

UNITED STATES MAGISTRATE JUDGES: PRESENT BUT UNACCOUNTED FOR

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The relationship between United States district judges and United States magistrate judges is unique within the American judiciary. United States magistrate judges are the first judges encountered in most federal civil or criminal cases and play an increasingly important role in the adjudication of virtually every case in United States district court. Yet, while the behavior of Article III judges has been the subject of active academic scrutiny, the behavior of magistrate judges, who are appointed to renewable eight-year terms by their Article III district judge colleagues, has largely been ignored.¹ This paper reports the results of interviews of thirty-four magistrate judges and district judges, and through their experiences, explores whether their judicial decision-making relationship, a motivation for re-appointment, or elevation to Article III status influences their judicial behavior and that of their district judge colleagues. The answers to these questions are nuanced and dependent on variables not previously considered, and are best understood in the context of the remarkable evolution of the Magistrate Judges System, which has existed for less than fifty years.

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¹ See *infra* Part II.

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INTRODUCTION

The central role played by judges in the American legal system is obvious. But as the views expressed by many who study, and endeavor to explain the behavior of American judges has shown, “the determinants of their decisions[] are not well understood”² There are undoubtedly many reasons for this lack of understanding. Human behavior, judicial and otherwise, is difficult to understand or quantify. Sometimes the data is limited and theoretical models are subject to genuine debate. This paper argues that the difficulty encountered in explaining the behavior of United States district judges is compounded by the failure to account for the evolving role of the United States magistrate judge, and a concomitant failure to adequately understand the judicial decision-making relationship between magistrate and district court judges.

The consequences of failing to account for magistrate judges when considering the judicial decision-making behavior of United States district judges are well illustrated in *The Behavior of Federal Judges*.³ This interesting book, written by the formidable triumvirate of Lee Epstein, William Landes, and Judge Richard Posner, appeals to those seeking to more fully understand the judicial decision-making behavior of Justices of the United States Supreme Court, judges of the United States courts of appeals, and United States district court judges. *The Behavior of Federal Judges* has garnered widespread praise in academic circles and the popular media, and it has been characterized by Cass Sunstein as, “the most detailed and elaborate quantitative analysis of the federal judiciary to date.”⁴ However, this paper argues the authors’ analysis of the behavior of United States district judges is rendered less useful by their failure to account for the interrelationship between Article III district judges, and their non-Article III magistrate judge colleagues in the adjudicative process. That relationship has evolved substantially in recent decades. This paper will show that the impact of

² LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 1* (2013).

³ See generally *id.*

⁴ Cass R. Sunstein, *Moneyball for Judges: The Statistics of Judicial Behavior*, NEW REPUBLIC (Apr. 9, 2013), <https://newrepublic.com/article/112683/moneyball-judges> [<https://perma.cc/KQW6-GZ2Y>]; see also Sara C. Benesh, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, 23 L. & POL. BOOK REV. 312 (2013) (reviewing EPSTEIN ET AL., *supra* note 2), www.lpbr.net/2013/07/the-behavior-of-federal-judges.html [<https://perma.cc/6E2Z-X7SJ>]; Adam Liptak, ‘Politicians in Robes’? Not Exactly, But . . . , N.Y. TIMES (Nov. 26, 2012), http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html?_r=0 [<https://perma.cc/98R5-26DC>].

this relationship on judicial decision-making behavior is apparent at almost every stage of the adjudicative process in civil and criminal cases litigated in United States district court.⁵

Despite the pivotal role magistrate judges play in adjudicating civil and criminal cases, with few exceptions,⁶ “[m]agistrate judges are an understudied group of judges; the literature on judging largely ignores them.”⁷ Why has this cadre of judges, who have become so important to the adjudication of cases in our federal courts, attracted such scant attention from the academy?⁸ One plausible explanation may be because it is easier to focus on the Justices of the United States Supreme Court, and to a lesser degree, on judges of the United States courts of appeals because such scholarship is more likely to garner notoriety or praise within the academic community. The fact that data from these courts is plentiful, and so much already has been written about them, undoubtedly adds to their allure. Additionally, although hundreds of thousands of litigants annually invoke the assistance of the federal trial courts to resolve significant disputes,⁹ the United States Supreme Court and the United States courts of appeals more broadly shape the life of the nation, and grapple with the weightiest constitutional, legal, and policy issues of the day.

Whatever the reason for the frequent omission, the academy’s failure to account for magistrate judges raises serious questions regarding the reliability of prior studies on the “determinants of [the] decisions” of United States district judges.¹⁰ Its omission further deprives us of insight into the determinants of the judicial decision-making behavior of magistrate judges, which so profoundly affects the outcome of cases in United States district courts.

This paper will first endeavor to fill the void by tracing the relevant history of the Magistrate Judges System and explaining the judicial decision-making role

⁵ See generally Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. L. REV. 661, 661–62 (2005); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1504 (1995).

⁶ See generally Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1114–18 (2006); Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002). These, and several of the articles footnoted therein, contain thoughtful discussions of the development of the Magistrate Judges System, and other non-life-tenured judicial positions within Article III courts.

⁷ Mitu Gulati et al., *In the Absence of Scrutiny: Narratives of Probable Cause* 16 (Duke L. Sch., Working Paper, July 1, 2013), https://scholarship.law.duke.edu/faculty_scholarship/3078 [<https://perma.cc/E25P-6CE9>].

⁸ “Academy” is the term of art used by the Duke University School of Law to refer to legal academia’s study of the law and legal profession.

⁹ See generally *Federal Court Management Statistics*, U.S. CTS. www.uscourts.gov/report-name/federal-court-management-statistics [<https://perma.cc/B87H-9Z7D>] (last visited Mar. 11, 2016).

¹⁰ EPSTEIN ET AL., *supra* note 2.

currently played by magistrate judges in relation to their Article III district judge colleagues. Next, this paper will explain why the analysis of district judge behavior portrayed in *The Behavior of Federal Judges* is incomplete, based on its failure to account for the interrelationship between district and magistrate judges in deciding cases in United States district court. Finally, this paper reports the results of interviews from thirty-four magistrate and district judges within the United States Courts for the Ninth Circuit. These interviews explore the interrelationship between these Article III and non-Article III siblings in a manner designed to elicit a better understanding of the influences on the judicial decision-making behavior resulting from their unique relationship.

The method for exploring the interrelationship between district and magistrate judges is fundamentally simple. The statutory framework and history of the Magistrate Judges System is readily available.¹¹ Profiles of caseloads of the United States district courts, including the division of matters adjudicated by district judges and magistrate judges, also are accessible through statistical caseload reports published annually by the Administrative Office of the United States Courts.¹² This is important because it reflects the scope of cases adjudicated fully or in part by magistrate judges throughout the nation's federal district courts. It further reveals the weakness of attempting to understand the judicial decision-making behavior of United States district judges without accounting for the significant role and influence of the associated magistrate judges.¹³

More difficult to ascertain are the reasons why each district court utilizes magistrate judges differently. The statutory framework for the appointment and reappointment of magistrate judges, and for the duties that may statutorily be assigned to magistrate judges, are fixed.¹⁴ However, the actual duties delegated to magistrate judges are within the discretion of the district judges in each district and are not entirely uniform.¹⁵

This paper proposes that the decisions of district judges regarding the selection and reappointment of magistrate judges, and the manner in which those magistrate judges will be utilized, are significant judicial decisions which must be

¹¹ See 28 U.S.C. §§ 631–639 (2012); FED. R. CIV. P. 59, 72–73. See generally D. Nev. Loc. R. IB 1-1 to 1-9 (2011).

¹² See *U.S. Magistrate Judges - Judicial Business 2014*, U.S. CTS. (2014), <http://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2014> [<https://perma.cc/H7S2-BLMU>] [hereinafter *Judicial Business*].

¹³ The failure to account for the interrelationship between Article III district judges and non-Article III magistrate judges is a bit like trying to understand the determinants of the decisions of Members of Congress by examining only one Chamber of that body. The results are metaphorically akin to the parable of the three blind men trying to describe an elephant by touching different parts of its body.

¹⁴ See 28 U.S.C. §§ 631, 636.

¹⁵ The interviews of the thirty-five magistrate judges and district court judges recounted below illustrate how magistrate judges are used in varying capacities from district to district. See *infra* Part III.

considered because they dictate the respective judicial decision-making responsibilities which will be exercised by district and magistrate judges in each district. As the interviews of thirty-four magistrate judges and district judges discussed in Part III reveal, there are many reasons for this. Magistrate judges' duties, and the interrelationship between magistrate judges and their Article III colleagues may vary depending upon the size, caseload needs, and experience or culture of each particular district. These, and other factors, also influence the selection and reappointment of magistrate judges. In sum, this paper will show that a combination of relevant factors influences and reflects the judicial decision-making behavior of district judges and magistrate judges, including the synergistic relationship between the two, which has previously been unaccounted for.

I. A BRIEF HISTORY OF THE MAGISTRATE JUDGES SYSTEM

Today, lawyers entering any United States district court will immediately become familiar with the first judicial officer they likely will encounter: the United States magistrate judge. Yet a mere forty-seven years ago, magistrate judges did not even exist.¹⁶ A basic understanding of the history of the Magistrate Judges System is helpful to provide context for the current role of magistrate judges in the adjudication of cases in relation to their district judge colleagues.

Four years after the Judiciary Act of 1789, Congress authorized the judges of the United States circuit courts to appoint "discreet persons learned in the law" to take bail in criminal cases.¹⁷ In 1817, Congress first referred to these judicial officers as "commissioners" when it empowered them to assist federal judges in the taking of discovery in civil actions.¹⁸ In successive Judiciary Acts throughout the ensuing 150 years, Congress extended the authority of commissioners to assist United States district courts with continually growing caseloads.¹⁹ Finally, in response to the recommendations of several members of the Judicial Conference of the United States and Congress, the Senate Judiciary Committee conducted hearings to consider comprehensive reform of the Commissioner System, resulting in enactment of the Federal Magistrates Act of 1968.²⁰

¹⁶ See Pro & Hnatowski, *supra* note 5.

¹⁷ Judiciary Act of 1793 § 4, 1 Stat. 334 (1793).

¹⁸ See Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1 FED. CTS. L. REV. 607, 608–09 (2006); Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 1–2 (1970).

¹⁹ See generally MAGISTRATE JUDGES DIV., OFFICE OF JUDGES PROGRAMS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM (2009) (on file with author); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979); Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565 (1974).

²⁰ See Spaniol, *supra* note 19. See generally Federal Magistrates Act of 1968 § 101, 82 Stat. 1108, 1108–14 (codified as amended at 28 U.S.C. §§ 631–639 (2000)).

The Federal Magistrates Act of 1968 . . . represented the culmination of years of joint effort by Congress and the federal judiciary to improve the quality of justice and to expedite the disposition of the growing caseloads in the federal courts. The Act built upon and superseded the 175-year-old United States commissioner system and created a unique corps of judicial officers, the United States magistrate judges.²¹

As it has evolved, the Magistrate Judges System has continued to fulfill the objectives of Congress in enacting the Federal Magistrates Act of 1968:

(1) in upgrading the status and quality of the first echelon of the federal judiciary; (2) in establishing an effective forum for the disposition of federal misdemeanor cases; (3) in providing needed assistance to district judges in the disposition of their civil and criminal cases; (4) in improving access to the federal courts for litigants; and (5) in providing the courts with a supplementary judicial resource to meet the ebb and flow of their caseload demands.²²

When the Magistrate Judges System commenced operation in July 1971, it was comprised of “82 full-time magistrates, 449 part-time magistrates, and 11 combination referees in bankruptcy/magistrates and clerk/magistrates.”²³ The magistrate judges were responsible for a significantly larger share of the workload of the federal courts than were the 700 United States commissioners they replaced.²⁴ Since 1968, the Magistrate Judges System has evolved in a manner, which demonstrates the capacity of the largely self-governing federal judiciary, to address the growing, and increasingly complex civil and criminal caseloads that confront the federal courts. As of August 1, 2014, there were 534 full-time magistrate judge positions authorized throughout the ninety-four federal districts, thirty-five part-time positions, and only three clerk/magistrate judge positions.²⁵

A magistrate judge is a judicial officer of the Article III United States district court.²⁶ Congress has clearly provided in the Act that the role of a magistrate judge is to assist Article III judges, not to serve as a lower tier court.²⁷ “The authority that a magistrate judge exercises is the jurisdiction of the district court itself, delegated to the magistrate judge by the district judges of the court under

²¹ Pro & Hnatowski, *supra* note 5; *see also* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 10–12 (2014), <http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf> [<https://perma.cc/9HM6-4WST>].

