* in the administration of justice is promoted by the perception of greater judicial unity and the reduced susceptibility to external influences that might otherwise threaten the judges' responsibility to decide cases without fear or favour.

### C. Consecutive Judicial Roles

The previous section examined how the judicial diet can be leavened by concurrently assigning non-specialist cases to specialist judges. A conceptual alternative is to do this *sequentially*. The central idea is that judges might take on specialist roles for limited periods of time—say five years—before returning to general duties or to a different specialisation. An example of this arrangement is Daniel Meador's advocacy of rotating appellate panels on the United States Courts of Appeals, where each panel would focus on a narrow band of cases, defined by subject matter, until such time as the judges are rotated to cases of a different ilk.[186] More recently, the Consultative Council of European Judges stated that 'judges should be entitled to change court or specialisation in the course of their career', moving from specialist to generalist duties, or vice-versa. The Council considered that mobility provides judges with more varied and diversified career opportunities, which fosters development of case law.[187]

Temporal rotation is a means of negating some of the adverse consequences of specialisation by adopting a partial model, at least when the judicial system is viewed over the long term. Regulatory capture and intellectual isolation are mitigated by the fact that judges move on periodically.[188] The notion that judges may serve in different capacities during their office supports an ethic of generalism, to which many judges

185 Senior Courts Act 2016 (NZ) s 48; Butler (n 99) 104.
186 Daniel Meador, 'A Challenge to Judicial Architecture: Modifying the Regional Design of the US Courts of Appeals' (1989) 56 University of Chicago Law Review 603; discussed in Stempel (n 110) 115-20.
187 Consultative Council of European Judges (n 8) 5.
188 Glazebrook (n 116) 553.

aspire. It also promotes public trust in a judicial system administered by a body of proficient but interchangeable judges.

However, periodic rotation may also limit the benefits of specialisation. The cost-effective advantages of division of labour may be muted by the circumstance that, as some experienced judges are rotated out of a specialisation, others are rotated in to start anew. For the same reason, consistency of decision making may be put at risk until judges settle into a stable pattern of adjudication in a specialised field that is new to them. The size of these impacts will depend on the details of implementation, including the interval between rotations, the proportion of judges rotated, and whether the interchange is implemented for individuals or larger cohorts.

### D. Specialisation at Trial, Generalisation on Appeal

Writers have observed that specialisation delivers asymmetrical benefits, depending on the level of the court hierarchy, and that adjudicatory structures should reflect this difference.[189] The greatest gains from specialisation are likely to arise at the trial level where familiarity with detailed subject matter, special procedures, expert witnesses, and a specialised Bar can deliver efficiency gains. By contrast, at an appellate level (unless the standard of review requires a hearing *de novo*),[190] the focus is more on abstract questions of law than on findings of fact. Here, non-specialisation can offer quality control, including the benefits of cross-fertilisation of ideas from other areas of law.

This understanding is reflected in the architecture of many common law judicial systems. In Australia, appeals from the specialist New South Wales Drug Court go to the state's generalist Supreme Court sitting as the Court of Criminal Appeal.[191] In Canada, appeals from the specialist Tax Court go to the generalist Federal Court of Appeal.[192] In England, appeals from the various specialist civil courts that sit within the High Court go to the generalist Court of Appeal, albeit to its civil division.[193] And in New Zealand, appeals from the specialist Employment Court go to its generalist Court of Appeal.[194]

Such arrangements, which are plentiful, reflect the common wisdom of specialisation at trial and generalisation on appeal, but they are not universal. There are examples of specialisation at trial *and* on appeal.[195] And there are perverse examples of generalisation at trial and specialisation on appeal. For example, in the United States, intellectual property disputes are heard at first instance by the generalist federal district courts but appeals go to the Court of Appeals for the Federal Circuit (known as the 'Federal

189 Legomsky (n 31) 24; Stempel (n 110) 112-15.
190 Adam Steinman, 'Rethinking Standards of Appellate Review' (2020) 96 Indiana Law Journal 1.
191 Criminal Appeal Act 1912 (NSW) ss 3, 5AF, 5DC.
192 Federal Courts Act, RSC 1985, c F-7, s 27.
193 Senior Courts Act 1981 (UK) ss 3, 16.
194 Employment Relations Act 2000 (NZ) s 214.
195 Federal Circuit and Family Court of Australia Act 2021 (Cth) s 26, regarding appeals in Australian family law matters.

Circuit'), which is an intermediate court of appeal primarily specialising in intellectual property matters.

