Notre Dame Journal of Law, Ethics & Public Policy

Volume 16
Issue 2 *Symposium on Poverty and the Law*

Article 11

February 2014

Federal Courts, Magistrate Judges, and the Pro Se Plaintiff

Lois Bloom

FEDERAL COURTS, MAGISTRATE JUDGES, AND THE PRO SE PLAINTIFF

LOIS BLOOM*
& HELEN HERSHKOFF**

"Access to justice is the subject for countless bar commissions, committees, conferences, and colloquia, but it is not a core concern in American policy decisions, constitutional jurisprudence, or law school curricula," writes Deborah L. Rhode, an influential scholar on legal ethics and the legal profession.[1] Decrying the "shameful irony that the nation with the world's most lawyers has one of the least adequate systems for legal assistance,"[2] Professor Rhode urges "[c]ourts, legislatures, and bar associations . . . [to] assume greater obligations to insure ade-

* Lois Bloom is a United States Magistrate Judge in the United States District Court, Eastern District of New York. She was appointed on May 18, 2001, to the position described in this Article and was formerly the Senior Staff Attorney of the Pro Se Office of the United States District Court, Southern District of New York.

** Helen Hershkoff is a Professor of Law and a Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. She was formerly an Associate Legal Director of the American Civil Liberties Union. She is currently a Visiting Professor of Law at Columbia Law School (Spring 2002).

The authors thank Rochelle Dreyfuss, Herbert Eisenberg, Stephen Loffredo, Henry Monaghan, and Liam Murphy for comments and discussion. Helen Hershkoff thanks Ron Brown, Linda Ramsingh, and Traci Williams for library support; Theane Evangelis, Aryeh Haselkorn, Matthew Larsen, and especially Gabriel Ross and Christine Bohrer Van Aken for research assistance; and the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law for financial support.

1. Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 FORDHAM L. REV. 1785, 1786 (2001). Professor Rhode is the Ernest W. McFarland Professor at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession.

2. *Id.* For an early important statement of this view, see REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919). Smith writes:

> The administration of American justice is not impartial, the rich and poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.

Id. at 8.

quate legal assistance for those who need but cannot realistically afford it."[3]

The literature on access to justice generally uses the term "legal assistance" to mean the provision of counsel, whether subsidized by the government or compensated by contingency fee or other arrangement, to a party who cannot afford representation.[4] Access to justice, however, should also entail other forms of legal assistance, including a court structure that responds fairly and efficiently to claimants who lack the legal equipage needed to present their cases in an effective way.[5] In this Article, we describe various institutional adaptations made by one federal district court in response to the increasing number of claims filed by pro se civil litigants, who are typically indigent and cannot afford counsel.[6] In May 2001, the United States District Court for the Eastern District of New York appointed a new magistrate judge and assigned her to hear and to oversee significant categories of pro se matters. Magistrate judges are judicial officers with powers determined by statute, but responsibilities determined by each federal district.[7] Although other federal district courts have enlisted the assistance of magistrate judges in the handling of pro se cases, the Eastern District of New York's

3. Rhode, *supra* note 2, at 1818.

4. *See generally* Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369 (1998) (urging the development of new approaches to the distribution of legal services for the poor). Discussing "access to justice," Stephen L. Pepper distinguishes between two meanings of the term: the first refers to "the distribution of lawyer services in regard to litigation, and in the attendant negotiations of disputes prior to litigation," and the second "focus[es] not just on litigation and dispute resolution, but on access to legal advice more generally." *See* Stephen L. Pepper, *Access To What?*, 2 J. INST. STUD. LEG. ETH. 269, 269–70 (1999).

5. Equipage refers to "the legally optional, yet practically essential" resources needed to mount an effective case, including "attorneys' fees, chiefly, but consultant, expert witness, investigation, stenographic, and printing costs as well." Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, Part I, 1973 DUKE L.J. 1153, 1163.

6. Pro se means "[f]or himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

7. *See* R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 804 (1993) ("Although the office of magistrate judge is established by federal statute, the duties of specific magistrate judges are determined within each judicial district."); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L.J. 163, 166 n.18 (1992) [hereinafter Smith, *Judicial Lobbying*] ("Because the precise role for magistrates was left intentionally undefined by Congress, district judges can use magistrates according to the needs of their district and their own personal preferences.").

approach to the problem is sufficiently different to warrant closer attention. Moreover, the literature has so far emphasized state judicial responses to the rise in pro se cases, with less attention paid to Article III innovations to deal with the needs of unrepresented litigants.[8]