²² THE JUDICIAL CONFERENCE OF THE U.S., THE FEDERAL MAGISTRATES SYSTEM 67 (1981).

²³ Pro & Hnatowski, *supra* note 5, at 1505.

²⁴ *Id.*

²⁵ E-mail from Thomas Davis, Attorney Advisor of the Judicial Servs. Office, to Philip Pro, Former Chief Judge of the U.S. Dist. Court for the Dist. of Nev. (Aug. 31, 2015, 09:23 PST) [hereinafter Davis E-mail] (on file with author).

²⁶ 28 U.S.C. § 631 (2012).

²⁷ *See* Brendan Linehan Shannon, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 265 (1991).

governing statutory authority and local rules of court.”²⁸ As a result, the Judicial Conference of the United States consistently has encouraged Congress to establish all causes of action in the district court rather than mandating the reference of particular types of cases or proceedings to magistrate judges.²⁹

The Federal Magistrates Act of 1968 grants each district court wide latitude to assign judicial duties to magistrate judges, enabling courts to take into account their own needs and conditions.³⁰ The Act allows the utilization of magistrate judges, which manifests judicial decision-making behavior of the district judges of each district court, regarding the appointment of magistrate judges and by means of the allocation of case specific judicial duties and participation in matters of district court governance. These decisions are made, often in collaboration with their magistrate judge colleagues, in light of experience, and changes in the district’s caseload, resources, rules, or relevant statutory and case law.

In federal criminal cases, virtually every initial proceeding, including determinations regarding pretrial release or detention, is conducted before a magistrate judge.³¹ The issuance of search warrants, and the initiation of federal criminal proceedings by a criminal complaint and arrest warrant, typically will be authorized by a magistrate judge.³² These are not perfunctory duties, but important proceedings in which the magistrate judges’ decisions can have a profound impact on any criminal case. In many districts, a magistrate judge may adjudicate pre-trial discovery, and other non-dispositive motions.³³ In some districts, dispositive motions in felony cases also may be preliminarily decided by the magistrate judge on a report and recommendation to the district judge.³⁴ Most trial proceedings and sentencing in non-felony cases will be conducted before a magistrate judge. In those districts with enormous criminal caseloads, some

²⁸ ADMIN. OFFICE OF U.S. COURTS, JUDICIAL SERVS. OFFICE, INVENTORY OF UNITED STATES MAGISTRATE JUDGES DUTIES, <http://www.pamd.uscourts.gov/sites/default/files/general-ordes/Inventory.pdf> [<https://perma.cc/C4Y8-DPJ6>]. The *Inventory* is a 251-page compilation of court decisions discussing various duties referred to magistrate judges by circuit. *See also* JUDICIAL CONFERENCE COMM. ON THE ADMIN. OF THE MAGISTRATE JUDGES SYS., SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, (2013) [hereinafter SUGGESTIONS] (on file with author).

²⁹ SUGGESTIONS, *supra* note 28.

³⁰ The specific provisions of the Act that govern magistrate judge authority are found at 28 U.S.C. § 636 and 18 U.S.C. § 3401. In addition, other statutory grants of authority to magistrate judges appear throughout the United States Code, and the Federal Rules.

³¹ *See* 28 U.S.C. § 636 (2012).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

change of plea proceedings in felony cases, and even jury selection in felony trials also may be conducted before a magistrate judge.³⁵

A review of the statistical reports of criminal matters adjudicated by magistrate judges for the twelve-month period ending September 30, 2013, graphically illustrates the range of judicial decision-making duties discharged by magistrate judges.³⁶ During that period, magistrate judges presided over 202,227 criminal proceedings, including 107,697 non-dispositive and 3,177 dispositive motions, conducted 38,072 pretrial conferences, took 30,726 guilty pleas, issued 62,575 search warrants, and issued 53,202 arrest warrants.³⁷ Magistrate judges also conducted 101,349 initial appearances, 64,230 arraignments, and 49,936 detention (bail) hearings.³⁸ Additionally, magistrate judges adjudicated 8,404 Class A misdemeanor cases, including non-jury and jury trials on consent of the parties, which otherwise would have remained on the trial docket of their district judge colleagues.³⁹

In most civil cases, the interaction of counsel and the parties with the magistrate judge will be even greater. In many, if not most districts, magistrate judges conduct pretrial case management conferences, and adjudicate non-dispositive motions, including discovery matters, which can define the scope of the litigation. In some districts, magistrate judges preliminarily adjudicate dispositive motions, by making a report and recommendation to the assigned district judge. Magistrate judges also routinely conduct settlement conferences in civil cases as well as other court annexed Alternative Dispute Resolution programs offered in many district courts. Most significantly, on consent of the parties, the authority of a magistrate judge to fully and finally adjudicate all or any part of any civil case filed in United States district court either on motion, or by bench or jury trial, is almost unlimited under 28 U.S.C. § 636(c).⁴⁰ When this occurs, the case is entirely removed from the docket of the assigned district judge, and the assigned magistrate judge thereafter acts as a *de facto* Article III judge, with appeal available directly to the pertinent court of appeals.

Whatever the utilization scheme employed, the statistical profile for civil matters adjudicated by magistrate judges for the twelve-month period ending September 30, 2013, again, is dramatic.⁴¹ During that period, magistrate judges adjudicated 229,199 non-dispositive motions, typically discovery motions, and

³⁵ In the author's experience and personal knowledge, receiving pleas of guilty and selecting juries in felony criminal cases has become common in the District of Arizona, Tucson Division, and the Southern District of California, as a result of their comparatively high criminal caseloads.

³⁶ See *Judicial Business*, *supra* note 12, at Table S-17.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* See 18 U.S.C. § 3559(a)(6) (2012) (stating that Class A misdemeanors are offenses punishable for one year or less, but more than six months).

⁴⁰ 28 U.S.C. § 636(c) (2012); FED R. CIV. P. 73.

⁴¹ See *Judicial Business*, *supra* note 12, at Table S-17.

21,991 dispositive motions in civil cases not involving prisoners.⁴² These were typically motions to dismiss or for summary judgment, either fully decided on consent of the parties, or via report and recommendations to a district judge. Magistrate judges also conducted 56,812 pretrial conferences, and 22,757 settlement conferences.⁴³ In the arena of prisoner habeas and civil rights litigation, magistrate judges fully adjudicated, or recommended disposition to a district judge, 8,681 state habeas, and 3,281 federal habeas cases, and 14,268 prisoner civil rights cases.⁴⁴ Most significantly, during that same twelve-month period, magistrate judges fully adjudicated 15,803 civil cases on consent of the parties pursuant to 28 U.S.C. § 636(c), including 313 jury trials, and 143 non-jury trials, which represents 14 percent of the civil jury trials conducted in the United States district courts during that period.⁴⁵

Recalling the parable of the boatload of statisticians who drowned in a lake averaging two feet in depth, mere statistical profiles can be deceiving. While the statistics above demonstrate the substantial utilization of magistrate judges to handle an ever-growing array of civil and criminal matters, they must be understood in relation to the overall caseloads of the United States district courts. An important but previously unaccounted for example of judicial decision-making behavior by district judges also is reflected in the statistical profiles above. Except for cases proceeding before the magistrate judge for full adjudication on consent of the parties, each ruling by a magistrate judge on a non-dispositive or dispositive motion reflected above is subject to review on objections (appeal) before the assigned district judge.⁴⁶ More significantly, the statistical profiles represent a fundamental manifestation of judicial decision-making behavior by United States district judges in allocating case specific decision-making responsibilities to magistrate judges within their districts.

One reason district judges have come to rely so heavily on magistrate judges to undertake such substantial adjudicative responsibilities is easy to discern: since the inception of the Magistrate Judges System, federal criminal and civil caseloads have continued to grow in number and complexity. The concomitant inability to secure Congressional authorization for additional Article III judgeships to meet the needs of growing caseloads, and the incapacity of the Executive and Legislative Branches to fill vacant Article III judgeships, makes reliance on magistrate judges to help fill the gap understandable. This is particularly so given that it is the district judges in each district who select new magistrate judges,

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Under 28 U.S.C. § 636(b)(1)(A), the ruling by a magistrate judge on a non-dispositive motion is subject to review by the district judge on a clearly erroneous or contrary to law standard. Under 28 U.S.C. § 636(b)(1), a recommendation for final ruling by a magistrate judge on a case dispositive motion is subject to de novo review by the assigned district judge.

decide whether to reappoint incumbent magistrate judges, and define the scope of the judicial work they will perform.⁴⁷

Another significant manifestation of judicial decision-making behavior by district judges is found in the manner in which magistrate judges are appointed to the district court. The selection process for magistrate judges is rigorous, and substantially different from that utilized by the Executive and Legislative Branches for Article III judges, mostly because it does not involve the political nomination by the President affiliated with a particular political party and confirmed by the United States Senate.⁴⁸ Yet by any measure, the process for appointing magistrate judges has produced a cadre of over 500 highly competent and diverse federal judges comprising a significant number of the total judges in the United States district courts.⁴⁹

Today, remarkably talented state judges and lawyers increasingly apply for vacant magistrate judge positions. The Federal Magistrates Act established certain minimum standards and procedures for filling vacant magistrate judge positions, for creating new magistrate judge positions, and for the selection and appointment or reappointment of magistrate judges.⁵⁰ Before a vacancy in a magistrate judge position may be filled or a new magistrate judge position may be authorized, the district court must obtain approval of the judicial council for its circuit.⁵¹ The Judicial Conference Committee on the Administration of the Magistrate Judges System also must review the request, and the Judicial Conference of the United States must grant final authorization.⁵² Hence, while not related to specific judicial decision-making behavior on the merits of a particular case, the process for establishing and filling magistrate judge positions reflects the judicial behavior of the judges of the requesting district court, with respect to court governance. It also offers insight into judicial decision-making with respect to the division of civil and criminal case related responsibilities (utilization) among the Article III and non-Article III judges of that court. Presumably district judges select, and reappoint, those they consider to be the best magistrate judges from each available group of candidates, and they do so without the partisan political “kabuki” that sometimes plagues the selection and confirmation of Article III judges.

⁴⁷ See 28 U.S.C. § 631 (2012).

⁴⁸ See *id.*

⁴⁹ As of September 30, 2013, there were 677 authorized Article III district judgeships, but seventy-five of those were vacant pending nomination and confirmation of new district judges. Davis E-mail, *supra* note 25. There also were 346 senior district judges handling a significant number of cases in the district courts. *Id.* As of August 1, 2015, there were 534 full-time, and thirty-five part-time magistrate judges, and seventy-one retired magistrate judges serving on recall for up to five years in accord with 28 U.S.C. § 375(a)(1). *Id.*

⁵⁰ See 28 U.S.C. § 631.

⁵¹ *Id.* at (f).

⁵² *Id.* at (a).

