

HOW BAYESIAN ARE JUDGES?

Jack Knight, Mitu Gulati & David Levi*

Judge Richard Posner famously modeled judges as Bayesians in his book, How Judges Think. A key element of being Bayesian is that one constantly updates with new information. This model of the judge who is constantly learning and updating, particularly about local conditions, is one of the reasons why the factual determinations of trial judges are given deference on appeal. But do judges in fact act like Bayesian updaters? Judicial evaluations of search warrant requests for probable cause provide an ideal setting to examine this question because judges in this context have access to information on how well they did on their probabilistic calculations (the officers who conduct the search have to file, in every case, a “return” detailing what was found in their search). Based on detailed interviews with thirty judges, our answer to the “How Bayesian are Judges?” question is: “Not at all.” The puzzle we are left with, given that acting in a Bayesian fashion is normal behavior for the rest of us, is why we get these puzzling results for judges in the search warrant context?

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INTRODUCTION

A fundamental element of the United States judicial system is that trial judges find facts. Judges at the trial level are the first to hear a case. They live in the area, interact with the litigants, witnesses, and lawyers, and are generally assumed to have a deep understanding of the local context. That understanding is supposed to enable them to make factual determinations with a high degree of accuracy. When we say “factual determinations,” we do not literally mean facts in the sense of “the bus was painted blue.” We mean something along the lines of “in this area, the fact that a building has multiple teenagers constantly going in and out, with numerous fast Japanese-made motorcycles parked on the curb” suggests a high probability of a drug selling operation. In a different area, those same facts might suggest that the building is the headquarters for a motorcycle racing team. The assumption that judges at the local level develop this kind of deep understanding of context is part of the reason why appellate courts are required to defer to the trial courts on their fact-findings.¹ There are, of course, other reasons for deference to the trial judge as well. For example, the trial judge is the one who interacts with witnesses, observes demeanor, hears variations in tone, and so on—much of which does not come through in a trial transcript.² For our purposes though, what is relevant is that the trial judge is supposed to be able to better predict whether motorcycles plus teenagers equals drug den or racing team.

Implicit in the foregoing reasoning—and this is particularly important for purposes of our project—is that judges are assumed to be “Bayesians.”³ That is, the model of the judge is one where she is constantly learning, and particularly as she sees more and more disputes.⁴ It is assumed that as judges improve their understandings of the facts on the ground, they are better able to make legal determinations.⁵ They learn things like, for example, a car with Florida license plates driving around in North Carolina that is always careful to drive no more than five miles above the speed limit, is most likely transporting cocaine. They also learn to recognize at what point that set of facts no longer indicates drug carrying, where instead it is the peppy cheerleader type who tries to chit-chat at the airport with the TSA officer who is likely the newest drug mule. Judges at

¹ This is explicitly true as a matter of doctrine in the area that is the focus of our research, grants of search warrants. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) (directing that the magistrate judge’s determinations on sufficiency of evidence for the grant of a warrant be given “great deference”); *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *United States v. Leon*, 468 U.S. 897, 914 (1984) (similar). For an articulation of this rationale by Judge Posner that draws analogy to the negligence context, see *United States v. McKinney*, 919 F.2d 405, 419–20 (7th Cir. 1990) (Posner, J., concurring).

² *See* ALEX KOZINSKI & JOHN K. RABIEJ, *FEDERAL APPELLATE PROCEDURE MANUAL* 10 (2014).

³ *See* RICHARD A. POSNER, *HOW JUDGES THINK* 67 (2008).

⁴ *See id.* at 68.

⁵ *See id.*

the appellate level, by contrast, who are often located in some distant big city and never interact with litigants, are not expected to have these deep understandings of the facts on the ground. Their specialty is applying the substantive law to the facts that the trial judge determines.

This articulation of how judges, and particularly trial judges, behave is often how many of us describe the legal system to our students. It is the model of the fact-finding judge used by Justice Rehnquist to justify his decision to limit the review of magistrate judges granting warrants in *Illinois v. Gates*.⁶ Justice Rehnquist explained,

[T]he central teaching of our decisions bearing on the probable-cause standard is that it is a “practical, nontechnical conception.” “In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” . . .

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.⁷

Further, this is the conception of the judge that has undergirded the work of legal luminaries as diverse as Karl Llewellyn and Judge Richard Posner.⁸ Indeed, the description of judges as Bayesian is one that we take from Posner’s book, *How Judges Think*.⁹

Do judges actually behave in this fashion, like quasi social scientists, constantly learning, updating, and making better decisions? Judge Posner does, we

⁶ *Gates*, 462 U.S. at 231–32.

⁷ *Id.* (citations omitted) (first quoting *Brinegar v. United States*, 338 U.S. 160, 175, 176 (1949) and then quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

⁸ Karl Llewellyn famously had confidence in judges being able to locate local customs in the merchant context and learn from observing multiple disputes over time. See Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 12, 16 (Jody S. Kraus & Steven D. Walt eds., 2000). For a contemporary utilization of the assumption of judges updating, see Scott Baker & Claudio Mezzetti, *A Theory of Rational Jurisprudence*, 120 J. POL. ECON. 513, 513 (2012) (emphasizing, as a key assumption of their model, that courts “learn[] over time”).

⁹ Posner’s book, to be fair, emphasizes a different aspect of the Bayesian calculus than we do. And that is the part about how probability estimations are made as a function of “priors” or “preconceptions”—that is, one’s prior understandings of the world. POSNER, *supra* note 3. In a Bayesian model, though, the priors get constructed as a function of observation and experience and then get updated as a function of new information that the agent receives. For more, see SHARON BERTSCH MCGRAYNE, *THE THEORY THAT WOULD NOT DIE: HOW BAYES’ RULE CRACKED THE ENIGMA CODE, HUNTED DOWN RUSSIAN SUBMARINES, AND EMERGED TRIUMPHANT FROM TWO CENTURIES OF CONTROVERSY* (2011).

suspect.¹⁰ But do others? At first cut, it seems obvious that this must be the case. After all, more interactions with the world improve everyone's understanding and judgment.¹¹ However, judges making legal determinations are not necessarily making decisions in the way that ordinary individuals do. Take Joe, a law student, who is contemplating whether to buy a burger at the law school cafeteria. On the last two occasions that Joe ordered burgers from the cafeteria the meat was overcooked and the buns were soggy. Joe now has a sense that he will suffer a cost (an unpleasant eating experience) if he orders a burger from the law school cafeteria a third time. The judge, by contrast, may not suffer any cost from his incorrectly concluding that a building with broken windows in his town is an indicator of a drug den. Put differently, someone else has to eat the soggy bun that the judge has purchased. And if there is no cost from failing to update (or if instead there is a benefit—maybe the store with the soggy buns is very conveniently accessible), then it is even more unlikely that updating will occur.

