

INTRODUCTION

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This conference establishes the centrality of magistrate judges in the administration of justice, and it recognizes the cohort of magistrate judges and the process of magistrate judging as important areas of study. The papers printed here establish the pathways of research with respect to demographics, authority and utilization, and reasoning and decision-making. Our conference also offers an innovative model for engaging these issues: we showed how the judiciary and the academy can come together to engage in a conversation that advances the understanding of both groups. The William S. Boyd School of Law was proud to launch this effort and will continue to seek opportunities to continue these important conversations.

Much has been written about judges, judicial decision-making, and the judicial process. But the academy's fascination with Article III judges has obscured the complexity of an adjudicative process that, in fact, involves multiple actors. Magistrate judges, in particular, occupy a vital role at "almost every stage of the adjudicative process in civil and criminal cases litigated in United States district court[s]."¹ Yet the system of magistrate judges is essentially ignored in studies of judicial behavior, in analyses of the judicial process, and in accounts of judicial decision-making. Indeed, magistrate judges are the "least-understood elements of the federal judiciary."² These observations are as profound and revelatory as they are conspicuous and irrefutable.

This anomaly was first brought into relief by Judge Philip Pro. Judge Pro is long a distinguished public servant of the federal bench; he is a lion of the legal community in the West; and he is a beloved citizen-leader of the State of Nevada and the City of Las Vegas. Intellectually curious and capacious, Judge Pro, after decades of experience as a judge, enrolled as a student in Duke University School of Law's Judicial Studies Program. Judge Pro earned a Master's degree, and his thesis analyzed the long-overlooked role of magistrate judges in studies of the

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¹ Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted for*, 16 NEV. L.J. 783, 785 (2016).

² Tracey E. George & Albert H. Yoon, *Article I Judges in An Article III World: The Career Path of Magistrate Judges*, 16 NEV. L.J. 823, 823 (2016).

judicial process. His thesis triggered a conversation between members of the faculty at the law schools at Duke and UNLV. Those conversations led, in turn, to the organization of this conference, which took place on September 25–26, 2015, at the University of Nevada Las Vegas. The conference was a joint effort of the William S. Boyd School of Law and the Duke University School of Law.

In this introductory essay we highlight one area of research where a richer understanding of the role of magistrate judges may be especially significant. First, some broader context. The role of the federal judge—and, therefore, the administration of justice—has changed dramatically in the past seventy-five years. In 1938, new Federal Rules of Civil Procedure introduced a uniform and unified system of civil procedure.³ Also in 1938, the Supreme Court held, in *Erie Railroad Co. v. Tompkins*, that a federal court must apply the substantive statutory and decisional law of the appropriate state, except in matters governed by the Constitution or by Congressional legislation.⁴ The combination of these two events established federal *procedure* as a focal point for academic study and as another important battleground for competing policy interests.⁵

This modern era of federal courts can, in turn, be divided into two halves.⁶ For decades leading up to the 1980s, judges played a limited but significant role: ensure that the parties had access to discovery, and preside over a trial in those cases that did not settle.⁷ Dispositive motions were rarely granted, judges tried cases, and the vast majority of cases settled in the shadow of a trial.⁸

³ These uniform Federal Rules of Civil Procedure replaced a regime of conformity acts by which federal courts, in cases at law, conformed to the procedure of the state in which the federal court sat. These Federal Rules also unified the procedure for cases at law and equity. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

⁴ 304 U.S. 64 (1938).

⁵ See generally Stephen B. Burbank, *Procedure, Politics, and Power*, 52 J. LEGAL EDUC. 342, 343 (2002) (recognizing that “[p]rocedure is power, that like all power . . . can be used for good or ill”); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818 (2010) (“Procedure is an instrument of power and social control. Procedures alter the conduct of groups and individuals, and thus can prefer some over others. And procedure can, in a very practical sense, negate, resuscitate, or generate substantive rights.” (quotation and citation omitted)).

⁶ Although we focus here primarily on the civil side of the court’s docket, it is our understanding that the criminal docket has experienced a similar transformation. See generally GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 13, 40–44, 121–24 (2003) (describing pressure on lawyers and judges to dispose of criminal cases through plea bargaining); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2476–81 (2004).

⁷ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1845–46 (2014).

⁸ *Id.* For the origins of the shadow metaphor, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (“Individuals in a wide variety of contexts bargain in the shadow of the law . . .”).