II. THE BEHAVIOR OF FEDERAL JUDGES

In the General Introduction to *The Behavior of Federal Judges*, the authors explain their reason for omitting consideration of magistrate judges as follows:

Data availability and a desire to keep the book to a manageable length have persuaded us to limit our analyses to the federal judiciary, and specifically to the Article III federal judiciary . . . There are other federal judicial officers, primarily federal magistrate judges[,] . . . but they are not appointed by the President or confirmed by the Senate, and have fixed terms of office rather than life tenure.⁵³

Thereafter, the only substantive discussion of magistrate judges is found 390 pages later, where the authors note in their Conclusion the decision to limit the scope of their book to certain Article III judges.⁵⁴ The authors place magistrate judges with bankruptcy judges, Tax Court judges, Article I administrative law judges, state judges, and foreign judges as inapposite to their study.⁵⁵ They explain this omission as necessary to reduce the variance in their data, “and thus the range of testable hypotheses that can be derived from a labor-market theory of judicial behavior.”⁵⁶

Naturally the authors are free to define the scope of their study. However, unlike the wide array of other judges omitted, the authors’ failure to account for over 500 magistrate judges in conjunction with their analysis of district judges, arguably limits the validity of several of the conclusions reached regarding nearly seventy-five percent of the Article III judges studied in their book.⁵⁷

The theme of *The Behavior of Federal Judges* is a familiar and recurring one: “[T]he behavior of American judges, and in particular the determinants of their decisions, are not well understood . . . by lawyers, law professors, and even many judges . . .”⁵⁸ In part, the authors attribute the difficulty in understanding judges’ behavior to their assertion that, “judges in our system are permitted to be, and most are, quite secretive.”⁵⁹ Hence, explain the authors, “indirect methods must be employed to understand their behavior,” including “sophisticated theoretical concepts and quantitative tools to penetrate self-serving judicial rhetoric, go beyond judges’ limited self-understanding, and place the study of judicial behavior on a scientific basis.”⁶⁰ The authors also seek to determine whether

⁵³ EPSTEIN ET AL., *supra* note 2, at 7.

⁵⁴ *Id.* at 397.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ My attempt at calculating this percentage is based on current Administrative Office of the United States Courts statistics showing a total of 1,023 (677 active and 346 senior) district judges, 268 circuit judges (179 active and eighty-nine senior) and nine Supreme Court Justices. Although not all vacancies on the district courts or courts of appeal are currently filled, I am confident that the final nine is accurate.

⁵⁸ EPSTEIN ET AL., *supra* note 2.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1–2.

an aversion to reversal,⁶¹ effort aversion and leisure preference,⁶² or a desire for promotion, influence judicial behavior.⁶³ Grounded in their debatable assumption of secrecy, the authors outline their intention to offer an explanation of judicial behavior that falls between the legalism or formalism theory, in which careerism and ideology play no role in judicial decisions, and the polar opposite theory of realism in which judges are simply politicians in robes who employ “legalist pretensions . . . to conceal the political character of their rulings.”⁶⁴

No doubt the use of sophisticated theoretical concepts and quantitative tools wielded by able political scientists, economists, psychologists, lawyers, or judges can penetrate self-serving judicial rhetoric, and circumvent judges’ limited self-understanding. The task is made easier, but arguably less reliable, when the authors fail to square their analysis with the views of the judges they study. This paper suggests the authors’ analysis of district judge behavior is weakened further by the failure to account, directly or indirectly, for the role of the magistrate judge in the adjudicative process.

Certain other weaknesses are apparent in *The Behavior of Federal Judges* and warrant comment.⁶⁵ First, in their Introduction, the authors correctly state, “the vast majority of [federal district court] cases are decided without a trial.”⁶⁶ However, in the very same sentence they parenthetically opine, without any evident basis, that these cases are resolved “often without any significant judicial proceedings, being settled or abandoned early in the litigation.”⁶⁷

Undoubtedly, a number of cases filed in United States district courts lack even arguable merit. Also, many cases are resolved early in the litigation process, but this does not support the authors’ assertion that the majority of cases are resolved often without any significant judicial proceedings. The mountain of dispositive and non-dispositive motions adjudicated in the district courts by district and magistrate judges strongly suggest otherwise. Moreover, it is unclear what the authors mean by “significant judicial proceedings.”⁶⁸ They do not distinguish between rulings made exclusively by district judges, or by magistrate judges, or

⁶¹ For district judges, *The Behavior of Federal Judges* characterizes “reversal aversion” as a motivator when “they cannot be confident that the appellate court will defer to an ideologically colored exercise of discretion . . .” See *id.* at 12.

⁶² *The Behavior of Federal Judges* defines “effort aversion” as including a reluctance to work “too” hard (leisure preference), and a reluctance to quarrel with colleagues (conflict aversion). *Id.* at 7.

⁶³ *Id.* at 4, 13.

⁶⁴ *Id.* at 2.

⁶⁵ While I find other portions of *The Behavior of Federal Judges* worthy of comment, particularly as they relate to the analysis of the judicial decision-making behavior of United States district judges, they are not relevant to the interrelationship between district and magistrate judges. Hence, they are not discussed herein.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.*

⁶⁸ *Id.*

by a combination of the two.⁶⁹ Are the authors referring to rulings, which are dispositive of the case before the district court, including such matters as motions to remand to state court, which may not be subject to review by the court of appeals, or only rulings to which the authors ascribe some behavioral driver? If the latter, the authors are entitled to their opinion even though it is offered without empirical evidence, or even minimal analysis. If the former, the empirical basis is, at best, gossamer.

Indeed, the authors' parenthetical conclusion is contradicted in the same paragraph, wherein they note that "[d]istrict courts therefore hear a higher percentage of cases that can be disposed of readily by the application of legalist concepts than courts of appeal do."⁷⁰ From this, the reader might conclude, either that the authors do not consider legalist concepts such as standing, ripeness, and mootness to be significant judicial rulings, or that ideology has no role in the application of such judge-made doctrines, at least not in comparison to the ideology employed at the appellate level.

Again the reader is left to wonder how the authors view the significance, either in an ideological and behavioral sense, or a case dispositive sense, of cases resolved not only by district judges, but also by or in conjunction with magistrate judges. Here, countless examples could be found in rulings by both district and magistrate judges on motions to dismiss for lack of jurisdiction, or for failure to state a claim, or perhaps, on a claim of immunity, or on a motion for preliminary injunctive relief. Nor do the authors explain the significance they would ascribe to rulings on motions relating to discovery issues which implicate cost and burden of litigation, or claims of privilege, or trade secrets, to name but a few. Certainly they do not speak to the significance of rulings, early or otherwise, in criminal cases, such as motions to suppress evidence, post-arrest statements or identification, or of motions to dismiss an indictment, or to sever or join defendants, or for the production of exculpatory or impeaching evidence, all of which tend to influence plea negotiations and hence, take the form of what may be fairly characterized as dispositive of the case.

The reader, particularly one who presides or litigates frequently in the United States district court, is further left to ponder how the authors factor in the mountainous caseload of 28 U.S.C. § 2254, Petitions for Writs of Habeas Corpus, considered as frequently by magistrate judges as by district judges.⁷¹ Such cases often entail the review of entire state court criminal trial proceedings, or the review of quasi-trial proceedings occurring before a variety of administrative tribunals or Article I courts within the Executive Branch, such as Social Security appeals.⁷²

⁶⁹ See generally *id.*

⁷⁰ *Id.* at 10. Examples of "legalist concepts" offered by the authors include "standing, ripeness, and mootness, and doctrines that allow early dismissal of weak cases." *Id.*

⁷¹ This assertion is based on the author's personal and professional experience.

⁷² See 28 U.S.C. § 636(b)(1) (2012).

In Chapter five, titled *The District Courts and the Selection Effect*, the authors begin with an acknowledgment that “[f]ederal district judges have received less attention in academic studies of judicial behavior than Supreme Court Justices and court of appeals judges.”⁷³ They offer several reasons, with the last being most curious:

[I]nformation about district court decisions is hard to come by because most are decided without written opinion, often on procedural grounds and rarely after a trial—in the 12-month period ending in March 2009, fewer than 2 percent of the 237,802 civil cases filed in district courts resulted in a judgment after trial.⁷⁴

Here, the logical connection between the existence of written opinions and the percentage of cases resolved by trial is somewhat elusive. The fact that not every ruling finally adjudicating a case in the United States district court includes a detailed written opinion does not necessarily render the rationale for disposition “hard to come by.”⁷⁵ Virtually every order or opinion, case dispositive or otherwise, rendered by a district judge or magistrate judge, is available on PACER,⁷⁶ or on legal research services such as Westlaw and LexisNexis, regardless of whether it is a published or unpublished ruling. Additionally, a great many rulings disposing of cases in United States district court are made in open court after oral argument, generally with a full explanation by the judge of the basis for the ruling.⁷⁷

Moreover, the authors do not explain what they have learned from the two percent of cases adjudicated at trial, or what they might expect to find were a greater percentage of the 237,802 cases actually tried. Undoubtedly, some civil and criminal cases involve issues that can be resolved only through the trial process.⁷⁸ However, the majority of the civil trials that comprise the two percent cited by the authors could just as well consist of cases that could not be adjudicated on summary judgment because they turned on issues of credibility of witnesses; or cases which barely survived summary judgment but lack substantial merit and are being tried in an attempt to recover attorney’s fees; or cases that proceeded to trial due to an uncontrollable client; or a *pro se* litigant who possessed unrealistic expectations. Once again, no consideration is given to the role played by magistrate judges in the cases involved, or to the decision-making behavior of the district judges involved concerning how to utilize their magistrate judges in assisting with the resolution of these cases.

Ultimately, the authors may well have achieved the worthy goal of adding to the growing knowledge of the judicial behavior of judges appointed in conformity with Article III of the Constitution, with regard to Justices who sit on the

⁷³ EPSTEIN ET AL., *supra* note 2, at 207.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See PUB. ACCESS TO CT ELECTRONIC RECS. (PACER), www.pacer.gov [https://perma.cc/9VKZ-EM8R] (last visited Apr. 28, 2016).

⁷⁷ This assertion is based on the author’s professional experience.

⁷⁸ See generally Philip M. Pro, *Mis(understanding)judging*, 7 NEV. L.J. 480 (2007).

United States Supreme Court, or judges on the United States courts of appeals. However, the interviews conducted of district judges and magistrate judges, as outlined below, suggest the authors' attempt to explain the behavior of United States district judges is weakened because their analysis fails to account for the impact of the decision-making by magistrate judges in the cases considered and the interrelationship between district judges and magistrate judges in the adjudicative process.

III. THE EXPERIENCES OF MAGISTRATE JUDGES AND DISTRICT JUDGES IN THE NINTH CIRCUIT

Most cases flowing through the federal judicial system begin in the United States district courts. Most end there as well. Given the enormous role magistrate judges play in that adjudicative process, a thorough understanding of the judicial decision-making behavior of district judges is incomplete if the analysis fails to account for the relationship between the magistrate judges and district judges involved.

I have thought about the subject of the development of the Magistrate Judges System for a long time. It is only natural that I should do so given my service as a magistrate judge from 1980 to 1987, and thereafter for twenty-eight years as a district judge, which entailed daily interaction with magistrate judges, participation in the selection of twelve new magistrate judges, and the reappointment of eight.⁷⁹ Hopefully, these experiences give me some insight regarding the subject. Arguably they color, or even distort, some of my observations. This is a human affliction undoubtedly shared with others who have written on the subject of judicial behavior. Accepting such limitations, my experiences, and those of others who sit as United States district judges and magistrate judges, may nonetheless be useful to understanding judicial decision-making behavior in an environment as dynamic as the United States district courts.

For those actually engaged in the process, judicial decision-making is almost always a humbling experience. Every day, constitutional, statutory, and human issues surge up against the walls of our federal trial courts, challenging the capacity of every district and magistrate judge to fairly resolve the conflicts before them. The environment in which trial judges function is dynamic, and the landscape frequently changes, requiring judges to cope with shifts in caseloads, reductions in funding and staffing, or significant changes in applicable law, among others.

Although district judges are appointed for life in accord with Article III of the Constitution, they come and go.⁸⁰ Some assume senior status, others fully

⁷⁹ Additionally, I served as Chair of the Judicial Conference of the United States Committee on the Administration of the Magistrate Judges System from 1993 to 1998, and also as Chief Judge of the District of Nevada from 2002 to 2007, during which, among other duties, I was responsible for oversight of magistrate judges in my District.