Now, it is not quite the case that judges do not internalize *any* of the costs of failing to act like Bayesians. We suspect that judges do not like getting reversed by a higher court.¹² Even if the risk of reversal is small because appeals courts must defer to the trial judges on their fact-findings, there is still some risk. If there were no risk of reversal, would judges still work on developing deep local knowledge of the facts? After all, there are still other pressures that would be in operation, such as the judge's concern about reputation and the desire for promotion, and this is to say nothing of the potential social costs of failing to update the factual criteria of what constitutes probable cause in criminal investigations.¹³

This article reports on the results of a study regarding the degree to which judges seek to update and improve their knowledge of the local circumstances.

¹⁰ See Noah Feldman, *Voter ID Math Finally Adds Up for Judge Posner*, BLOOMBERG VIEW (Oct. 14, 2014, 3:18 PM), <http://www.bloombergvew.com/articles/2014-10-14/voter-id-math-finally-adds-up-for-judge-posner> [<https://perma.cc/8EHW-JB5A>].

¹¹ There is a large literature on the question of “How Bayesian” people are that tries to examine the degree to which people are able to update their probabilistic calculations. Our question with respect to the judges is much simpler: We ask whether the judges are updating at all, in the warrant context. On the larger literature, see, for example, JONATHAN ST. B.T. EVANS, *HYPOTHETICAL THINKING: DUAL PROCESSES IN REASONING AND JUDGMENT* 33 (2007); MARTIN PETERSON, *NON-BAYESIAN DECISION THEORY: BELIEFS AND DESIRES AS REASONS FOR ACTIONS* 20–22 (2008).

¹² See generally Jack Knight & Mitu Gulati, *Talking Judges* (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585760 [<https://perma.cc/6MU8-2MAA>]. The assumption of “reversal aversion” is often used in the academic research on judges. See LEE EPSTEIN, RICHARD A POSNER & WILLIAM M. LANDES, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY ON RATIONAL CHOICE* 83 & n.55 (2013).

¹³ On the various factors that motivate judges, and particularly reputation, see, for example, NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* (2015).

Our investigation takes advantage of an unusual aspect of the rules relating to search warrants in the federal system. To obtain a search warrant, the law enforcement officer in question must present the judge (usually a magistrate judge, but sometimes a district judge) with a set of facts that the officer thinks add up to “probable cause.”¹⁴ No one quite knows what exactly the threshold for probable cause is, but we do know generally that it is a probabilistic decision that the local magistrate makes based on information that she is given by a law enforcement officer.¹⁵ The information that officers typically present to the judge is in the form of affidavits asserting facts observed by the officer or reports from informants who work with the officer.¹⁶ From that information, the judge determines whether there is enough of a probability that evidence of a crime will be found to justify allowing an intrusion into someone’s private space. In doing so, the judge must take account of the trustworthiness and the reliability of both the officer and the informants, as she would with any witness.

The most relevant aspect of these rules for purposes of our study is that the officer, after the search is completed, has to file a “return” with the court, in which the officer is required to report on the results of the search.¹⁷ This access to after-the-fact reflection is unusual in the federal court system because in most judicial contexts (for example, in sentencing), judges are not given information about how their decisions have turned out (e.g., did the defendant who was shown leniency because of the sterling character references from local politicians continue to misbehave?). In the warrant context, however, the judge has ready access to this kind of information. The officer files a document with the court detailing what was found during the search, making information available to the judge to evaluate how well she did in making her probabilistic decision.¹⁸ It also provides information about the reliability of the officer and the related informants on whose assertions the original probable cause decision was based. With enough of this kind of data (judges in busy districts can have over a few hundred warrants that they approve in any given year), the judge can begin to determine which officers and informants are more trustworthy and reliable as well as which factors contributing to her decision were good predictors and

¹⁴ FED. R. CRIM. P. 4.

¹⁵ On the Court’s refusal to quantify probable cause because it involves considering the totality of the circumstances on the ground, see *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). This type of decision can be contrasted with what one might call a legalistic decision, where the appellate courts set down a formula for what kind of evidence it is appropriate to consider while calculating probable cause. This latter approach was rejected by the Court in *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983).

¹⁶ See FED. R. CRIM. P. 4.

¹⁷ See FED. R. CRIM. P. 41(f)(1)(D) (describing the obligation to file a “return” with the court).

¹⁸ FED. R. CRIM. P. 4(c)(4).

which ones were not.¹⁹ The end result should be, over time, improved predictions regarding whether contraband will be found.

An important feature of the context that we examine here is that the judges are unlikely to be concerned about the risk of reversal. As a result of the Supreme Court's decision in *United States v. Leon* three decades ago, the decision of a judge to grant a warrant is essentially immunized from appeal.²⁰ The Supreme Court said that unless it could be shown that the judge acted in bad faith, the decision to grant the warrant would stand even if ex post it seemed like there was not enough evidence to establish probable cause.²¹ The Court reasoned that since the officers in question would have performed the search in reliance on the judge's determination, no deterrent purpose vis-à-vis the officers would be served by holding otherwise.²²

Our initial plan, when we set up the project, was to look at the actual returns for individual judges in a handful of states and examine whether the quality of decision making improved over time (including before and after the decision in *United States v. Leon* which, as noted, essentially immunized the judge's decision from being overturned on appeal). After a few months of attempting to obtain the data from courts in our state (North Carolina), however, we gave up; we were able to get some data, but most of it was either lost, misplaced, or unavailable to us for some other unspecified reason. During the process of trying to find the hard data, and in particular in talking to various court officers about these returns, we began to realize that our original premise—that judges were surely interested in these returns and were updating their probabilistic calculations with information from them—was off base. Among the clues here were the spiders and dust; it seemed as if no one, let alone judges, had ever looked at these returns.²³ We turned our focus, therefore, from the returns themselves to the judges and the question of whether they were using that information to update their knowledge bases.

¹⁹ As the paper by Lee and Davis for this conference describes, there are tens of thousands of warrant requests evaluated by magistrate judges every year. Douglas A. Lee & Thomas E. Davis, "Nothing Less than Indispensable": *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 940 (2016).

²⁰ See *United States v. Leon*, 486 U.S. 897 (1984). For a description, see Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507 (1986).

²¹ *Leon*, 468 U.S. at 914–15.

²² See *id.* at 921.