By the mid-1980s, a wave of concerns about exploding caseloads, escalating costs, and endless delays, transformed the judicial role.⁹ The conceit of various reforms then (as since) was *case management*.¹⁰ Judges were empowered to actively manage their cases at every stage of litigation from start to finish.¹¹ Today, scheduling conferences, pretrial conferences, status conferences, settlement conferences, and discovery conferences are de rigueur.¹² As a natural complement to this increased judicial involvement, judges also received (or seized, as the case may be) authority to dispose of cases on preliminary motions.¹³ The vast majority of cases still settle by agreement of the parties.¹⁴ But because trial can be perceived as a failure or a “mistake” on the part of a managerial judge,¹⁵ academics, practitioners, and many judges worry about the emphasis on settlements and about the disappearance of trials.¹⁶

In this new regime, adjudication is a more opaque process. Gone are the days when cases were resolved either by trial in a public courtroom or by a voluntary settlement in the shadow of a trial. Instead a constellation of actors earnestly manage cases toward settlement, toward disposition by motion, or for that rare 1–2 percent of cases, toward a trial.¹⁷ It is no coincidence that the emergence of

⁹ Subrin & Main, *supra* note 7, at 1859–67.

¹⁰ See generally Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 75 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

¹¹ See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262–68 (2005) (chronicling “the ascendance of a judicial ideology [over the past thirty years] that commends intensive judicial case management and active promotion of settlements”); Judith Resnik, *supra* note 10, at 414–31; Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

¹² See generally Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).

¹³ District judges led the reforms to 12(b)(6) and summary judgment practice that were ultimately endorsed by the Supreme Court. See Subrin & Main, *supra* note 7, at 1890–91.

¹⁴ See Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1599 (2015).

¹⁵ See generally Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 105 (2010) (asserting that the Administrative Office of the U.S. Courts “preach[es]” that trials are a failure on the part of the judge); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 107–08 (1994) (suggesting that most judges and scholars believe “trials represent mistakes”); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 n.200 (1995) (criticizing the inclination to perceive of a “trial as a pathological event”).

¹⁶ See, e.g., Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 308 (2012); Patrick E. Higginbotham, Mahon Lecture, 12 TEX. WESLEYAN L. REV. 501, 502 (2006); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006).

¹⁷ See Main, *supra* note 14.

a judicial bureaucracy attended this transformation of the judicial role. The number of senior judges, law clerks, staff attorneys, and externs expanded to assist judges whose duties were more focused on managing cases, as opposed to trying cases.¹⁸ “As Judge Posner described in 1985, upon review of the astounding growth in the number of non-Article III employees in the federal judiciary, judges have become administrators instead of decision-makers. He even predicted this bureaucracy would be put to the task of avoiding trials.”¹⁹ Meanwhile, magistrate and bankruptcy judges assumed a proportion of the federal docket larger than that of their life-tenured judicial counterparts.²⁰

There is no shortage of writing about case management, the vanishing trial, and the effect of these reforms on access to justice. Yet whether the institution of magistrate judges deserves the blame (or the credit, as the case may be) for those phenomena remains an open question. Who are these magistrate judges? What motivates their decisions? Are they utilized differently across different districts—and is tailoring a good thing or is disuniformity inconsistent with the ideal of a federal *system* of courts?

This symposium may have been the first of its kind—exploring the critically important institution of magistrate judges from interdisciplinary, empirical, theoretical, and practical perspectives. Speakers included political scientists, legal academics, lawyers, statisticians, federal magistrate judges, federal district judges, federal appellate judges, and officers from the Administrative Office of the U.S. Courts. Prior iterations of the papers that are printed in this symposium issue were presented at the conference. Because the conference was structured to encourage, in particular, participation by judges, the papers triggered a robust and frank conversation that was unusually revealing and pragmatic for an academic conference. The papers printed in this volume reflect the value of those exchanges. A list of persons to whom we are especially grateful appears at the end of this essay.

This symposium includes six papers. First, Judge Pro revised his thesis, and it is included here as *United States Magistrate Judges: Present but Unaccounted for*.²¹ Judge Pro outlines the consequences of failing to account for magistrate judges when considering the judicial decision-making behavior of United States district judges. Judge Pro’s research methodology leveraged his comparative advantage, to-wit: access to federal judges. Judge Pro had a long and distinguished

¹⁸ See Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012) (documenting the contributions of senior judges). See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) (“The proliferation of staff and subjudges and the delegation of power to them weaken the judge’s individual sense of responsibility.”).

¹⁹ See Subrin & Main, *supra* note 7, at 1873–74 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 66–67 (1985)).

²⁰ Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998).

²¹ Pro, *supra* note 1.

career as a magistrate judge, district judge, and chief judge. Known and respected by judges, Judge Pro interviewed thirty-four Ninth Circuit district and magistrate judges. His findings illustrate not only the broad scope of judicial decision-making by magistrate judges but also the dependence of district and magistrate judges on each other in ways not commonly recognized as case determinative. Of course the legacy of Judge Pro's research is not only the specific findings reported in his careful article, but also the product of the broader conversation that his project has initiated.