⁸⁰ U.S. CONST. art. III.

retire, and inevitably, our terms end at some point. When this occurs, new judges join the bench with a variety of professional and life experiences. So it is with magistrate judges. Just as the balance or personality of the United States Supreme Court changes with each new Justice, so too does the personality of each district court change over time, and such change may influence the judicial decision-making behavior of district and magistrate judges. Indeed, the utilization of magistrate judges, and the relationship between the district judges and magistrate judges in each of the ninety-four districts is of necessity, dynamic. Over forty years of experience has shown that flexibility in the utilization of magistrate judges is essential to enable each district court to cope with the equally dynamic landscape of evolving caseloads, the culture of the local legal community, and the ever-changing makeup of the individuals who occupy the relevant Article III and non-Article III judgeships.⁸¹

Examining the models of magistrate judge utilization employed by the various district courts provides a useful vehicle to consider the judicial decision-making behavior of magistrate judges and district judges. Models for magistrate judge utilization are, to a degree, reflected in the local rules of each district court, and their public court web sites.⁸² Also useful are the readily available annual statistical reports produced by the Administrative Office of the United States Courts, which document the vast array of civil and criminal cases fully, or partially, adjudicated by magistrate judges which otherwise would be left exclusively to the district judges of their court.⁸³ A tour of the statutory changes in the Federal Magistrates Act since 1968, and related changes to the Federal Rules of Civil and Criminal Procedure, further reflects the evolving nature of the Magistrate Judges System over the past forty-six years.⁸⁴ Particularly important in this regard is 28 U.S.C. § 636(b)(3), which provides, “[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.”⁸⁵ Augmented by changes in case law from the various circuit courts of appeals and the Supreme Court, relating to magistrate judges,⁸⁶

⁸¹ The dynamic nature of caseloads in the ninety-four United States district courts, combined with the evolving nature of magistrate judge utilization, pose a potential danger to those relying on calcified data sets in support of contemporary conclusions regarding judicial decision-making behavior.

⁸² See, e.g., D. Nev. Loc. R., IB 1-1 (2011), <http://www.nvd.uscourts.gov/Files/LOCAL%20RULES%20OF%20PRACTICE%20August%202011.pdf> [https://perma.cc/98XY-QD8W].

⁸³ See generally *id.*

⁸⁴ See 28 U.S.C. §§ 631–639 (2012); 18 U.S.C. §§ 3401, 3402, 3060 (2012).

⁸⁵ 28 U.S.C. § 636(b)(3).

⁸⁶ While an in depth exploration of significant case law critical to the development of the Magistrate Judges System is beyond the scope of this paper, the profound influence of Supreme Court precedent on the role played by non-Article III magistrate judges, and bankruptcy judges, has rarely been more evident than in the recent decision of the United States Supreme Court in *Wellness Int’l Network, LTD. v. Sharif*, 135 S. Ct. 1932 (2015). While *Wellness* addresses the circumstances under which Article III of the Constitution permits bankruptcy

this provision of the Act has created the floor for the measured development of the Magistrate Judges System, flowing not only from the top down, but also percolating from the bottom up.

As useful as the foregoing analytical avenues may be, surely there is more we can do to better understand the current behavior of United States district judges and magistrate judges, and the determinants of their judicial decisions. One straightforward way to reach beyond these limitations is to ask the judges themselves. So that is what I have done.

I am not an anthropologist, and have no special skill in ethnography. However, in deference to Margaret Mead, I have “liv[ed] with the natives,” and shared their way of life thereby acquiring some capacity to see the world through their eyes.⁸⁷ Borrowing from the technique of those skilled in the art of ethnographic interview, I have tried to reach beyond personal experience to capture an understanding of the judicial decision-making relationship between district judges and magistrate judges in the words, stories, and experiences of those who live them. There are, of course, reasonable limits to reliance on self-reporting by subjects who may be viewed as offering their comments with a self-serving gloss. The tenor of the responses received during the interviews recounted herein suggests that most judges are made of sterner stuff. When speaking of their judicial decision-making behavior on the bench, and the behavior of colleagues, most display admirable insight, and a capacity to penetrate self-serving judicial rhetoric.

Reporting on such interviews, however, is a delicate matter, and my assessment of the tenor of their responses is admittedly subjective. The judges I interviewed are professional colleagues, and they rely on my assurance of confidentiality that will be rigorously maintained. It is not possible to recount fully everything said by each judge interviewed, and undoubtedly some useful insights conveyed will be missed. However, while this interview approach may not permit comment about a particular judge, or even anonymously their experiences in a particular district, it does permit the development of some data points grounded in the thoughts, experiences, and actions of actual members of the cadre of judges being studied.⁸⁸

courts to exercise the judicial power of the United States on the basis of party consent, and also the circumstances under which consent can be implied by a party's conduct, the case also has implications for magistrate judge consent authority. *Id.* at 1948–49. *See generally* Stern v. Marshall, 131 S. Ct. 2594 (2011); Waldman v. Stone, 698 F.3d 910 (6th Cir. 2012); Frazin v. Haynes & Boone, L.L.P., 732 F.3d 313 (5th Cir. 2013); Day v. Persels & Assocs., LLC, 729 F.3d 1309 (11th Cir. 2013); cases discussed in Douglass 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, 900–04 (2016).

⁸⁷ John M. Conley, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831, 832 (2006).

⁸⁸ It is enough that others skilled in the use of indirect analytical methods should do so. *See supra* Part II.

The interviews reported also permit some generalization where the magistrate judges and district judges interviewed repeatedly identified similar issues, and discussed them in similar terms in response to common questions posed, or sometimes offered spontaneously. In this respect, it is important to capture not only what those interviewed said, but how they said it. Admittedly, fifty hours of interviews conducted of thirty-four Ninth Circuit magistrate judges and district judges, many of whom formerly served as magistrate judges, cannot allow sweeping quantitative assertions regarding the views or experiences of all United States district and magistrate judges in every district court, regardless of size. Nor can it fully account for their geographic, demographic, or caseload diversity. However, it does reflect a representative sampling of judges in most of the fifteen districts within the Ninth Circuit,⁸⁹ which is by any measure, at least at the level of the district courts, a reasonable microcosm of the federal judiciary.

So let us turn to some of the responses of those interviewed, and explore how the judges themselves describe the judicial decision-making relationship between district judges and magistrate judges, and the influences of that interrelationship on their behavior. Let us explore further whether aversion to reversal, effort aversion, leisure preference, or a desire for promotion, discussed in *The Behavior of Federal Judges* as arguably influential factors for Article III judges, also influence the judicial behavior of magistrate judges. The interviews of the magistrate judges and district judges recounted below provide interesting and useful information relating to the questions above.

A. The Influence of the Prospect of Review by a District Judge on the Judicial Decision-Making of Magistrate Judges

Judicial decision-making in the United States district court, or any other court, does not occur in a vacuum. It is impossible to identify, or quantify, all of the factors, which may influence the judicial decision-making process, but one factor may be the prospect of review by a higher court. In a seminal act of judicial decision-making, the district judges of each district define the universe of possibilities when they make the initial decision regarding what types of matters will be referred to a magistrate judge for adjudication, in accord with 28 U.S.C. § 636.

Thereafter, review of judicial decisions made by magistrate judges generally occurs in three ways. First, where the magistrate judge is acting with full case dispositive authority, on consent of the parties pursuant to 28 U.S.C. § 636(c), review occurs by appeal to the pertinent United States court of appeals.⁹⁰ Here again, the assigned district judge exhibits another act of judicial decision-making

⁸⁹ The 15 districts of the Ninth Circuit include Alaska, Arizona, California Central, California Eastern, California Northern, California Southern, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington Eastern, and Washington Western. The judges interviewed herein represent twelve of those districts, excluding only Guam, Northern Mariana Islands, and Eastern Washington.

⁹⁰ 28 U.S.C. § 636(c)(3) (2012).

behavior, because before a § 636(c) consent by the parties becomes effective, the transfer first must be approved by that district judge.⁹¹ Second, where the magistrate judge is adjudicating a non-case dispositive motion in a civil or criminal case, also assigned to a district judge, the ruling of the magistrate judge is subject to review by that district judge under a “clearly erroneous or contrary to law” standard, in accord with 28 U.S.C. § 636(b)(1)(A).⁹² Third, where a magistrate judge is ruling on a case dispositive motion in a civil or criminal case by means of “findings . . . and recommendation” to the assigned district judge, the ruling is subject to *de novo* review by that district judge in accord with 28 U.S.C. §§ 636(b)(1)(B)–(C).⁹³

When confronted with the question whether their judicial decision-making on the merits of a case was influenced by the prospect of review of their rulings by the district judges, who may ultimately determine whether they will be reappointed to an additional eight-year term, the responses of both the magistrate judges and the district judges were consistent. Virtually all responded without equivocation that such a consideration played no role in their judicial decision-making behavior on the merits of a case. The chorus of responses was best stated by one district judge—who previously served as a magistrate judge—when he said, “Not for a second.”⁹⁴ The general sentiment of incumbent magistrate judges was well captured by one who said, “I’d rather do what I think is right in a case and lose my job, than do what I didn’t think was right just to keep my job.”⁹⁵ One or two such responses might be viewed as pretentious. However, the fact that such reactions were common suggests a firmly held attitude on the part of both magistrate judges and district judges.

Predictably, all magistrate judges reported that they valued their judicial reputations, and stated that even though they knew they could not please all parties in a case with their rulings, at a minimum they wanted to convey to the parties that they had fairly considered their arguments, and had rendered the best decision they could in accord with the applicable facts and law. The sentiment expressed by most was summed up by one magistrate judge who noted that, “Unlike an associate in a law firm whose ass is on the line for errors which cost the firm clients and money, the currency of a judge is different. It is almost exclusively credibility. You want to be known as a capable and fair judge.”⁹⁶ Another magistrate judge pointed out that it would be very difficult to do otherwise, as

⁹¹ *Id.* § 636(c)(1).

⁹² *Id.* § 636(b)(1)(A).

⁹³ *Id.* § 636(b)(1).

⁹⁴ Interview with subject 13 (Dec. 2013–Jan. 2014). As I promised all interview subjects that I would not identify them, directly or indirectly, the only citation I will provide for each quote is the random number I have assigned to the particular subjects. The interviews are on file with the author.

⁹⁵ Interview with subject 21 (Dec. 2013–Jan. 2014).

⁹⁶ Interview with subject 5 (Dec. 2013–Jan. 2014).

that would entail the nearly impossible task of trying to accommodate the proclivities of multiple district judges in a wide variety of cases subject to review. Instead, the best approach was to do the “best you could and let the chips fall where they may.”⁹⁷

One magistrate judge, with substantial prior experience in both criminal and civil law practice, explained that he would not “brook direction to a particular decision,” noting that he did not “need the job to survive.” He speculated, however, that those who had spent a lifetime in government service might feel otherwise.⁹⁸ Based on the interviews conducted, it is not clear that it does. Only two magistrate judges reported instances where they received a referral of a case dispositive motion for preparation of a report and recommendation with an indication from the referring district judge of the preferred outcome. Both magistrate judges indicated that they made it clear to the referring district judge that they would make an independent decision on the matter.⁹⁹ However, the specter that this may occur in other cases, or with other judges, is a matter that deserves further study because such a referral has the clear potential of influencing the judicial decision-making of the magistrate judge. It is not clear that all magistrate judges would respond in the same manner as the two magistrate judges receiving the referrals above. Perhaps the response would depend not only on the manner in which the referral was couched, but also on the relationship between the district judge and magistrate judge involved, whether the magistrate judge was confronting reappointment, or other more nuanced factors.

Most magistrate judges expressed the view that they felt the reason they had been selected by the district judges of their court was because they were highly qualified and could be relied upon to call each case on the merits as they thought the law and facts required, rather than based upon some other internal or external influence. Responding district judges expressed the same sentiment. Indeed, for some district judges, influence occasionally seemed to run the other way. For example, a few district judges expressed the view that they considered it important to “back up” the magistrate judge when objections were taken to a magistrate judge’s discovery rulings.¹⁰⁰

Some magistrate judges acknowledged the presence of a limited influence, not on the merits of a particular motion, but on the manner in which they prioritized or organized their judicial decision-making. For example, some magistrate

⁹⁷ Interview with subject 19 (Dec. 2013–Jan. 2014).