²³ The court clerks told us on multiple occasions that they were "thrilled" that "someone" was finally attempting to use the data in the returns. Although, as noted in the text, we ultimately could not get enough of the data.

I. THE INTERVIEWS

During 2012–2014, we conducted thirty interviews with magistrate judges and district judges from four states.²⁴ We also spoke to roughly a dozen prosecutors, defense lawyers, higher court judges, state judges, and court administrators in these states. Of the thirty judges, twenty-eight had been federal magistrate judges at some point in their careers.²⁵ For the lawyers to whom we spoke, we tried to speak to respected senior lawyers within the system.

We conducted almost all of our interviews together, with the three of us present and participating. So as to make our interviewees comfortable, we did not record the interviews and instead took notes. The three of us—a former judge and prosecutor (now a law school dean), a political scientist, and a law professor—had different prior experiences with and expectations about judges, which was in part why we decided to do this project together. What we found surprised and puzzled all three of us.

We conducted the interviews without a fixed set of questions. Instead we began by explaining our interest in understanding the warrant process, the data we had attempted to collect, and the context of the seminar on judicial behavior that we were teaching. Our first question always was to ask for the subject's view on the operation of the warrant application process (that is, the mechanics of how the process works).²⁶ Our subsequent questions encouraged respondents to share their stories with additional detail. The interviews ranged from roughly one to two hours.²⁷

In the next section, we report on the themes from the narratives, as they pertain to the question at the heart of our paper: How do judges update their views as a result of the information they obtain through the warrant review process? Our impressions are necessarily subjective. In other words, we know what the judges *said* they did, not what they actually did. First, however, we will provide some background on the judges who constituted the vast majority of our sample: federal magistrate judges.

²⁴ The majority of these judges (over 80 percent) were located in two states in the southern United States. The handful of other judges were from states in the Midwest and the West, whom we spoke to primarily to find out whether the phenomenon we were observing was idiosyncratic to the states we had focused on. That did not appear to be the case.

²⁵ We identified our judges from the federal court websites for the states in question.

²⁶ We formally began each interview with a statement about the subject's rights of confidentiality and anonymity.

²⁷ The interviews were primarily conducted in the judges' offices.

A. Magistrate Judges

The overwhelming majority of warrant applications in the federal system are reviewed by magistrate judges.²⁸ In theory, district judges can also review these applications, but they rarely do so unless a magistrate judge is unavailable. Given that magistrate judges are roughly 90 percent of our sample, some background on who they are and what role they play may be helpful.

Magistrate judges are an understudied group of judges; the literature on judging largely ignores them.²⁹ Their importance within the federal system, however, has been consistently increasing over recent years as the workload of the federal trial courts has increased.³⁰ Structurally, these judges operate under a different set of conditions than do their district court judge colleagues in terms of the appointment process they go through, the possibility of job loss, salary, pension, support staff, and overall responsibilities.³¹

Magistrate judges in the U.S. federal court system perform a supplementary or assisting function to the district court judges who sit above them within the hierarchy of the judiciary and who have the ultimate responsibility of handling all of the cases filed in the district.³² One sees and feels that hierarchy within the courthouse when one visits the judges at the different levels. Among other things, magistrate judges get paid less, have fewer assistants, and have smaller offices. They do not have life appointments, and for the most part their duties are as assigned by the district court.³³ Magistrate judges perform a wide variety of tasks, which vary by jurisdiction depending on the direction and needs of the district court.³⁴ Magistrate judges have the statutory authority to make initial decisions on juvenile cases, misdemeanor cases, and certain motions. They also may make recommendations of fact, sign off on search warrants (our focus), and conduct certain civil trials with the consent of the parties

²⁸ This is evident from Federal Rule of Criminal Procedure 41 on warrants that speaks explicitly of magistrate judges having the responsibility for approving warrant requests. FED. R. CRIM. P. 41; *see also* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 26 (Aug. 2014), <http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf> [<https://perma.cc/9HM6-4WST>]; Lee & Davis, *supra* note 19.

²⁹ The conference from which this volume of papers originates is the exception. Among the handful of prior articles on the evolution of the magistrate judges' system are, Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); Jack B. Streepy, *The Developing Role of the Magistrate in the Federal Courts*, 29 CLEV. ST. L. REV. 81 (1980).

³⁰ *See* Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted for*, 16 NEV. L.J. 783 (2016); *see also* Lee & Davis, *supra* note 19.

³¹ *See* 28 U.S.C. § 631 (2012) (regarding appointment process); *id.* § 631(e) (regarding job loss); *id.* § 634(a) (regarding salary); MCCABE, *supra* note 28, at 13 (regarding remaining conditions).

³² *See* Pro, *supra* note 30, at 806.

³³ *Id.* at 807.

³⁴ *Id.* at 787.

and the permission of the district judge assigned to the case.³⁵ Over the past few decades, as the caseloads of the federal courts have increased significantly and the number of Article III judges has not, magistrate judges have become an increasingly important part of the trial court system, helping ease the burdens on district judges.³⁶ In 1986, there were 280 full-time and 177 part-time magistrate positions.³⁷ With expansion, in 2014 there were 534 full-time and 36 part-time magistrate positions.³⁸

While these magistrate judges perform many functions that are similar to those that a federal district judge might perform, they are selected via a different system. Magistrate judges are selected based on merit by committees formed by the Chief Judge of each federal judicial district, and officially appointed by the district judges of that district.³⁹ Magistrates are required to be licensed practicing attorneys with five years of state bar membership in the state of appointment.⁴⁰ The magistrate judge salary is fixed at 92 percent of the district judge salary.⁴¹ Full-time magistrate judges are appointed for eight-year terms, which are renewable by a majority vote of the district judges in that district.⁴² Essentially, magistrate judges serve at the pleasure of the local district judges, although re-appointment appears to be the norm.

B. Narratives of Probability

We began each of our interviews in roughly the same fashion: thanking the judges for making time to see us, describing our interest in understanding their process of evaluating and updating information about local context, and asking the judges if they might describe the warrant process for us. From that point on, we allowed the conversation to flow in the direction that the judge took it. We did, however, have a set of topics that we ensured were discussed, and the discussion that follows is organized to include those topics.

Almost all the judge-respondents appeared to have done some preparation in advance of our visits to their chambers in terms of thinking about aspects of the warrant process that we might find interesting. We made certain to assure

³⁵ See 28 U.S.C. § 636 (2012).

³⁶ See, e.g., Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 668 (2005).

³⁷ PETER CHARLES HOFFER ET AL., *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 421–22 (2016).

³⁸ *Id.*

³⁹ See Baker, *supra* note 36, at 663.