Because the domain of magistrate judges is largely undiscovered, all of the scholarship in this symposium is pioneering work. In *Article I Judges in an Article III World: The Background and Attributes of U.S. Magistrate Judges*,²² distinguished law professors Tracey George and Albert Yoon offer the first demographic study of magistrate judges. The purpose of their article is to increase our understanding of magistrate judges by examining who is chosen as a magistrate judge. Although demographic data about federal *district* judges is systematically collected, reported and analyzed, such is not the case for *magistrate* judges. The professors' data reveal how the composition of magistrate judges differs from district judges. Specifically, although magistrate judges come from more diverse educational and professional backgrounds than do district judges, Article I judges are not otherwise any more diverse than their Article III counterparts. These scholars explore the extent to which the compositional differences are a product of the different selection processes for magistrate judges and district judges.

Another paper is authored by two senior attorneys who have more than 45 years of combined experience providing advice and analytical support to the federal courts. In "*Nothing Less Than Indispensable: The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*,"²³ Douglas Lee and Thomas Davis of the Administrative Office of the U.S. Courts offer a tour de force that documents the expansion in the authority and utilization of magistrate judges. As a narrative frame for the description of this ambitious trajectory of growth and power for the institution of magistrate judges, the authors identify three key events: (1) the final report of the Federal Court Study Committee in 1990; (2) the enactment of the Judicial Improvements Act of 1990; and (3) the issuance of the Supreme Court's opinion in *Peretz v. United States* in 1991. The silver anniversary of all three of these events is an especially compelling reason to appreciate the comprehensive historical analysis that Lee and Davis offer.

²² George and Yoon, *supra* note 2.

²³ Douglas A. Lee & Thomas E. Davis, "*Nothing Less than Indispensable*": *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845 (2016).

In *The Comparative Outputs of Magistrate Judges*,²⁴ political scientist Christina Boyd uses both original and newly-available data sets to address three threshold questions about decision-making by magistrate judges. First, she considers whether magistrate judges produce different decisions and produce distinct judicial outputs when compared to their district judge counterparts. Second, she examines the data for evidence that magistrate judges alter their outputs to seek promotion via nomination and confirmation. And third, she explores whether prior experience as a magistrate judge affects the decision-making of district judges. In all three inquiries, the data reveal statistically-significant findings. Although Professor Boyd warns that her findings are preliminary and limited, this work constitutes a breakthrough in our understanding of how the decision-making of magistrate judges and districts judges may differ.

In *Magistrate Judges, Settlement, and Procedural Justice*,²⁵ Professor Nancy Welsh dissects the unique role that magistrate judges occupy in the facilitation of settlements. Although the “settlement culture” of the federal judiciary has been critically examined in the literature,²⁶ this paper may be the first to closely examine the different ways in which magistrate judges are used to facilitate settlement. Magistrate judges are often described as the face or the front-line of the federal judiciary, and using the literature of procedural justice as her lens, Professor Welsh carefully documents the increasing, disparate, and occasionally problematic uses of magistrate judges in the settlement process. Invoking the broad perspective of a comparativist, the nuance of someone well-versed in the interdisciplinary literature, and the first-hand experience of someone who directed an ADR organization for nearly a decade, Welsh’s paper also proposes specific and ambitious reforms.

Finally, Duke University School of Law was a co-sponsor of the conference, and three of their distinguished professors jointly authored *How Bayesian are Judges?*²⁷ Judges, and people generally, are assumed to “Bayesians.” A Bayesian model predicts that persons are constantly learning, and that that learning is incorporated into our decision-making as a feedback loop. Professors Jack Knight and Mitu Gulati, together with Dean and former-judge David Levi, probe that assumption in the context of search warrants, and find surprising results. After a search warrant is issued, the officer who executed the search files a “return” with the court. The paper discusses what happens—or, more accurately, what *doesn’t* happen—with respect to those returns which, after all, contain information that

²⁴ Christina L. Boyd, *The Comparative Outputs of Magistrate Judges*, 16 NEV. L.J. 949 (2016).

²⁵ Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016).

²⁶ See, e.g., Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994); Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1526–27 (2014); Young, *supra* note 16, at 80–81.

²⁷ Jack Knight, Mitu Gulati & David Levi, *How Bayesian Are Judges?*, 16 NEV. L.J. 1061 (2016).

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could inform future probabilistic decisions about the merits of forthcoming warrant requests.

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The works published in this symposium benefitted from the perspectives and inputs of all of the participants. Panelists and commenters included the following federal appellate, district, and magistrate judges: Robert Collings, Valerie Cooke, Candy Dale, Cam Ferenbach, Michael Newman, James O'Hara, Johnnie Rawlinson; and Neil Wake. Academic panelists and commenters included Nancy King, Ann McGinley, Jeffrey Stempel, Jean Sternlight, Tobias Barrington Wolff.

The conference was well-attended and benefited from the unique insights of Boyd Law faculty members and students, judicial law clerks, court administrators, attorneys, and distinguished others including Representative Elliott Anderson, Professor Rishi Batra, Judge Irene Feldman, Judge Bill Hoffman, Professor Katherine Macfarlane, Professor Norman Spaulding, Federal Public Defender Brenda Weksler, and Judge Telia Williams.