⁹⁸ Interview with subject 11 (Dec. 2013–Jan. 2014).

⁹⁹ Interview with subjects 20, 34 (Dec. 2013–Jan. 2014).

¹⁰⁰ Interview with subjects 14, 15 (Dec. 2013–Jan. 2014). As the author of this paper, I must avoid personal “war stories,” but can attest to the phenomenon above from my experiences as a magistrate judge managing pretrial discovery in the MGM Grand Hotel Fire Litigation, MDL-453, in the early 1980’s. There, the presiding district judge, Louis C. Bechtle, of the Eastern District of Pennsylvania, provided the kind of discovery ruling “back up,” which rendered almost non-existent objections to my rulings on non-dispositive motions.

judges responded that when addressing pre-trial case management and discovery issues in a civil case, it was fairly common for them to consider what they understood to be the general preference of the assigned district judge, regarding such matters as the extension of discovery cut-off dates, continuances of trials, or other case management guidelines known to them by either express policy, or experience with a particular district judge.¹⁰¹ As one district judge, who formerly served as a magistrate judge, commented, “I would generally ask myself, how will this affect the case before the district judge?”¹⁰² Another former magistrate judge, now serving as a district judge, said, “You are always mindful that what you do will have an impact on a case which is assigned to another judge, but it is still your job to exercise your independent judgment in deciding the matter before you.”¹⁰³ A current magistrate judge characterized the relationship between district judges and magistrate judges as “symbiotic” in that each relies on the other to discharge the judicial decision-making responsibilities in a manner that jointly moves the case toward resolution.¹⁰⁴

In sum, the magistrate judges interviewed identified no general influence from the specter of review by their fellow district judges. Most noted that their rulings on non-dispositive matters were rarely reversed by the assigned district judge, and that reversals on findings and recommendations, with respect to case dispositive matters, also were infrequent but not particularly troubling due, in large part, to the fact that ultimate responsibility for final adjudication of the case was vested with the district judge. Of course, where the magistrate judge was fully responsible for adjudicating the case on consent of the parties, the prospect of review by a district judge was non-existent.

B. The Influence of Coordination and Mentoring

It is not surprising that some coordination in judicial decision-making occurs between district and magistrate judges even as they discharge separate decision-making responsibilities on the same case. The interviews conducted show the degree of coordination was not the same in every district due in part to the different sizes of the districts, the varying nature of the caseloads from district to district, and the experience levels and personalities of the judges involved. The influence of mentoring between district and magistrate judges is, however, a bit more surprising. As explained below, perhaps it should not be.

Case specific coordination between district and magistrate judges was more pronounced with respect to complex civil litigation where the district judge and magistrate judge had actually discussed a plan for case management specific to

¹⁰¹ Interview with subject 22 (Dec. 2013–Jan. 2014) (and many others).

¹⁰² Interview with subject 16 (Dec. 2013–Jan. 2014).

¹⁰³ Interview with subject 2 (Dec. 2013–Jan. 2014).

¹⁰⁴ Interview with subject 5 (Dec. 2013–Jan. 2014).

the case. Some judges reported examples of case management conferences presided over jointly by the district judge and magistrate judge assigned to the case as a viable means of developing with counsel a workable case management protocol.¹⁰⁵ Additionally, in those districts where magistrate judges were heavily relied upon to handle pretrial case management and discovery motions in civil cases, several noted that their pretrial rulings helped define the parameters of the case for both the parties and the assigned district judge. The judicial decision-making of magistrate judges in this regard would seem to influence the parameters of summary judgment motions later filed, the scope of trial before the district judge, and the boundaries of potential settlement.

However, one magistrate judge captured the sentiment expressed by several others when observing that, “Our heavy caseloads often inhibit case specific collaboration on pretrial case management in most cases.”¹⁰⁶ This was a source of frustration for some magistrate judges, particularly those who came from private law firms where they grew accustomed to collective problem solving whereby partners and associates would brainstorm on how to handle certain cases. Furthermore, some magistrate judges found the more solitary experience on the bench required adjustment,¹⁰⁷ and occasionally were motivated to seek specific feedback from the assigned district judge regarding their procedural preferences.¹⁰⁸ However, one magistrate judge expressed frustration with the lack of feedback from district judge colleagues.¹⁰⁹

Mentoring of new judges, of course, is not new. Nonetheless, it does not appear the impact of mentoring on judicial decision-making behavior has received much attention. Quite frequently when a new district or magistrate judge joins a district court, the Chief Judge, of the district, designates a colleague to serve as a mentor judge to their new colleague. Such mentoring can involve providing guidance on almost any question a new judge may have about their new position, from library and staffing resources to internal court procedures, but also can include discussions regarding case management in general, or in specific cases, as well as the utilization of magistrate judges. Mentoring, however, is not the exclusive province of district judges.

Several magistrate judges also commented that as new district and magistrate judges join their court, they bring with them experiences from either civil or criminal practice, but generally not from both. Hence, experienced magistrate judges reported that in addition to mentoring new magistrate judges, they occasionally found themselves serving as unofficial mentors to the new district judges in the areas in which the new judge lacked prior experience. Such mentoring

¹⁰⁵ This is a procedure I have invoked from time to time when presiding over Multi-District or other complex litigation.

¹⁰⁶ Interview with subject 23 (Dec. 2013–Jan. 2014).

¹⁰⁷ Interview with subjects 7, 29 (Dec. 2013–Jan. 2014).

¹⁰⁸ Interview with subject 25 (Dec. 2013–Jan. 2014).

¹⁰⁹ Interview with subject 7 (Dec. 2013–Jan. 2014).

sometimes took the form of case specific discussions with the new judge to which both were assigned, or more general discussions regarding civil or criminal case management or procedure, or other areas in which the new judge needed a primer.¹¹⁰ At other times mentoring took the form of a more detailed order or a report and recommendation to the district judge, where the magistrate judge took greater pains to explain the basis for their ruling than might otherwise be necessary were the magistrate judge writing for a more experienced colleague on the district court.¹¹¹ As one former magistrate judge, now serving as a district judge, described his approach: “You try to be sensitive to the assigned district judge’s case management preferences and still lead with your recommendation, but perhaps also offer alternatives for their consideration.”¹¹² While some who are not judges might find this ad hoc mentoring of district judges by magistrate judges surprising, the judges involved did not. Rather it seemed to them a sensible manner of addressing the responsibility of fairly resolving the cases before them.

C. Size Matters and so Does Collegiality

The judges interviewed often emphasized the importance of collegiality among the judges on their court. To the judges interviewed, collegiality meant more than being friendly or considerate of one another, but also adhering more fully to a common purpose to fairly adjudicate their cases and respect for the abilities of each other to work toward that goal. In particular, several judges in smaller districts reported that a strong personal and professional relationship exists between the magistrate judges and district judges, either because they came from a relatively small legal community, or in some cases even from the same law firm or public entity. In such circumstances, the working relationships between the judges tended to be less formal and the expectations of one toward the other were understood even when unspoken.¹¹³ Judges from larger districts also reported similar experiences where a prior professional relationship had been established between individual colleagues before joining the federal bench.¹¹⁴ The impact of collegiality also appears present in districts that are geographically very large or heavily populated, where the district court is divided into official or unofficial divisions headquartered in distinct communities sometimes located hundreds of miles apart, particularly where those locations of holding court were fairly small.¹¹⁵

Some district and magistrate judges from districts which are relatively small, in terms of population, caseload, and number of judges, yet geographically vast, noted that they rely heavily on each other to discharge as full a range of duties

¹¹⁰ Interview with subjects 9, 20, 25 (Dec. 2013–Jan. 2014).

¹¹¹ Interview with subjects 5, 20, 23 (Dec. 2013–Jan. 2014).

¹¹² Interview with subject 2 (Dec. 2013–Jan. 2014).

¹¹³ Interview with subjects 13, 29, 3 (Dec. 2013–Jan. 2014).

¹¹⁴ Interview with subject 1 (Dec. 2013–Jan. 2014).

¹¹⁵ Interview with subjects 18, 26 (Dec. 2013–Jan. 2014).

as possible to ensure cases are handled expeditiously in the various court locations in their districts. Where there are an insufficient number of Article III district judges to populate each such locale, a magistrate judge who resides in that location may be more readily accepted by the bar as the only federal trial judge conveniently available. In such circumstances, especially where the magistrate judge in that location had established credibility with the local bar over years of practice or on the bench, the tendency to consent to magistrate disposition of a case in accord with § 636(c) appeared to be greater. Similarly, in such districts, magistrate judges may be more heavily relied upon by their colleague district judges to handle such criminal proceedings as changes of plea and supervised release violation hearings, which would involve preparation of a report and recommendation to the assigned district judge regarding proposed final action. Some judges also identified such options as viable because they conserved the scarce resources available to the courts, United States Probation Office, United States Attorney, Federal Public Defender, and United States Marshal's Office.¹¹⁶

Not surprisingly, changes in the makeup of the individuals serving as district judges and magistrate judges were reported by some magistrate judges to impact both their decision-making behavior as well as the utilization of magistrate judges in their district. Understandably, most interviewees reported that when magistrate judges and district judges work together over several years on a particular court, they become familiar with each other's preferences. However, because the collaborative working relationship between a magistrate and district judge may vary from judge to judge, several interviewees reported there is a period of adjustment when a new magistrate or district judge joins a district court. This adjustment period includes a dialogue extending beyond a single case specific conference, or general court-wide discussions regarding case management, and includes the manner in which the magistrate judge crafts a ruling, or a district judge handles an objection to a magistrate judge's ruling.¹¹⁷

Collegiality, and the size of the court, also appears to influence district judge decision-making with respect to how to utilize magistrate judges. While most characterized the utilization of magistrate judges as increasing over the years, a couple noted some backsliding in utilization and involvement regarding matters of court governance as the makeup of the individuals serving as district judges and magistrate judges has changed. For example, one magistrate judge with several years of experience noted that as new district judges join the court, a few are more hierarchical in their approach, and may consciously, or unconsciously, treat magistrate judges as less worthy of participation in court governance.¹¹⁸ Such judges also may be less inclined to encourage district wide schemes to promote

¹¹⁶ Interview with subjects 17, 18, 26 (Dec. 2013–Jan. 2014).

¹¹⁷ This comports with my experience and general comments of several interviewees.

¹¹⁸ Interview with subject 8 (Dec. 2013–Jan. 2014).

§ 636(c) consents in civil cases, essentially with the view, “Why should magistrate judges get all the good civil cases?”¹¹⁹

Another magistrate judge with many years of experience highlighted the significance in the 1991 amendment to 28 U.S.C. § 632, which changed the title “magistrate” to “magistrate judge.”¹²⁰ That amendment was in part designed to ease some of the hierarchical stratification between district and magistrate judges, which it did, but there was a lag with some district judges embracing the new title, which in the minds of some diminished the magistrate judge position.¹²¹ The interviews conducted suggest this phenomenon was rare, and it is difficult to identify or quantify a reason for such a perceived change of direction beyond the personalities and philosophies of the judges involved.