⁴⁰ 28 U.S.C. § 631(b)(1) (2012).

⁴¹ *History of the Federal Judiciary: Judicial Salaries*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/js_6.html [https://perma.cc/ZAG4-EFQN] (last visited Mar. 25, 2016).

⁴² Lawrence O. Anderson, *United States Magistrate Judge: The Utility Fielder of the Federal Courts*, ARIZ. ATT'Y, Jan. 2007, at 10, 10.

the judges that we would ensure their anonymity as respondents and would not press for answers to any questions that they felt were inappropriate.⁴³ We took pains to emphasize that our interest was in the general warrant approval and evaluation process, rather than any judge's individual practices. In no case did we ask about individual cases that the judges had seen.

We begin with the descriptions of the warrant process that we heard.

1. *The Mysterious Role of the AUSA*

The warrant process described to us was essentially the same across the judges. Government law enforcement agents are supposed to call or email the judge's chambers to inform them that a warrant request is forthcoming. Almost always, this contact is initiated by the U.S. Attorney's office. A draft of the officer's affidavit is then sent over to the judge's assistant so that the judge can look at it ahead of time. A number of judges emphasized that they preferred to receive the draft affidavits ahead of time because they did not want to make the officers wait around in their offices while they were reading their statements. Every warrant, while formally submitted by an officer, came with the imprimatur of a federal prosecutor—an Assistant United States Attorney (AUSA). The informal practice that all of the judges followed was that the AUSA in question would have to either initial the application for a warrant or indicate in some other way to the judge who the responsible AUSA was.

The AUSA's role in the warrant acquisition process was our first clue as to how ritualized the process was. When we asked why the AUSAs were involved, the initial explanation we received on a number of occasions was that these AUSAs performed a "certification" or "gatekeeping" function.⁴⁴ We found this interesting because it looked like the judges had figured out that they could enhance the quality of the warrant submissions by threatening to impose reputational penalties on AUSAs who consistently provided low quality warrant applications either in their clarity and specificity, or accuracy (something that presumably would be discovered using the returns that we discussed earlier).

It was clear from what we heard, we thought, that the officers had only secondary responsibility for the submissions, at least as to the assertion that

⁴³ These were also the conditions under which we received approval from Duke's Institutional Review Board to conduct these interviews. For details on the Duke IRB or Institutional Review Board, see *Research with Human Subjects*, DUKE U. OFF. RES. SUPPORT, <https://ors.duke.edu/research-with-human-subjects> [<https://perma.cc/8DQU-MW3Y>] (last visited Mar. 25, 2016). The goal of this review is to protect the subjects from harm that might be caused by the research. Our specific IRB Protocol Number for the project is #B0164.

⁴⁴ The idea of lawyers playing gatekeeping roles in other contexts has been the subject of much discussion in the legal literature. See, e.g., Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 986 (2005).

“probable cause” to search existed. In some cases, we heard that it was the AUSAs who even drafted and formatted the applications for the warrants once the officers presented them with the relevant information.

When we pushed the judges on this certification function performed by the AUSAs, we did not get what we expected. The following is an example:

Judge: The AUSAs perform something of a certification function.

Us: That is interesting. Does this mean that judges know where there are AUSAs who consistently turn in lower quality warrants? Do the applications of those AUSAs receive higher scrutiny?

Judge: No. That’s not it. There aren’t big discrepancies. We treat each warrant separately. And the agents are . . . good. Plus, there are many agents from different agencies.

As we went through the interviews, it began to dawn on us that what the judges understood to be the AUSAs’ certification function was at odds with what we expected it to be. It was clear that the AUSAs were playing an important role, but what was it? What emerged from the interviews was that the AUSAs seemed to be certifying the *legal validity* of the warrant.

This was puzzling. It is the officer who has personal knowledge of the facts that he is claiming constitute the basis for the probable cause justifying a warrant, and assuming that the submission satisfied the judge’s notion of probable cause, the officer (not the AUSA) would come in to formally swear to the underlying facts. There does not seem to be any role for AUSA “translation” of the officer’s facts or determinations of whether the warrant satisfies probable cause. The judges described for us a process in which a key actor was the federal prosecutor. We heard statements along the following lines: “We require the AUSAs to read the warrants and think there is probable cause [M]y threshold requirement is that there is an intellectual investment by the AUSA” Or, “The AUSA . . . has made a quality determination.”

At this point, one of us would typically interject and ask whether the point of the AUSA’s initial determination of whether there was probable cause was something that was useful because the judge could defer to it. The response invariably (and, on occasion, with a dose of annoyance) was the equivalent of, “of course not; we would never defer to an AUSA’s determination.” The question that we were left with then was what role the AUSA played if not providing certification in some reputational sense nor enhanced efficiency in terms of reducing the amount of scrutiny required by the judge.

We heard explanations along the lines of the AUSA evaluation being useful because AUSAs, as lawyers, had ethical duties as officers of the court, or that AUSAs could help ferret out errors, but none of these explanations were satisfying. Judges rarely defer to lawyers because they think that the ethical obligations of those lawyers somehow overcome the lawyer’s advocacy role in an adversary system. As for the errors the AUSAs were supposed to ferret out, how would this work when the AUSAs did not have first hand knowledge of the facts? We were left with the sense that the “certification” requirement ful-

filled a variety of different functions in practice, although there was no explicit agreement on the reasons for the requirement. We tried to push the judges on this issue. Their answer was that we were missing the point. The AUSAs were lawyers certifying that the affidavits were of high quality as a legal matter; that is, in terms of meeting the relevant probable cause standard set out by the circuit court. To reiterate, what we were hearing was that probable cause was a legal standard and the judges wanted the warrants to meet the legal requirements. At bottom, here is what we discerned about the function the AUSA involvement served:

- It ensured that the application would be in line with the legal standards; consistent with “circuit precedent.”
- It notified the judge of whom to call if there was some problem with the warrant and it needed to be redone.
- It put the attorney’s reputation on the line and might lead to the submission of an affidavit that was clearer, better written, more precise, and more persuasive of probable cause.