The mere existence of divergent state practices does not undermine the normative claim regarding the desirability of specialisation at trial and generalisation on appeal. Indeed, the inverted arrangement in the United States has provoked numerous calls for structural reform, including diversifying the caseload of the Federal Circuit or establishing a specialist federal trial court in intellectual property matters.[196] However, the variety of arrangements does highlight the difficulty of weighing the often-competing values that judicial systems are intended to serve in relation to specialisation. The unusual arrangement in the Federal Circuit was a (successful) legislative attempt to improve consistency in appellate decision making in intellectual property matters, in service to the value of just outcomes.[197]

## E. Utilising Non-judicial specialists

The final model for optimising the benefits of specialisation concerns the way courts utilise specialists to supplement the judicial process, thereby lessening the need for judges to master various specialisations. For hundreds of years, judges have used expert evidence, called by the parties, to decide facts at trial,[198] but the model proposed here concerns the proactive use of specialists by courts themselves. This comes in many guises, of which the use of assessors and referees is discussed below. They are of greatest value in disputes that require the sifting of large volumes of complex facts, such as maritime collisions, salvage, building disputes, and competition cases.[199]

One way courts can import specialisation is by exercising the power to appoint independent *assessors* to advise the judge on technical issues related to matters before the court. Assessors are persons who, by virtue of some special skill, knowledge, or experience that they possess, sit with a judge during judicial proceedings to answer questions that might be put to them by the judge on the subject in which they are experts.[200] They are present as advisors to the judge (often, as private advisors), and unlike expert witnesses, they 'are not called by the parties, are not sworn, and cannot be cross-examined'.[201] While it remains the judges' duty to make their own determinations of fact and law, the input of qualified experts can be highly influential.

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196 Rochelle Dreyfuss, 'The Federal Circuit: A Continuing Experiment in Specialization' (2004) 54 Case Western Reserve Law Review 769, 798.

197 Baum, *Specializing the Courts* (n 26) 179-86.

198 Déirdre Dwyer, 'Expert Evidence in the English Civil Courts,1550–1800' (2007) 28 Journal of Legal History 93, 93-4.

199 On competition cases, see Despoina Mantzari, 'Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK' (2016) 36 Oxford Journal of Legal Studies 565.

200 Anthony Dickey, 'The Province and Function of Assessors in English Courts ' (1970) 33 Modern Law Review 494, 501.

201 ibid

The practice of appointing assessors has a long lineage in England. In admiralty cases, it can be traced to the early 16th century, and to this day the 31 Elder Brethren of Trinity House (incorporated under royal charter in 1514) act as advisors to the Admiralty Court on matters of nautical skill and seamanship.[202] Despite use in such cases, the power to appoint assessors is not limited to admiralty. Statutes authorise the appointment of assessors or advisers across a range of English courts, regardless of subject matter.[203] Similar powers can be found in some courts in Commonwealth countries, although their usage varies. In Australia, assessors have been embraced in patents cases and native title cases,[204] and in Canada they have been widely used in admiralty cases.[205] However, some senior judges believe that the complexity of modern litigation leaves scope for expansion. Lord Bingham once lamented the 'professional neglect' of English judges in using assessors beyond the field of admiralty, due to their 'temperamental reluctance' to depart from the traditional adversarial format of proceedings.[206] And Justice Allsop has opined that the use of assessors in Australian competition cases would be of 'great utility', although there is presently no power to do so.[207]

Another way courts can import specialisation is by exercising the power to appoint independent *referees*. This is a more significant interruption to the 'traditional adversarial format of proceedings' because it involves removing the whole or part of a proceeding, or particular questions, for inquiry and reporting by a referee. Once a written report has been prepared, the court may adopt, vary, or reject it in whole or part. The referral remains subject to court supervision and control, but its practical effect is to delegate much of the labour involved in sifting complex or technical facts to this form of 'special trial'.

As with assessors, the use of referees also has a long pedigree in English courts. From the mid-18th century, the English Court of Chancery often referred disputed issues of fact to court officers or experts especially selected for that purpose, and in common law courts this practice was given a clear statutory footing by the *Supreme Court of Judicature Act 1873* (Eng).[208] Versions of this 'new procedural [tool] for the trial of issues or of whole cases'[209] spread to many colonial courts in the days of Empire and can be found in much court legislation today.[210] In contrast to assessors, this facility has been widely used in some courts. The New South Wales Supreme Court, for instance, has an extensive

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202 ibid. See Trinity House, 'Elder Brethren' <www.trinityhouse.co.uk/about-us/trinity-house-fraternity/older-brethren> accessed 24 March 2022.