However, if collegiality can be viewed as a positive influence on judicial decision-making behavior, to what extent does the absence of collegiality produce the opposite effect? While the interviews conducted produced only a few examples of lack of collegiality between judges, it appears that not all judges share a collegial or even friendly relationship with one another. This can undoubtedly influence the manner in which decision-making authority is divided between district and magistrate judges. The reasons for this appear to be as complicated as the personalities of the judges involved. But the judges interviewed commonly noted the prevalence of a professionally respectful, and purposeful relationship among the district and magistrate judges of their court with regard to the adjudication of cases.¹²²

D. Magistrate Judge Utilization and Judicial Decision-Making Behavior

“The evolution of the magistrate judges system since 1968 shows the federal judiciary’s capacity to address the growing and increasingly complex civil and criminal caseloads that have confronted the federal courts.”¹²³ Nothing better illustrates that capacity than the flexibility in utilization of magistrate judges throughout the ninety-four United States district courts. Commenting on the vast array of judicial decision-making responsibilities discharged by magistrate judges, one district judge, who had not previously served as a magistrate judge, characterized magistrate judges as “heavily utilized, and underappreciated.”¹²⁴ However, because utilization of magistrate judges varies so significantly in some districts and evolves to meet the changing needs of each individual district court, it becomes more difficult to precisely define the judicial decision-making roles of magistrate judges and district judges in a single model.

¹¹⁹ Interview with subject 11 (Dec. 2013–Jan. 2014).

¹²⁰ Interview with subject 24 (Dec. 2013–Jan. 2014).

¹²¹ *Id.*

¹²² *See generally* Interviews cited throughout Part III.

¹²³ Pro & Hnatowski, *supra* note 5.

¹²⁴ Interview with subject 10 (Dec. 2013–Jan. 2014).

Under the statutory framework embodied in 28 U.S.C. § 636, the district judges of each district, generally in collaboration with their non-Article III magistrate judge colleagues, revise as necessary the manner in which magistrate judges are utilized, that is, the way in which they share or divide case decision-making responsibilities.¹²⁵ The utilization of magistrate judges may even vary among the various official or unofficial divisions within a district for a variety of reasons, including the demands of the district court caseload. Magistrate judge utilization also can reflect the preferences of counsel who litigate regularly in federal court as is illustrated by their decisions whether to consent to proceedings before a magistrate judge under 28 U.S.C. § 636(c). This again involves an exercise of judicial decision-making by the district judges who first must decide to designate magistrate judges in their district to receive civil cases on consent of the parties, and thereafter must approve or disapprove the transfer of a specific case to the magistrate judge when § 636(c) consent is tendered.¹²⁶ Hence, the decisions made in each district concerning the manner in which magistrate judges will be utilized is a significant manifestation of judicial decision-making behavior because it determines the case specific judicial decision-making responsibilities of both district judges and magistrate judges.

As the caseload dynamics of each district have evolved, and as the judges on the court have changed, the details of magistrate judge utilization also have changed from district to district based on experience and experimentation. A few examples illustrate this point.

The District of Oregon, for example, has long incorporated magistrate judges in its civil case draw on an equal footing with district judges.¹²⁷ In the District of Nevada, magistrate judges in the unofficial Las Vegas Division are assigned responsibility for initially adjudicating all non-dispositive motions in civil cases, and also all dispositive and non-dispositive motions in criminal cases, whereas in the unofficial Reno Division, magistrate judges are generally not assigned pre-trial motions in criminal cases.¹²⁸ In the Western District of Washington, magistrate judges are directly assigned Social Security and Section 1983

¹²⁵ I have personally witnessed this occur during my thirty-five years on the federal bench.

¹²⁶ Here it may be appropriate to draw a parallel to the exercise of judicial decision-making behavior by judges of the courts of appeal to invoke the assistance of Article III district judges to sit by designation with their court. Does such behavior reflect effort aversion or leisure preference? Or does it reflect a thoughtful and practical decision to enhance the ability of the courts of appeal to administer more effectively their caseload at a particular moment and in light of judicial resource limitations on the appellate court? It seems reasonable to assume the latter, particularly because including district judges on court of appeals panels allows for a valuable sharing of perspectives among the two Article III cadres—a learning experience for both.

¹²⁷ Interview with subject 28 (Dec. 2013–Jan. 2014).

¹²⁸ Based on the author's professional experience.

prisoner cases.¹²⁹ If the parties do not consent in accord with § 636(c), the magistrate judge retains the case for pretrial purposes, including preparation of reports and recommendations regarding case dispositive matters.¹³⁰ In the Northern District of California, the District of Idaho, and at certain divisional locations in the District of Montana, the courts have adopted a procedure whereby consent is assumed in a specified share of the civil caseload draw if the parties do not timely object.¹³¹ The utilization of magistrate judges in Arizona differs regionally because the enormous number of criminal cases arising near the border with Mexico warrant utilization of magistrate judges to take pleas of guilty and select juries in felony cases in Tucson, but not in Phoenix.¹³²

The very act of parsing the judicial decision-making responsibilities of district judges and magistrate judges reflects the court governance decision-making of each district court, and helps define the structural relationship between the district and magistrate judges of that district. Further, it segregates the cases, or parts of cases, with respect to which Article III or non-Article III judge will actually perform a judicial decision-making function. Do such institutional court decisions reflect the collective effort aversion, aversion to appeal, or leisure preferences of the district judges on each particular court? The interviews of the magistrate judges and district judges suggest that, with minor exceptions, such considerations do not influence their behavior.

The judges interviewed responded that the scheme for utilization of magistrate judges in their districts was driven by a variety of factors. Among these were changes in the district's caseloads, changes in relevant statutory or case law, or federal or local rule, and the experience levels and skill sets of the district and magistrate judges involved. Another factor often cited was local culture, not only within the district court, but also among the practicing bar in each locale. Undeniably, a huge factor in the development of magistrate judge utilization has been the unavailability of Article III judicial resources, in the form of district judgeships, which have been in chronically short supply. This has repeatedly driven requests for additional magistrate judgeships in many districts which simply could not secure additional district judgeships, or could not fill existing vacancies given the seemingly perpetual institutional incapacity, or unwillingness, of the Executive and Legislative Branches to do so. In this regard, one district judge in a very busy district, who formerly served as a magistrate judge,

¹²⁹ Interview with subject 32 (Dec. 2013–Jan. 2014).

¹³⁰ *Id.*

¹³¹ See MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, FACILITATING CONSENT TO THE EXERCISE OF CASE-DISPOSITIVE AUTHORITY IN CIVIL CASES (Mar. 2009) (on file with author).

¹³² Interview with subject 11 (Dec. 2013–Jan. 2014).

quoted a fellow district judge, as once saying, “I could solve the caseload problem right now by appointing all magistrate judges as district judges because they already can do the job.”¹³³

Nearly every district articulates its utilization scheme in its local rules, general orders, internal templates, or a combination thereof.¹³⁴ A few magistrate judges observed that some district judges will deviate from the standard utilization procedure in their district and may refer matters to a magistrate judge either because of the complexity of the case or because they are overwhelmed with pending motions. As characterized by one magistrate judge, the district judge in the latter instance may simply be trying to get the file “off their desk because they could.”¹³⁵ That magistrate judge noted that informing the district judge that they had deviated from standard procedure was always an option, but as with others, indicated they would simply handle whatever matter was referred.¹³⁶ The sentiment of most magistrate judges was well stated by one who said he knew the district judges were working hard to address a variety of cases, and sometimes face a crushing criminal caseload, and considered it the responsibility of the magistrate judge to assist the district judges in whatever manner they could.¹³⁷

Otherwise, throughout the interviews conducted, the concepts of aversion to effort, and appeal, or leisure preference did not seem to fit. The discussion focused more on efficiency in coping with growing caseloads, and comments by several judges about attempting to achieve the goals expressed in Rule 1 of the Federal Rules of Civil Procedure, satisfying the demands of the Civil Justice Reform Act of 1990 (“CJRA”), 28 U.S.C. §§ 471–482, and meeting the mandates of the Speedy Trial Act under 18 U.S.C. § 3161 in criminal cases.¹³⁸

The impact of the CJRA, which is commonly referred to in federal courts as the civil speedy trial act, warrants particular attention. As several commentators have observed, the CJRA has resulted in increased utilization of magistrate judges to satisfy the emphasis on early involvement by the court in case management.¹³⁹ Combined with statutory changes to the Federal Magistrates Act, and expansive judicial interpretation, the CJRA has contributed to much of the innovative utilization of magistrate judges chronicled throughout this paper.¹⁴⁰ However, although the subject was not raised by any judge during the interviews, it

¹³³ Interview with subject 4 (Dec. 2013–Jan. 2014).

¹³⁴ 28 U.S.C. § 636 (2012); Michelle H. Burns, *U.S. Magistrate Judges: The Breadth and Depth of Their Service*, FED. LAW. 63, 63 (May/June 2014). See generally D. Nev. Loc. R. IB 1-1 (2011).

¹³⁵ Interview with subject 20 (Dec. 2013–Jan. 2014).

¹³⁶ *Id.*

¹³⁷ Interview with subject 23 (Dec. 2013–Jan. 2014).

¹³⁸ See 28 U.S.C. §§ 471–482 (2012); see also 18 U.S.C. § 3161 (2012).

¹³⁹ Baker, *supra* note 5, at 665–67, and articles cited therein.

¹⁴⁰ See Shannon, *supra* note 27, at 253.

also may be productive to explore whether the semi-annual CJRA case reporting deadlines motivate district judges to refer matters to magistrate judges they otherwise might retain.

Variances in magistrate judge utilization in many districts also has led to specialization in some areas. Commenting on the wide range of duties assigned to magistrate judges in various districts, one magistrate judge noted it is predictable that magistrate judges would develop expertise in particular kinds of cases or adjudicative functions.¹⁴¹ For example, where the caseload demands of a district, perhaps combined with the skills of the magistrate judges in that district for pre-trial case management, or conducting settlement conferences, or conducting civil trials on consent of the parties, it is fairly natural for the district judges of the court to rely on its magistrate judges to address such matters. Another magistrate judge explained that when such areas of utilization are carved out for magistrate judges in a particular district, this tends to impact the types of applicants who seek appointment as magistrate judges in that district, as well as the types of candidates selected by the district judges to serve that utilization need.¹⁴²

In sum, while the judges interviewed identified a variety of factors as influencing magistrate judge utilization, leisure preference, or aversion to effort, or appeal were not among them, and only rarely did the factors identified tend to suggest such behaviors.

E. Cases Adjudicated by a Magistrate Judge on Consent of the Parties

As seen in the foregoing section on utilization, substantial effort has been expended in many districts to encourage parties to consent to full case dispositive decision-making authority before magistrate judges under 28 U.S.C. § 636(c). The success of these efforts is demonstrated by the fact that for the twelve-month period ending September 30, 2013, 15,803 civil cases were fully adjudicated by magistrate judges on consent, and 14 percent of all civil jury trials, and 143 non-jury trials were conducted by magistrate judges on consent of the parties.¹⁴³ But there is more to this story than raw statistics can provide. When a district judge approves the reassignment of a case on his or her docket to a magistrate judge in accord with 28 U.S.C. § 636(c), that district judge has exercised his or her judicial decision-making discretion by deciding for whatever reason that transfer to a magistrate judge for all adjudicatory purposes is appropriate. Thereafter, the district judge is no longer responsible for the case. Appeal of any dispositive rulings made by that magistrate judge, including a final judgment, will be taken directly to the relevant court of appeals.¹⁴⁴

¹⁴¹ Interview with subject 19 (Dec. 2013–Jan. 2014).

¹⁴² Interview with subject 11 (Dec. 2013–Jan. 2014).

¹⁴³ See *supra* Part I.

¹⁴⁴ 28 U.S.C. § 636(c)(3) (2012).