There was also a suggestion that the certification function might have originated from judges’ desires that law enforcement agents not come directly to them for a warrant without first getting the go-ahead from a prosecutor. Here the assumption was that in the days prior to certification, many warrant applications were defective for a variety of reasons and that a prosecutor either could have fixed the defects or weeded out the bad warrants—saving judicial effort in both cases. One judge (perhaps cynically) suggested that the AUSAs might be the only Bayesian updaters in the equation, to the extent that what they were doing was updating as a function of their steadily improving knowledge of what sorts of evidence the judge was likely to sign off on and the format he or she liked to see the evidence in. To quote: “AUSAs get trained over time as to what the judges of a particular district find acceptable, and they do not want to be embarrassed by having their warrants routinely rejected and their investigations delayed or disrupted.”⁴⁵

At this stage, we generally shifted gears by asking about the model of the judge’s interaction with the officer, in the event there was a deficiency with the warrant. Our interest was in how officers were receiving feedback from the judges about deficiencies with their warrants and whether that process of giving feedback to the agents might result in the judges learning more about what the agents were seeing on the ground.

We heard a couple of interesting themes in response. First, the judges differed in terms of whether they saw themselves as having an interactive role with the agents or not. A number of judges viewed the interactive model as inappropriate. It would suggest, they explained, that the judges were part of the

⁴⁵ This is a quote we received from a judge who had seen an early draft of our paper, and therefore was aware of what our initial conclusions were (unlike the thirty primary respondents for this project).

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prosecution's team if they were to be seen as helping the officers and the AUSAs improve their warrants so as to have them pass muster. The responsibility for submitting a satisfactory warrant was that of the prosecution side. The judge had to be neutral.

Some of the judges expressed this bluntly:

Us: What was your interaction with the agents like when you had to reject an application?

Judge: I just said no. Nothing more. It is not my job to try and educate them.

Or

Us: Would you give reasons [for the rejection of a warrant request]?

Judge: I typically just say "no probable cause."

Others maintained a distance, but expressed it in more nuanced terms. For example:

Speaking only for me and my colleagues here, we take a middle ground approach. We make it clear that the judge is not on the prosecution team. It's not their job to practice law. But, that said, it is not a game. If the information is stale, and here that is rare, but let us say, I get a stale application. I would probably ask, "Do you have any info more recent than last February?" It frequently occurs, I guess, that there is a small hole—just a clerical matter—I'll point the AUSA to that. [However,] I seldom tell them how to fix the problem.

Yet, other judges viewed their relationships with the officers and their supervising AUSAs as more cooperative. One explained:

It serves no purpose for me to hide the ball. That just wastes everyone's time. I try to tell them where I think their warrants are weak. I don't tell them precisely what to say. But I don't simply reject the warrant and expect them to read my mind.

One respondent explained that in some cases it was simply a matter of asking the officer questions about why they thought there was probable cause. When the officers explained what was there, it would often turn out that important pieces of evidence that would have helped persuade the judge had simply not been included in the affidavit.⁴⁶ This division among the magistrate judges suggests two sides or expectations of the judicial role: one, that the judge should be neutral, and two, that the judge must explain his or her actions. For us though, the underlying question we were interested in was whether there was learning going on for the judge via the process of interaction with the agent. There may have been some for the judges who were talking to the agents about what was deficient about their warrant applications—but none of the judges we spoke to suggested that any learning was going on (and it was espe-

⁴⁶ A number of the magistrate judges did appear to have been former federal prosecutors, and it is possible that the difference noted above was a function of whether the judge had previously been on the other side of the fence in the warrant process. However, we did not collect this data.

cially unlikely to occur if—as was the case with many judges—the judge was providing his feedback to the agents via the AUSAs).

The second interesting aspect of the foregoing was that it did not appear that many warrant requests were rejected. We did not explicitly ask any of our respondents whether they had ever rejected warrants in a fashion such that it was clear to the officer that a resubmission would be futile. However, the impression we got was that the overwhelming majority of warrants were granted, perhaps after minor additions to the affidavit. Multiple judges even told us that the sufficiency of warrants was simply not an issue in the federal context because of the high quality of the submissions by federal law enforcement officers. For example, one judge emphasized the quality of the preliminary investigations:

If there are legal questions, I will ask the U.S. attorney in charge, the AUSA. Ninety-five percent of the time or more, it goes quickly. These are federal agents, they're pretty well trained . . . usually there is a whole lot of investigation. Generally, [the question of] probable cause is not even close.

Another added the low threshold for approval: “The U.S. attorney produces high quality product. Probable cause is a low standard. Very . . . easy.”

On rare occasions, one judge suggested, there might be submissions by officers from policing divisions, such as the Parks Services, where the warrant was wanting in some respect. However, this was generally because those officers did not have as much experience with warrants as the typical FBI or ATF agent. Another judge explained, “These federal officers are very good. They go through a great deal of training. They usually give us so much more than what is needed.”

Juxtaposing their experience with federal officers against that with state officers, a point that was made to us again and again, was that the issue of weak warrants really only came up when state agents were involved, as they sometimes were in joint federal-state task forces. In conjunction with the above point, a number of our respondents also added that, to the extent there were interesting issues and problems regarding the judicial approvals of warrants, they were going to be in the state system. The not-so-implicit message seemed to be that we were looking in the wrong place. At this point, there was usually some discussion of the fact that in the state system, the “magistrates” authorizing warrants were not always lawyers. The theme that emerged, again and again, was that those on the federal side were clearly superior in quality and status to those in the state system.⁴⁷ One judge expressed it as follows: “The state process is very different, very sloppy. Lawyers do not want to be embarrassed in front of federal judges. Much more shooting from the hip in state courts.” An-

⁴⁷ One former prosecutor did say that a possible exception might be the Manhattan District Attorney's office, where things would likely be run in a more professional fashion, akin to the federal system.

other offered a more sympathetic interpretation: “I do see state court warrants—you know, frankly, there is a pretty big difference. The training and resources make a difference. They just do 500 cases for every one case we do. I have enormous respect for them.”

We should note that overall, despite the lack of interest that the judges seemed to have in acting in a Bayesian fashion, we got little indication in our interviews that the judges did not take warrant submissions seriously or that they viewed their reviews as a chore. Instead, the judges seemed to spend considerable amounts of their scarce time tackling these warrants. As mentioned earlier, they would generally insist that the draft affidavits were submitted ahead of time so that the judge could read them carefully. There seemed to be almost no delegation of the work on the warrants to law clerks. We asked about this on multiple occasions and the response was always that the task at hand was important, and important tasks do not get delegated to law clerks. By contrast, the drafting of judicial opinions, the judges seemed to be saying, could be delegated. As one judge put it, in response to our question about whether he delegated any of the decision making on warrants to his clerks: “No. No use of law clerks. We take search warrants seriously.”

The foregoing struck at least two of us as upside down. Granting routine warrants, where almost every one gets approved (after all, the federal officers are so good at their jobs), gets direct attention from the judge. Yet, even though the judge is applying her scarce time to this task, there is little updating of information going on. By contrast, the drafting of judicial opinions to explain the resolution of a complex case—opinions are generally written only if the case has some complexity—can be delegated to law clerks.