203 See e.g. Constitutional Reform Act 2005 (UK) s 44; Senior Courts Act 1981 (UK) s 70; County Courts Act 1984 (UK) s 63.

204 Patents Act 1990 (Cth) s 217; Federal Court of Australia Act 1976 (Cth) s 37A.

205 James Allsop, 'The Judicial Disposition of Competition Cases' (2010) 17 Competition and Consumer Law Journal 235, 249.

206 Bingham (n 21) 24.

207 Allsop, 'The Judicial Disposition of Competition Cases' (n 205) 249-50.

208 *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1, 15-16.

209 ibid 20.

210 See eg Federal Court of Australia Act 1976 (Cth) s 54A; Federal Courts Act, RSC 1985, c F-7, s 46; District Court Act 2016 (NZ) s 113.

building and construction list but it is said that, due to the generous use of referees, judges have not heard the factual basis of building cases for many years.[211] Apart from the economy of judicial labour achieved by using referees, the practice offers courts the benefits of specialisation, beyond the judges' expertise, in complex and technical areas of litigation.

## 6 Conclusion

This essay began by noting the great legal reforms of the late 19th century that brought about the centralisation of justice in England and the amalgamation of courts through which justice was delivered. Yet, there is ample evidence of the subsequent fragmentation of that system through the creation of a large array of specialist courts. This empirical observation applies equally to many countries in the common law world, and the pace of fragmentation shows few signs of abating.

These changes reflect the circumstance that the 'burden of knowledge' has taken society ever further from the Renaissance ideal of a 'universal man' who can know all things. Specialisation in adjudication has enhanced the judges' command over the mounting volume and intricacy of statute law and case law in complex societies. But many judges have not relinquished the view that adjudication requires law to be understood as an integrated system of principles and rules, best achieved through an ethic of generalism rather than specialism.

In this essay, I have sought to demonstrate that, whatever one's political or philosophical disposition, specialisation is already deeply entrenched in contemporary judicial systems. Many accounts of specialisation focus solely on subject matter, but specialisation extends along other axes to include personal, scalar, functional, and hierarchical dimensions. Moreover, specialisation is achieved through many modalities. New structures (whether as new courts or new divisions of courts) may be the most common, but specialisation is also effected through personnel, administrative, and jurisdictional modes. Thus, when viewed through a wider lens, modern judicial systems are saturated with specialisations of one kind or another.

The interactions between different types of specialisation and the modalities for achieving them lead to complex patterns of specialisation in real-world courts. Consider, for example, the contrasting circumstances of the United Kingdom Supreme Court and the Tax Court of Canada.[212] Whereas the Supreme Court demonstrates one predominant type of specialisation (hierarchical) because it only hears appeals, the Tax Court demonstrates several types—material (cases relate to federal tax law), scalar (there is a simplified procedure for small value claims), and hierarchical (it is a trial court). Yet both courts utilise similar modalities for achieving their type of specialisation. They rely on structure

211 Allsop, 'The Judicial Disposition of Competition Cases' (n 205) 245.
212 Constitutional Reform Act 2005 (UK) s 23; Tax Court of Canada Act, RSC 1985, c T-2, s 3.

(both are stand-alone courts), personnel (their judges become specialists in appeals and tax matters, respectively), and jurisdiction (statutes define the narrowness and concentration of their caseload). Moreover, the Supreme Court utilises the administrative modality insofar as case allocation reflects the justices' areas of prior legal specialisation.[213] These patterns deserve more analysis than they have attracted to date, and a valuable direction for future research would be to map these interactions in order to distil trends across time and space.

The important question for judicial systems is not whether specialisation is good or bad, because it is often both. The important question is how to harness the benefits of specialisation while minimising the costs. I have argued that this should be done by assessing the pros and cons of specialisation by reference to the core values of the judicial system, and asking how specialisation affects cost-effectiveness, just outcomes, impartiality, public trust, access to justice, and procedural fairness.

Measured against these yardsticks, specialisation is usually optimised when it is delivered in a partial or hybrid form. Some practical measures to achieve this include using new divisions or panels rather than stand-alone specialist courts, giving specialist judges concurrent or consecutive roles that diversify their judicial diet, focussing on specialisation at the trial level while maintaining generalisation on appeal, and co-opting non-judicial specialists such as assessors and referees to complement the judicial process. There is wide scope for further research about how specialisation can be optimised for particular judicial systems, taking into account the types of specialisation and the modalities through which it is achieved in contemporary judicial systems.

[213] Hanretty (n 83) 268-9.