Most magistrate and district judges reported that concerted efforts had been made in their districts to encourage § 636(c) consents in civil cases where practical.¹⁴⁵ The manner in which this was accomplished, however, took many forms. While opposition to encouraging civil consent cases was not expressed by any of the judges interviewed, there do appear to be some who feel utilization of magistrate judges for such purposes is either unnecessary or raises potential constitutional issues.¹⁴⁶ Otherwise, some efforts to promote civil consent cases took the form of putting magistrate judges on the wheel for case draw with respect to a particular number or percentage of civil cases, or for specified categories of cases such as prisoner civil rights, habeas corpus petitions, or Social Security appeals.¹⁴⁷ Other districts invoked a written notice of right to consent to proceed before a magistrate judge, followed by either a deadline to exercise such consent or ad hoc encouragement by district and magistrate judges at pretrial conferences to consider the option.¹⁴⁸ One message conveyed by most district and magistrate judges was that the success of efforts to encourage § 636(c) consent in civil cases was dependent not only on both the perceived ability of the magistrate judges to effectively adjudicate such cases and the confidence displayed by the district judges of the court who approved the consent, but also rested heavily on the culture of the local bar.¹⁴⁹

One magistrate judge reported that their district was experimenting with a procedure by which counsel can jointly consent to proceed before one of several magistrate judges.¹⁵⁰ This approach appears to permit a type of forum shopping not typically seen in United States district court. The view expressed was that the fact that the assigned district judge retained control over whether to approve the transfer on consent was sufficient to avoid an overwhelming number of consents to any particular magistrate judge thereby nullifying potential abuse.¹⁵¹

A district judge, who was a former magistrate judge, noted that their district strongly promoted consent to magistrate judges in civil cases not only by placing magistrate judges on the wheel for civil case draw, but also by providing in a General Order that no dispositive civil motions would otherwise be referred to a magistrate judge.¹⁵² This judge explained further that some district judges would permit counsel to select the magistrate judge before whom they would consent

¹⁴⁵ See *supra* note 131, at 22.

¹⁴⁶ See, e.g., *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (1984) (Posner, J., dissenting). See generally Interviews cited throughout Part III.

¹⁴⁷ See generally Interviews cited throughout Part III.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Interview with subject 30 (Dec. 2013–Jan. 2014).

¹⁵¹ *Id.*

¹⁵² Interview with subject 12 (Dec. 2013–Jan. 2014).

so as to place the case before a judge with experience in a particular area, such as intellectual property or employment discrimination.¹⁵³

Another district judge, who previously served as a magistrate judge, indicated considerable success in securing consents by placing magistrate judges on the wheel for draw of prisoner civil rights and pro se cases. When asked whether the decision to limit civil consents to these areas was a matter of “efficiency” or a “roll down the hill” determination, the judge responded, “More the latter, though it also served efficiency.”¹⁵⁴

The circumstances above raise a legitimate question concerning whether in deciding which types of cases to refer to magistrate judges as potential consent cases, the district judges involved designate the types of cases they find less interesting, (i.e. prisoner civil rights or Social Security), or in a hierarchical sense, less worthy of their attention, as better suited for reference to a magistrate judge. It may be useful to examine further what motivates the district judges in some district courts to refer civil consent cases without distinction as to the type of litigation involved to those districts that carve out certain types of cases for civil consent consideration. In particular, it may be useful to explore whether such decisions regarding magistrate judge utilization are driven strictly by the case-load needs of the district or by other considerations.

Is the judicial decision-making behavior of magistrate judges any different when adjudicating a case fully on its merits rather than by way of pre-trial rulings subject to review by a district judge colleague on the same court? The interviews conducted suggest that in some instances it may be.

One magistrate judge, from a very large district, commented that when handling dispositive or non-dispositive motions in cases without § 636(c) consent, the magistrate judge would not hold a hearing unless necessary.¹⁵⁵ In comparison, when the case was before that magistrate judge for full adjudication on consent of the parties, there was a tendency to more regularly grant a hearing because the parties had consciously selected the magistrate judge to hear their case.¹⁵⁶ This tendency may reflect a motivation to encourage parties to consent to future proceedings before a magistrate judge.

One magistrate judge, who adjudicated cases on consent of the parties, responded that they might be more summary in their rulings on motions because the prospect of appeal was remote, or at least more abstract.¹⁵⁷ These views were consistent with those of district judges interviewed who viewed the prospect of

¹⁵³ *Id.*

¹⁵⁴ Interview with subject 4 (Dec. 2013–Jan. 2014). This behavior might properly be characterized as an example of effort aversion on the part of district judges in a court wide structural sense.

¹⁵⁵ Interview with subject 30 (Dec. 2013–Jan. 2014).

¹⁵⁶ *Id.*

¹⁵⁷ Interview with subject 27 (Dec. 2013–Jan. 2014).

appeal to the court of appeals as only marginally influential to their merits decisions, in part, because it is somewhat remote and there is no way for the deciding judge to know whether there even will be appellate review.¹⁵⁸ By comparison, a magistrate judge's decision on a motion absent § 636(c) consent is always subject to what one district judge described as an immediate "elevated appeal" to the assigned district judge.¹⁵⁹ Another district judge, who formerly served as a magistrate judge, observed that when a magistrate judge is presiding in a civil case with full dispositive and trial authority, there is virtually no prospect of influence by the district judges, because every appeal would lie with the court of appeals.¹⁶⁰ In contrast, when the magistrate judge acts on a motion in tandem with a district judge, there is an awareness that "you did not want to mess up the district judge's case."¹⁶¹

When cases proceed before a magistrate judge on consent of the parties pursuant to 28 U.S.C. § 636(c), the magistrate judge acts as a *de facto* Article III judge. There is no further review before the formerly assigned district judge, and appeal lies directly to the pertinent court of appeals.¹⁶² Under such circumstances, does the prospect of appeal influence the judicial decision-making behavior of the magistrate judge any differently than it does an Article III district judge? The responses of the judges interviewed suggest there is no difference.

This is interesting because while Article III district judges are appointed for life, magistrate judges serve eight-year terms, subject to reappointment to successive eight-year terms by their district judge colleagues through a process of review which entails the opportunity for comment from the members of the bar regarding the incumbent magistrate judge.¹⁶³ Naturally, this would include counsel who had participated in civil consent cases before that magistrate judge. Also, during the reappointment process the reviewing district judges would be privy to the reversal rate of the magistrate judge before the court of appeals in civil consent cases. It is unclear what those skilled in the use of "indirect methods" and "sophisticated quantitative tools"¹⁶⁴ would find if they compared the 14 percent of the civil cases fully adjudicated by magistrate judges with the 86 percent adjudicated by district judges in this regard, and whether the results of such analysis would square with the results from the interviews of judges involved.¹⁶⁵ Regardless, the consequences from the failure of prior studies to account for the role of magistrate judges is well illustrated in the area of civil consent cases under 28 U.S.C. § 636(c).

¹⁵⁸ Interview with subject 15 (Dec. 2013–Jan. 2014).

¹⁵⁹ *Id.*

¹⁶⁰ Interview with subject 12 (Dec. 2013–Jan. 2014).

¹⁶¹ *Id.*

¹⁶² 28 U.S.C. § 636(c)(3) (2012).

¹⁶³ MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 38 (2010).

¹⁶⁴ *See supra* Part II.

¹⁶⁵ *See supra* Part I.

F. Magistrate Judge Participation in District Court Governance

The development of the Magistrate Judges System demonstrates vividly the self-governing capacity of the federal judiciary. The management of this relatively new and valuable judicial resource has largely been accomplished through the governing structures of the Judicial Conference of the United States, circuit judicial councils, and through the governing structure of each district court. Moreover, magistrate judges have themselves played a pivotal role in court governance thereby contributing to the development of the Magistrate Judges System.

As the policy making body of the federal courts, the Judicial Conference relies heavily on the work of its committees to study and address all manners of important details relating to the operation of the federal judiciary, including budget, security, space and facilities, federal rules, and the Magistrate Judges and Bankruptcy Judges Systems, among others.¹⁶⁶ Similarly, the structure of most circuit courts of appeals provide for circuit committees addressing some of these same areas, and many others relating to the courts within their circuit.¹⁶⁷ So, too, do the governing structures of many of the ninety-four United States district courts.¹⁶⁸ At each level in this judicial governance structure, magistrate judges have become full participants with representatives serving on, and sometimes chairing, many national, circuit and district court committees.¹⁶⁹ Magistrate judges also are represented on the Board of the Federal Judicial Center, the research and training arm of the federal judiciary, as well as most advisory committees of the Administrative Office of the United States Courts.¹⁷⁰

This representation did not occur overnight. Rather, as interaction between magistrate judges and their Article III colleagues increased, and as reliance on magistrate judges grew with their expanded utilization, it was inevitable that they also would have a seat at the table of court governance. Here again, the opportunities for district judges and magistrate judges to influence the judicial behavior of one another are myriad.

Does participation by magistrate judges in the governance of the district court in which they sit reflect judicial decision-making behavior of the district judges and magistrate judges, and does it impact their decision-making behavior in cases before the court? The interviews conducted suggest that it does, and provide examples of both.

¹⁶⁶ See generally *Governance & the Judicial Conference*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference> [<https://perma.cc/PPT5-JFXK>] (last visited Apr. 28, 2016).

¹⁶⁷ See, e.g., *Judicial Council*, U.S. CTS. FOR NINTH CIRCUIT, http://www.ca9.uscourts.gov/judicial_council/judicial_council.php [<https://perma.cc/C4TF-7DGE>] (last visited Apr. 28, 2016).

¹⁶⁸ See, e.g., *Judicial Council Overview*, NEV. CTS., http://nvcourts.gov/AOC/Administration/Judicial_Council/Overview/ [<https://perma.cc/L3AJ-4S5J>] (last visited Apr. 28, 2016).

¹⁶⁹ Based on the author's professional experience and knowledge.

¹⁷⁰ *Id.*

No research is necessary to support an assumption that as different layers of judges share experiences and solve problems within the scope of the various national, circuit, and district court committees, a respectful relationship develops between the judges. This relationship enhances the mutual understanding of their respective roles, and the interconnection between their judicial responsibilities. Anecdotally, I can attest to the growth in understanding and respect between circuit, district, and magistrate judges, after representatives from each of those sectors of the federal judiciary served jointly on the Judicial Conference Committee on the Administration of the Magistrate Judges System, which I chaired in the mid-1990s. The impact was palpable as senior and active circuit and district judges worked closely with their magistrate judge counterparts to address a wide range of issues that came before that Committee. Not surprisingly, each gained insight regarding the responsibilities and challenges encountered by the other in the discharge of their judicial duties. The same dynamic occurs within each district court where magistrate judges participate with their district judge colleagues on almost every court committee, and participate in much of the court governance decision-making for that court.

This relationship is significant for reasons extending beyond the mutual understanding and respect engendered. It has a direct bearing on the judicial decision-making of the respective cadres of judges, most particularly the district and magistrate judges. District judges manifest their judicial behavior not only in deciding whether to seek authorization for additional magistrate judge resources to meet their growing caseloads, and in deciding who to select for each magistrate judge position, and later whether to reappoint them, but most importantly in how to utilize the magistrate judges on their court. These elements speak to a form of judicial decision-making, which has been largely untouched by those writing about district judge behavior. Judicial decision-making behavior seems most commonly analyzed in terms of decisions rendered on the merits of a case before a particular judge.¹⁷¹ But there is a broader judicial decision-making behavior, which helps define who will make the merits-based judicial decision, and the manner in which the judicial decision-making responsibilities of a particular district court will be divided between district and magistrate judges.

In this regard, one magistrate judge characterized the manner in which the district judges involve magistrate judges in the governance of the court as a form of utilization manifesting their judicial decision-making behavior and a factor in attracting strong candidates to apply for vacant magistrate judge positions.¹⁷² Another magistrate judge stressed, however, that when the district judges of a court select a magistrate judge to chair a committee of the district court, it is important that the district judges support the authority of the magistrate judge so designated.¹⁷³

¹⁷¹ See generally EPSTEIN ET AL., *supra* note 2; *Judicial Business*, *supra* note 12.

¹⁷² Interview with subject 21 (Dec. 2013–Jan. 2014).

¹⁷³ Interview with subject 20 (Dec. 2013–Jan. 2014).