Further, a number of the judges seemed to spend time interacting with the officers and AUSAs responsible for the warrants; they appeared to enjoy this interaction. Indeed, a few of the magistrate judges continue to personally “take” the return of the warrant from the law enforcement agent even though the federal rules of criminal procedure no longer require this personal interaction⁴⁸—and even though these very judges did not seem particularly interested in looking at what these returns actually said. It was the ritual that seemed to be important.

Overall then, the picture seems to be one of considerable judicial attention to warrants, and it is tempting to conclude that judges seem to work hard on even those aspects of their job for which they face little risk of “discipline” from a higher court. But there is a different explanation as well. As we looked back over our interviews as a whole, the picture that we saw was one where many of the judges seem to have a high opinion of the federal officers and expect to approve their submissions. Particularly striking were the statements that we heard on more than a few occasions about how the federal warrants typical-

⁴⁸ See FED. R. CRIM. P. 41(f)(1)(D).

ly cleared the probable cause barrier by a wide margin, and that this was unsurprising given the high quality of the officers and their training. The judges see themselves as overworked; their overwhelming caseload came up on multiple occasions. That meant, we assumed, that the judges were having to perform triage in terms of what cases and tasks to pay more or less attention to. In such a setting, it would be only natural that the judges should choose to give less critical attention to the evaluative tasks where the decisions could be prejudged to be easy. Based on what the judges were telling us, federal applications for warrants seemed to fall squarely within this category of easy decisions that should receive little critical attention—not in terms of time, but more in terms of critical scrutiny. Yet, judges give these warrants considerable attention and treat the social dynamics of their interactions with the U.S. Attorneys offices and the officers with great care.

Our take on this is that the judges see the rituals surrounding the warrant application and grant as having importance, independent of the substance of the probable cause determinations at hand. The whole process—the swearing on the bible, the need for approvals by the AUSAs, the submissions of the returns, the judge’s personal interactions, and the standard chit-chat with the officers that would often occur between the judge and the office—all struck us as ritualistic and maybe even ceremonial.⁴⁹ One judge explained that he wanted to interact with the officers before and after the search because a search is a significant intrusion on liberty. Might it be that the ritual around the granting of the warrant somehow reflects the judges’ continuing sense that the grant of a search warrant is an extraordinary exercise of judicial and executive branch power, even if the vast majority of applications will be granted easily?

2. *Returns*

As described at the outset of this article, the primary motivating factor for our study’s focus on search warrants was the fact that judicial decisions on search warrants constitute that rare instance where one could, in theory, meaningfully evaluate the quality of a judge’s decision. At the very least, one could assess the quality of the testimony and evidence from the officers and the informants that influenced the judge’s decision. If judges were making probable cause determinations that were improving over time, the returns should demonstrate that. Such data from the returns would reinforce the trustworthiness of the officers and the informants on whom the judges rely. If the quality of probable cause decisions were staying the same or declining, the returns should show that as well, and this negative trend in the data would presumably raise questions for the judge about the reliability of the relevant officers and informants. From this we assumed that judges who were interested in improving their

⁴⁹ A couple of the judges had special bibles, tables, or spaces in their chambers that were dedicated to the warrant interactions.

probabilistic decision making would be interested in knowing how good or bad their probabilistic decisions were and which factors (such as the factual assertions of officers and informants) were associated with the unsuccessful searches.

Given that our plan to analyze return data did not pan out, our primary question became whether magistrate judges were looking at data on the returns and self-evaluating. As a distant second, we were curious about whether the returns factored into the evaluations of the magistrate judges that were performed when these judges' terms were up for renewal.

To the first point, the overwhelming majority of the judges did not appear to pay any attention whatsoever to the data in the returns; at least, not in terms of reflecting about whether they were making appropriate probable cause decisions. One of us would typically ask at this stage: "Were you curious about what were in the returns? Would it help you learn to make better probable cause decisions if you were to know what fraction of your probabilistic calculations turned out to be correct?" The judges offered a range of answers, but the dominant perspective dismissed even the possibility that information in the returns could be useful.

First, some judges explained that they did not think it would be helpful to look at the returns, or at least not in the way we were framing the questions. The returns typically just reported whether the officers found any of the contraband in question but did not indicate how much was found. To make a meaningful estimation of whether there had been probable cause, they explained to us, one really needed to compare the amount of relevant evidence that the officers were predicting they would find and the amount of such evidence that was actually found.⁵⁰ Second, some judges saw it as inappropriate to examine the returns as a way of evaluating the quality of their prior decisions. The decision of probable cause is a legal one, they explained, with circuit precedent clearly dictating what constituted probable cause. Whether or not the officers were finding the desired evidence was irrelevant to the decision of probable cause. This second answer perplexed us, since our understanding of the probable cause decision was that it was at best a mixed question of law and fact, and mostly an estimation of the probability of an officer finding what he claimed he would find. Indeed, as we have stated, Justice Rehnquist explicitly said this was so in *Illinois v. Gates*, three decades prior (Judge Posner reiterated it with greater clarity in *United States v. McKinney*).⁵¹ Yet, our respondents appeared to see the matter differently, emphasizing that the standard for probable cause

⁵⁰ On a couple of occasions, we asked the follow up question of whether the returns should be improved so that the judges could get better or more usable information. The response to that was in every case something along the lines of: "No one looks at these returns anyway."

⁵¹ See *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. McKinney*, 919 F.2d 405, 419–20 (7th Cir. 1990) (Posner, J., concurring); *supra* note 1.

was a legal criterion established by precedent and not a practical criterion based on prior experience. One judge suggested:

As a legal matter, returns do not matter. I just signed them when they came in. These are search warrants, not seizure warrants. It is legally irrelevant whether anything is found or not. I don't see how it would help to know about the warrants in the returns. I don't look at [returns].

Another said:

I'm not sure this would be information that would be useful. Probable cause is a zone; it is [a] rough [estimation]. I can't imagine how information about an agent's success [in the past] would fit in.

Third, one judge said that it was a matter of respect for law enforcement officers. To be looking at the returns as a method of evaluating their submissions, he said, would demonstrate a lack of respect for the agents. Again, we found this perplexing. Was it not the judge's role to exercise skepticism about the information that the officers submitted and evaluate the officers' probabilistic decisions? Surely, it could not be the case, as a matter of law, that the judges were supposed to be taking all of the submissions by the police officers at face value as true. Finally, some of the judges thought that looking at the returns or inquiring about the success or failure of the search warrant would show bias toward the officers because it would suggest that the magistrate judge had some kind of interest in the outcome of the warrant and might suggest that the judge was "on the law enforcement team."