Like utilization, magistrate judge involvement in district court governance is not uniform. Some districts employ a procedure designating one magistrate judge as Chief Magistrate Judge to liaison with the Chief District Judge, or district judges on matters pertaining to magistrate judge utilization.¹⁷⁴ Other districts have no such formal structure, and vary in terms of magistrate judge participation at regular meetings of the district judges of the court, or participation on committees of the court.¹⁷⁵

The same is true with respect to involvement of magistrate judges in the selection of new magistrate judges. Most districts have some mechanism whereby incumbent magistrate judges participate in this process.¹⁷⁶ The most common procedure described was to permit incumbent magistrate judges to participate in the interviews of the finalists seeking appointment as a new magistrate judge, and then provide their recommendations to their colleague district judges who formally vote on the selection.¹⁷⁷ However, magistrate judges in two districts advised that incumbent magistrate judges actually cast a formal vote on the selection of a new magistrate judge.¹⁷⁸

G. Magistrate Judge Auditioning for Reappointment or Nomination to Article III Status

The interviews of both magistrate and district judges provoked similar responses to the question of magistrate judge auditioning for reappointment and elevation to Article III status. Several judges commented on the differences between the magistrate judge appointment process and that employed for nomination and confirmation to Article III judgeships.

As one former magistrate judge, now serving as a district judge, observed, the nomination and confirmation process for elevation to an Article III judgeship is “highly partisan,” whereas the magistrate judge selection process is “a brilliant system, more truly based on merit.”¹⁷⁹ A magistrate judge who previously had been appointed and elected to state judicial office expressed the view that the merit selection process for magistrate judges is one of the real strengths of the Magistrate Judges System.¹⁸⁰ The same magistrate judge noted that in contrast to the difficulty of occasionally trying to cope with Article III judges who are exhibiting age-related or other infirmities, yet cannot easily be eased off case

¹⁷⁴ Based on the author’s experience and professional knowledge.

¹⁷⁵ *Id.*

¹⁷⁶ *See generally* Interviews cited throughout Part III.

¹⁷⁷ *Id.*

¹⁷⁸ Interview with subjects 6, 8 (Dec. 2013–Jan. 2014).

¹⁷⁹ Interview with subject 16 (Dec. 2013–Jan. 2014).

¹⁸⁰ Interview with subject 21 (Dec. 2013–Jan. 2014).

work, a similar circumstance with a magistrate judge could be more effectively addressed by means of removal, or non-reappointment.¹⁸¹

Barring some performance issue, many echoed the view expressed by one district judge that, with rare exception, magistrate judges are almost always reappointed to successive eight-year terms.¹⁸² Another district judge put it more bluntly, “The best way to ensure reappointment is to not screw up!”¹⁸³ In this regard, a magistrate judge opined that counsel who litigate in federal court carry potentially significant influence because any member of the bar can offer comment on incumbent magistrate judge’s suitability for reappointment.¹⁸⁴ The same magistrate judge noted that while applications for original appointment to a vacant magistrate judge position are customarily confidential so as to encourage as wide a pool of applicants as possible, in some districts such confidentiality can be waived by the applicant, in which case the bar again has the opportunity to comment.¹⁸⁵

On the question of whether incumbent magistrate judges consciously auditioned for reappointment, the answer was again consistent among district and magistrate judges. As expressed previously regarding the influence of review of rulings by reappointing district judges,¹⁸⁶ the question of reappointment was basically dictated by the quality of performance throughout the prior term in office. In sum, if the district judges of the court did not think an incumbent magistrate judge’s performance warranted reappointment, no amount of auditioning would alter the result.¹⁸⁷

When the issue related to magistrate judges seeking nomination to an Article III judgeship was raised, the responses only differed slightly. Several magistrate judges who are currently in¹⁸⁸ the pool of eligibility for elevation to an Article III judgeship, or had been, and district judges who had garnered their judgeships after serving as magistrate judges, repeated the view that their auditioning for elevation came in the form of doing a highly credible job as a magistrate judge. Although most expressed the opinion that they did not view a magistrate judgeship as a stepping-stone to Article III appointment, one explained that the reason so many magistrate judges have received Article III appointments may be that they have demonstrated the ability to excel as a judge in the federal trial courts.¹⁸⁹

¹⁸¹ *Id.*

¹⁸² Interview with subject 15 (Dec. 2013–Jan. 2014).

¹⁸³ Interview with subject 2 (Dec. 2013–Jan. 2014).

¹⁸⁴ Interview with subject 17 (Dec. 2013–Jan. 2014).

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* Part III.A.

¹⁸⁷ *See generally* Interviews cited throughout Part III.

¹⁸⁸ At the time this article was written, several magistrate judges were in the nomination process to become district court judges. Obviously, as the district court nomination and confirmation process is a political process, this may change.

¹⁸⁹ Interview with subject 13 (Dec. 2013–Jan. 2014).

And, as one magistrate judge noted, they have not suffered the pitfalls of life outside the Code of Conduct for United States Judges.¹⁹⁰

Other forms of auditioning behavior were not, however, unheard of. A few district and magistrate judges observed that one sign of auditioning might be increased activity in local or state bar activities, or in presentations at continuing legal education programs, or in other community activities not otherwise prohibited under the Codes of Judicial Conduct.¹⁹¹ Those same judges, and others, also acknowledged, however, that since many judges routinely engage in such bar and community activities, this is probably weak indicia of auditioning for elevation or reappointment.¹⁹²

One district judge, who had previously served as a magistrate judge, commented that magistrate judges wishing to garner support for elevation to Article III status might make a more concerted effort to encourage civil consent cases to get more face time with attorneys who might thereafter have influence with those making recommendations for nomination to the district court.¹⁹³ This approach may be limited by the fact that the political process by which potential nominees are recommended to the President for nomination to Article III judgeships can vary in each State. Others noted that an auditioning magistrate judge might be more circumspect in comments on politically charged topics, or might be more conscious of actions that could offend counsel.¹⁹⁴ However, with respect to each of these behaviors, the same judges observed that it is difficult to ascribe such conduct to auditioning, because such circumspection and humility is a generally preferred mode of conduct for judges whether they are seeking promotion, praise, or simply trying to do their job well.¹⁹⁵ In the end, the tenor of most responses was that the latter motivation tended to enhance any judges chances of elevation, or reappointment, within the structure of the federal judiciary.

What does the fact that 162 magistrate judges have become Article III judges in the past forty-five years, or that several currently pending Article III nominees are incumbent magistrate judges, tell us about magistrate judge auditioning for Article III promotion?¹⁹⁶ Perhaps further study comparing behavior

¹⁹⁰ Interview with subject 34 (Dec. 2013–Jan. 2014). The Code of Conduct for United States Judges, originally adopted by the Judicial Conference of the United States in 1973, applies to United States circuit judges, district judges, magistrate judges, bankruptcy judges, Court of International Trade judges, and Court of Federal Claims judges. *See Code of Conduct for United States Judges*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [https://perma.cc/R2H2-DEQ9].

¹⁹¹ Interview with subjects 2, 15, 19 (Dec. 2013–Jan. 2014).

¹⁹² Interview with subject 28 (Dec. 2013–Jan. 2014).

¹⁹³ Interview with subject 14 (Dec. 2013–Jan. 2014).

¹⁹⁴ Interview with subjects 3, 5, 11, 14 (Dec. 2013–Jan. 2014).

¹⁹⁵ Interview with subject 13 (Dec. 2013–Jan. 2014).

¹⁹⁶ E-mail from Thomas Davis, Attorney Advisor of the Judicial Servs. Office, to Philip Pro, Former Chief Judge of the U.S. Dist. Court for the Dist. of Nev. (Dec. 26, 2103, 12:19 PST) (on file with author). This number is accurate as of Dec. 26, 2013. *Id.*

of Article III judges who previously had served as magistrate judges, with those who had not, would be revealing.

Somewhat surprising, the interviews conducted with magistrate judges suggest that a great many have no promotional aspirations, and hence elevation is not an influential factor in their judicial behavior.¹⁹⁷ Less surprising was the view expressed by others that because of their age, or the partisan political alchemy prevalent in their state, they did not consider themselves to be in the pool of eligibility for appointment to an Article III judgeship, and thus entertained no thoughts of auditioning for such an appointment.¹⁹⁸ In the end, it appears that the question of auditioning is dependent upon a host of variables not easily quantified, but apparently present at some level with some magistrate judges depending upon their particular circumstances.

CONCLUSION

Most United States district judges and magistrate judges are so consumed by the press of their daily caseload responsibilities that they have little time to patiently consider academic studies evaluating the determinants of their judicial behavior. Certainly most do not have sufficient time to write about the subject.¹⁹⁹ When we do, it may fairly be said that a judge may bring to the process long held views or barriers to self-understanding of the kind the authors of *The Behavior of Federal Judges*, and many others, are trying to penetrate indirectly by means of scientific methods and the use of sophisticated quantitative tools. Nonetheless, trial judges do tend to be practical individuals.²⁰⁰ Thus, this paper should not be understood as a gratuitous criticism of the methodology or conclusions of a very thoughtful study, but rather as an effort to fill a void in the current literature on the subject of the behavior of judges in the United States district courts.

This paper shows that attempts to understand and explain the motivations for the judicial decision-making behavior of Article III United States district

¹⁹⁷ See generally Interviews cited throughout Part III.

¹⁹⁸ *Id.*

¹⁹⁹ In this regard, I must express my deep appreciation to Dean David Levi, Professor G. Mitu Gulati, Professor Jack Knight, and the faculty and staff of the Duke Law Center for Judicial Studies, for the opportunity to participate as a member of the inaugural LL.M. in Judicial Studies Program. As I told Dean Levi upon enrolling in the program, as a recently minted Senior United States district judge, I considered it a rare opportunity to step back from my day to day responsibilities with the Court, and to reflect on the process in which I have been engaged over the past thirty-four years.

²⁰⁰ A practical approach is not necessarily unscientific. Inventor Thomas Edison was surely no stranger to experimentation and scientific method. Yet, in a story, which may be apocryphal, it is said that when hiring engineers to work at his laboratory in Menlo Park, New Jersey, each applicant was handed a large light bulb and asked by Edison to determine the exact amount of water the bulb would hold. The volume of the bulb could be determined by applying logarithmic formulas based on measurements of the bulbs surface. Edison, however, hired the engineers who simply removed the brass base from the bulb, filled it with water and then poured the water into a measuring cup. SUZANNE K. POWELL, CASE MANAGEMENT: A PRACTICAL GUIDE TO SUCCESS IN MANAGED CARE 85 (2d ed. 2000).

judges are weakened by the failure to account for their non-Article III magistrate judge colleagues. By tracing the relatively short history of the Magistrate Judges System, and exploring the evolving judicial decision-making role of magistrate judges, this paper also demonstrates that the interrelationship between United States district and magistrate judges is inescapable, and profoundly important to the resolution of most cases litigated in United States district court.

The interviews of thirty-four Ninth Circuit district and magistrate judges reported herein illustrate the scope of judicial decision-making of magistrate judges. The interviews also demonstrate the dependence of district and magistrate judges on each other in ways not commonly recognized as case determinative. The interviews offer no panacea for those seeking to understand the judicial behavior of judges in the United States district court. Still, the interviews tell us much about who these judges are, and reveal useful insights, which should not be discounted by those seeking to measure judicial behavior by more sophisticated, but indirect methods.

The interviews summarized in this paper suggest that the decision-making behavior of district and magistrate judges in the United States district court is motivated by an amalgam of factors not easily quantified, and not necessarily shared equally by all judges. Whether categorized as serving a particular ideological or policy preference, or the judge's own self-interest, the motivations for their judicial behavior are as complex as the judges themselves. This may not be a particularly useful observation because it permits those conducting a study of judicial behavior to read into their analysis almost any reasonable motivation they wish. Under such circumstances, it is "enough," but hardly ironic that, "the arrows fit exactly in the wounds that they have made."²⁰¹ The interviews do, however, evidence a unifying desire on the part of nearly every judge to be perceived as credible, competent, and fair.

The interviews show also that the multi-varied motivations of judges must be understood in the context in which the judicial behavior is manifested. In the end, it is enough that this paper shows that when attempting to understand the determinants of judicial behavior in the United States district courts, the collaborative and inter-dependent judicial decision-making of both district judges and magistrate judges must be accounted for.

²⁰¹ FRANZ KAFKA, *DIARIES 402* (Shocken Books, Inc., 1948).