The following exchange captures the dominant attitude toward returns that we discovered:

Us: [Something along the lines of: We are interested in the returns on search warrants. Do you ever look at the returns? Would knowing the information on the returns help you?]

Judge: Occasionally, I notice problems [with the warrants]. But nine out of ten [times] there are no problems. It is easy to meet the [probable cause] standard. The returns are ministerial as far as we [judges] are concerned. That's why we have changed the process [to one where there is no need to see the returns any more].

Us: [Might the information on returns not help to evaluate the quality of the AUSA?]

Judge: As for the returns helping us in the way you suggest [bursts into laughter], it is information. Typically, I see the effects [of granting a search warrant] in terms of arrests. [I ask] Did an arrest occur?

In contrast to the foregoing judges, who seemed quite certain that looking at the returns would serve no purpose, there were a couple of judges who affirmatively insisted on seeing the returns. Some background is useful here. Until a few years ago, as a matter of federal rule, the officers were required to come back to a magistrate judge (not necessarily the one from whom they obtained the warrant authorization) and provide the judge with the returns from the search (that is, an inventory of what was found as a result of the search). The officer would then swear to the truthfulness of the return in front of the

judge. That rule has changed. Now, the returns do not need to come back to the judge. Instead, the returns can be filed electronically.⁵² In the old system the judges were forced, as a structural matter, to see the returns because the officers had to come in and deliver the returns to the judges, and an opportunity was created to discuss the actual search. Under the new rule, that element of the process was removed. In effect, the current system requires judges who have an interest in the returns to expend effort to see them, and there is no informal opportunity to find out “what happened.” Given what we had been hearing in our initial interviews, we assumed that no judges would be asking for the returns. But there were a couple of judges who still follow the old rule. These judges continue to read the physical returns and ask the agent to swear to them. They typically discuss with the officer the execution of the warrant and whether there were any problems or surprises in the execution.

When asked why they were interested in the returns, however, neither of these judges suggested that they needed to see the returns in order to evaluate the officers, AUSAs, or themselves. One of the judges explained that he thought it was important that the judges be seen by the officers as actively involved with oversight of the entire system, so that issuance and execution of warrants did not become mechanical. Another explained that this was simply the practice that his colleagues in the district had adopted and that they found that it worked for them. In other words, both of the judges who were asking for the returns disclaimed that they were in any way using the returns to evaluate the officers and AUSAs or to test their own judgments.

3. *What if We Provided the Data?*

Our final question to every judge was a hypothetical. We asked each judge the following:

What if we examined the data on returns across all of the AUSAs or officers who were submitting warrants to each particular judge, and prepared a set of summary tables that provided information on the success rate of any given officer or AUSA? And what if these tables showed the percentage of times each officer found the item(s) that he predicted he would find and which sets of factors correlated with which rates of finding contraband?

The judges were willing to consider the hypothetical, but few thought the information would be useful to them. One said that he might have found the information useful in his first couple of years on the bench, when he was still feeling his way around and trying to learn about the officers and AUSAs, but spending the time looking at our summary table or regression results would not be worthwhile for him these days. He had already learned all that he needed to about search warrant evaluation. Another explained, rather forcefully, that providing statistical information on what factors correlated with findings of

⁵² See FED. R. CRIM. P. 41 advisory committee’s note to 2011 amendment.

contraband was not useful for him because his determinations of probable cause were dictated by the law of the circuit, by its case law, and not by some computer-generated table. Only two judges were even willing to consider the possibility that our table might help them, and only one specifically said that he might revise his views regarding a particular AUSA if it turned out that, over time, this AUSA was always bringing in officers whose warrants found very little. This judge, however, then went on to explain that the AUSAs typically did not last that long in their particular rotations and that it was hard to develop a good sense of what an individual AUSA was going to do (which begged the question of what kind of certification function the AUSAs were performing anyway).

We asked the hypothetical because of our initial assumption (which turned out to be faulty) that one of the reasons for requiring the data on returns was to allow the judges and court administrators to evaluate how accurate their probable cause determinations were and not simply to make sure that the agents were held accountable for precisely what was taken from the searched location. Whatever the underlying rationale for the rule, however, the federal rules committee appears to have decided a few years ago that it was inefficient to require officers to hand-deliver the returns to a judge; filing them in a central system would be more than adequate.⁵³

While there does not appear to be much of an attempt to either evaluate the return data or have it reported in a form that would make its use easier, data on magistrate judges is collected and utilized in their periodic evaluations. The data that is used, more than a couple of our respondents said, is the raw numbers of warrants a magistrate judge might hear. There is no attempt to analyze the quality of decision-making on probable cause determinations (or any others).

At bottom, we asked our hypothetical to make sure that the judges were not ignoring the return data because of the form in which the data was reported or because the court administrators were not providing summaries and analyses of the data. With a few exceptions, the judges do not believe they can learn anything from the data. Their instincts, intuitions, and prior experiences (often as prosecutors) have provided them with enough tools to make the necessary analyses. More data would not help.

CONCLUSION

How Bayesian are judges? Best we can tell, in terms of the updating part of the Bayesian equation: Not at all.⁵⁴ If anything, the judges are anti-Bayesian in

⁵³ *See id.*

⁵⁴ We had a glimmer of hope for the Bayesian model during a single interview where about half way through an interview that had been seeming to frustrate our respondent, he said:

I think I . . . [get] what you are interested in. . . . I do indeed update my views in one context; that of Rufus and Max. Max used to have pinpoint accuracy in predicting the presence of drugs

that, for the most part, even if we did the tabulation and statistical analyses of their returns for them, they apparently would not consider the information useful to their calculus.

The judges whom we interviewed did not see the probable cause decision as a probabilistic decision about facts but rather as a formalistic decision applying pre-determined legal criteria. If the petition addresses all of the features of the existing legal criteria of probable cause, then it will be deemed sufficient. For them, it appears to be more of an accounting task than a factual determination. While the judges do not seem to care about improving the quality of any conceivable probabilistic estimates, they do care about legal form and ritual.⁵⁵ Both in terms of their use of the AUSAs as a screening mechanism and their concern about the legal dictates of the circuit, they make the probable cause determination legalistic and ritualistic even though they are not required to do so.

Two concluding questions emerge from our analysis. First, why do judges treat these cases differently than they would other kinds of cases where the trustworthiness and reliability of witnesses is central to their decisions? And what does this tell us about modeling judges, beyond the observation that they do not seem particularly Bayesian? Here we are puzzled. Acting Bayesian should come quite naturally to all of us, including these judges. So, in a sense, the question is whether their judicial role is somehow constraining them from what we thought would be basic curiosity—wanting to know how one's decisions turn out. If so, why and how? Answering those questions may help us get to the next stage of asking whether this anti-Bayesianism shows up in other forms of judicial decision making beyond probable cause determinations regarding warrants.

A number of caveats apply to our observations of course. They include that: (i) we have a small sample of respondents who are primarily magistrate judges (arguably different from other judges, in terms of the pressures and constraints they face); (ii) we only know what we were told is done (which might be different from what is actually done); and (iii) the warrant evaluation pro-

and I could always trust his judgment. But then he retired and I began to find that Rufus was nowhere near as accurate. . . . [H]e made a lot of mistakes. So, I was less willing to trust him.

Rufus and Max, it turned out, were drug-sniffing dogs (we have changed the names of the dogs). To our surprise, two separate judges to whom we sent our draft for comments remarked on the fact that they had seen discussions of the relevance of past performance of an agent in determinations of probable cause, but only when the agent was a dog. And one judge even pointed us to a judicial opinion on the topic. *See United States v. Anderson*, 367 Fed. App'x 30, 32–33 (11th Cir. 2010).

⁵⁵ We are not the only researchers to be puzzled by decisions on probable cause. Rachlinski, Guthrie, and Wistrich, in studying the impact of the hindsight bias on judicial decisions, found that outcome information did not seem to impact probable cause determinations. *See* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Probable Cause, Probability, and Hindsight*, 8 J. EMPIRICAL LEGAL STUD. (SPECIAL ISSUE) 72, 97 (2011) (“[I]t is not so much their sense of the likely outcome of the search that influenced judges, as their ability to recall a case that would support ruling one way or the other in the case before them.”).

cess might be idiosyncratic and not representative of the ways in which judges behave more generally.

Regarding the first caveat, we should note that our findings had a remarkable degree of consistency. Bottom line: Not a single judge was consistently looking at the returns; nor did anyone think that there was much to be gained by doing so (a couple had looked at them on occasion, but there was nothing systematic). Further, the magistrate judges did not strike us as particularly different from the other judges we have researched in the past (or the handful of district judges we spoke to for this project). But this is ultimately an empirical question.⁵⁶

On the second caveat, we do not know whether judges were behaving in ways different from what they told us. But we had no reason to think that they were lying to us.

As for the third caveat, there is a need for more research. But as a preliminary note, we did present our findings at two workshops where the audiences contained a large number of judges (more than twenty-five at the two put together). At neither session did a single judge say that there were other contexts in which judicial updating was occurring and that this was a special context because of X or Y reason. This is not to say that they did not think our research was defective for other reasons (they did) and we note some of those below.

At the first workshop, we presented our results to a group of eighteen judges from a wide array of courts (state, federal, trial, appellate), all of who were enrolled in the Duke Judicial LL.M program. We were not able to convince them that there was a puzzle here, and to the extent they were puzzled, it was as to why we were studying the Bayesian aspect of judging in the first place. At the second workshop—which was in the context of the conference on the topic of magistrate judges that was the source of this symposium—there were ten judges in the audience, nine of whom had been federal magistrate judges and one of whom was a state judge at roughly the same level. Here, the widespread reaction from the judges was that none of them looked at returns either, nor did they see any reason to begin doing so after reading our paper.⁵⁷ They also seemed puzzled as to what the point of our study was.

A somewhat sarcastic comment we received at the end of the first workshop might illustrate the reason why the judges were puzzled. It was (roughly): “Academics concoct utterly unrealistic theories about how judges behave and

⁵⁶ See Christina L. Boyd, *The Comparative Outputs of Magistrate Judges*, 16 Nev. L.J. 949 (2016) (suggesting magistrate judges, in terms of decisions, are quite similar to the Article III district judges, but the research in this area is still preliminary); Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World: The Career Path of Magistrate Judges*, 16 Nev. L.J. 823 (2016) (noting the systematic difference in the backgrounds of magistrate judges and district judges).

⁵⁷ After the session was over, one judge came up to us to say that he did look at the returns regularly and was puzzled that the others did not.

then they test the theories against actual behavior and discover that the theories do not hold up. Wow.”⁵⁸ There is no doubt something to this point, although we would respond that the theory of Bayesian judging is highly plausible since it is how most of us behave in daily life. It also misses the mark in that the theory of judging that we set out to test is one that we would argue underlies the reason why trial judges are given deference on their findings of fact. This is particularly so in the case of warrants where not only is there high deference under *Illinois v. Gates*, but there is almost no incentive for the decisions to be appealed as a result of the good faith exception from *United States v. Leon*.⁵⁹

This leads to our second concluding question: What does the approach that magistrate judges take to probable cause petitions imply for the evolution of the law of probable cause over time? Our judicial system is grounded in the idea that the law evolves to meet changing circumstances through an ongoing process of judicial analysis and reassessment. The set of facts that would constitute sufficient probable cause to justify a constitutionally acceptable search would presumably change over time as the nature of criminal activity and search tactics and capabilities evolve.⁶⁰ If the trial judges are not updating their criteria, this evolution in the area of probable cause will be left to the appellate courts. Yet, if the probable cause decisions of the trial judges are, for all intents and purposes, no longer open to rigorous appellate review, the criteria will not be reviewed or reassessed by the appellate judges either.⁶¹ This produces an awkward institutional dilemma: With no readily available institutional mechanisms for review, the opportunity for the law of probable cause to change with the times is significantly diminished.

To conclude, we turn back to Richard Posner’s modeling of judges as Bayesians in his book, *How Judges Think*, that we began with.⁶² Have we shown that he was wrong? A key element of being Bayesian is that one updates, and the judges we spoke to do not appear to be updating in the warrant evaluation context. In that sense, they are not being Bayesian. To be fair, Posner’s model emphasizes a rather different part of the Bayesian equation through his book; specifically, the part about how judges are inevitably going to be making decisions as a function of their prior experiences and understandings of the world that they come to the bench with (some might call these biases). What we are showing, possibly, is that these priors or biases are not getting updated or corrected with new information that the judge receives on the job.

⁵⁸ This was not said in an interview context, so we did not get the exact wording.

⁵⁹ See *United States v. Leon*, 468 U.S. 897, 915 (1984); *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

⁶⁰ For example, consider how changes in technology can affect the nature of criminal acts and thus raise new questions about probable cause.

⁶¹ See *Leon*, 468 U.S. at 915.

⁶² See POSNER, *supra* note 3.