By appointing a special magistrate judge to handle particular pro se matters, the Eastern District of New York seeks to facilitate access to the courts "for those who need but cannot realistically afford [judicial relief]."[9] However, some may see the assignment as a way to funnel unimportant matters that society regards as annoying away from Article III judges to magistrate judges without life tenure, and so raise concerns about second class justice for unrepresented litigants.[10] Others may view the designating of a special decisionmaker to assist pro se claimants as presenting ethical concerns about judicial impartiality and independence. A full appraisal of the Eastern District of New York's approach to pro se cases is needed if it is to stand as a model for other courts to "provide meaningful access to legal institutions for the most disadvantaged— . . . one of the most important and intractable issues that face judges, policymakers, and concerned lawyers of this generation."[11]

---

8. The leading report on state judicial responses to pro se litigation is that of JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998), which reports the results of a nationwide survey of state court practices conducted by the American Judicature Society and the State Justice Institute. For a helpful collection of materials describing recent Article III innovations in different district courts to process pro se cases, see *Special Issue on Pro Se Litigation: New Legislation, New Challenges*, 9 FJC DIRECTIONS (1996) [hereinafter *Special Issue on Pro Se Litigation*].

9. Rhode, *supra* note 2, at 1818.

10. *See* Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 384 (1979) (acknowledging critics' concern that expanded magistrate jurisdiction would create a "dual system of justice" and "the spectre of a federal poor people's court"); *cf.* Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 657 (1981) (referring to "cynical attempts to isolate and pick off smaller plaintiffs . . . or to create a two-tiered system of justice that would effectively consign the poor to a second-rate forum for adjudicating their just grievances"). On whether federal courts disfavor pro se claims, see CHRISTOPHER E. SMITH, COURTS AND THE POOR 39 (1991) [hereinafter SMITH, COURTS AND THE POOR] ("Because the judicial officers may have a personal interest in quickly terminating these routine and repetitive cases filed by unsympathetic claimants, there is a risk that prisoners' cases, especially those filed by poor prisoners not represented by attorneys, will be dismissed without receiving adequate consideration.").

11. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1, 1 (1990); *see also* Weinstein, *supra* note 11, at 655 ("Equal access to the judicial process is the sine qua non of a just society.").

In Part I, we explore what one commentator calls "the flood of unrepresented litigants"[12] in courts nationwide and the various approaches that federal courts have taken to deal with the pressures that pro se cases generate. In Part II, we focus on the Eastern District of New York and its decision to designate a special magistrate judge to oversee pro se matters. In Part III, we examine the advantages and disadvantages of the single magistrate judge approach for the processing and disposition of pro se matters, recognizing that the work of this office is still at an early stage of institutional development and that additional lessons will be learned with experience and practice.[13]

I.

Writing in 1966, Ben. C. Duniway, a judge on the U.S. Court of Appeals for the Ninth Circuit, observed, "The poor plaintiff who has a meritorious money or property claim can nearly always find a lawyer who will take his case because of the almost universal use of the contingent fee to finance the litigation and even the litigant."[14] Duniway could not have anticipated the growth over the next forty years in federal litigation by poor litigants unrepresented by counsel, or the pressures that these cases create in the Article III system.[15] In this Part, we describe the volume and nature of pro se cases in the federal courts nationwide. Next, we set out the constitutional and statutory framework for the Article III response to case filings by indigent unrepresented litigants. Finally, we briefly describe the ways in which some district courts have adapted their institutional structures to handle the surge in pro se civil filings.

---

12. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1991 (1999).

13. *See* MAGISTRATE JUDGES COMMITTEE OF THE JUDICIAL CONFERENCE, SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES 1, 1 (Dec. 1999) [hereinafter SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES] (stating that lessons can be learned about the advantages and disadvantages of magistrate judges from the "courts' experiences with this resource"). We do not discuss the Article III implications of the single magistrate judge approach.

14. Ben. C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1285 (1966) (emphasis omitted).

15. *See* Rya W. Zobel, *New Statutes Add to Challenges Posed by Pro Se Cases in the Federal Courts*, 9 FJC DIRECTIONS 1, 1 (1996) ("Discussions regarding pro se litigation generally emphasize the burdens placed on judges and support staff by unrepresented litigants who are unfamiliar with rules and procedures for pursuing civil actions in the federal courts.").

A. *The Federal Docket: Litigation Explosion or Unmet Need?*

A consistent theme in the literature on federal courts is that the Article III system has witnessed a "huge expansion of federal litigation."[16] Writing in 1990, the Federal Courts Study Committee characterized the situation of the federal docket as a "crisis," in terms of its "congestion, delay, expense, and expansion."[17] The Committee explained, "[W]e must point out that between 1958 and 1988, following decades of extremely slow caseload growth, the number of cases (both civil and criminal) filed in the federal district courts (i.e., trial courts), trebled, while the number filed in the courts of appeals increased more than tenfold."[18]

A significant percentage of these increased filings involve pro se litigants, and a majority of the pro se filings are by prisoners asserting civil rights or constitutional claims.[19] Nationwide, prisoner petitioners comprised only one percent of federal civil filings in 1958; by 1989, these petitions constituted eleven percent of all civil filings.[20] The number of habeas corpus peti-

16. Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 430 (1988).

17. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990). Some commentators question whether a crisis exists in the federal courts, and if it does, its cause and content. *See, e.g.*, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 15 (1986) (characterizing federal court docket explosion as a myth); Weinstein, *supra* note 11, at 657 (Senior Judge of the Eastern District of New York stating, "I believe that the courts are not overutilized, but underutilized, precisely because they are not adequate fora for the grievances of the poor and oppressed").

18. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 5.

19. *See* David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC DIRECTIONS 6, 6 (1996) (reporting that twenty-one percent of all case filings in ten districts in the period 1991 to 1994 involved pro se litigants, and that prisoner petitions constituted sixty-three percent of these filings); Kim Mueller, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1330 n.8 (1995) ("Starting in 1982, reports issued by the Administrative Office of the United States Courts noted that prisoner civil rights petitions comprised a significant and growing segment of federal litigation."); *see also* REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA 34–35 (John B. Oakley, Reporter, Nov. 21, 1991) [hereinafter CIVIL JUSTICE REFORM REPORT] (reporting that in the Eastern District of California, "prisoner cases went from 11.6 percent of the total civil docket in 1981 to 36 percent of the total civil filings in 1990 . . . from 1988–1990 . . . for all civil cases, prisoner cases represented approximately 34 percent of the total filings").

20. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 49 (citing civil filing statistics). In addition, the number of habeas corpus

tions—the federal mechanism by which prisoners challenge their custody by the government[21]—rose 1800% nationwide from 1945 to 1989.[22] Similarly, the federal courts have witnessed a surge in § 1983 cases[23] filed by inmates challenging the conditions of their confinement, including the denial of medical care, physical abuse, and improper placement in administrative segregation.[24] In 1966 (the first year statistics were maintained for inmate § 1983 filings as a separate category),[25] inmates filed 218 such actions; in 1992, inmates filed 26,824 such actions, constituting more than ten percent of the federal court's total number of civil filings. The majority of prisoners proceed pro se in these actions—ninety-six percent according to a recent survey.[26]

The increase in pro se prisoner petitions puts a greater strain on the court system than would a similar expansion in civil filings by plaintiffs represented by counsel. As the Federal Judicial Center acknowledged twenty years ago, "The fact that the cases are pro se complicates the task of the judge, the magistrate, the clerk, and other court personnel and makes it more difficult

---

petitions showed "a steep 'spike'" in 1996 and 1997, coinciding with the enactment of the Antiterrorism and Effective Death Penalty Act. *See* Fred Cheeseman, II, Roger A. Hanson & Brian Ostrom, *To Augur Well: Future Prison Population and Prisoner Litigation* (unpublished manuscript prepared for presentation at the Federal Judicial Center, Washington, D.C., 11 (May 20, 1998) (on file with Lois Bloom, United States District Court, Eastern District of New York).

21. *See* 28 U.S.C. §§ 2241–2255 (1994 & Supp. V 1999).

22. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 51 (reporting 537 habeas corpus petitions filed in 1945 and 10,521 in 1989).

23. *See* 42 U.S.C. § 1983 (1996). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

24. *See* ROGER A. HANSON & HENRY W.K. DALEY, DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 17 tbl. 3 (1995) (listing issues in inmate § 1983 lawsuits).

25. *See* Marie Cordisco, *District of Nevada Uses Early Hearings to Cope with State Prisoner Pro Se Civil Rights Caseload*, 9 FJC DIRECTIONS 18, 18 (1996) (describing 1966 as "the first year state prisoners' rights cases were listed as a category" in reports maintained by the Administrative Office of the United States Courts).

26. HANSON & DALEY, *supra* note 25, at 2 (citing case filing statistics); *Id.* at 21 (citing pro se statistics for inmate § 1983 actions).

for them to effectively and efficiently identify the meritorious conditions-of-confinement case."[27]

The federal courts have also witnessed an increase in two other categories of non-prisoner pro se litigation: Social Security appeals and non-prisoner civil rights cases. Social Security appeals involve challenges by individuals, often indigent, to decisions by administrative law judges that deny or terminate disability benefits under federal law.[28] Non-prisoner civil rights cases have likewise increased over the last decade. After remaining stable from 1985 to 1990, the number of civil rights filings rose eighty-six percent from 1991 to 1995.[29] A majority of these cases involves claims of employment discrimination, and commentators attribute the increase in filings to the passage of new legislation, such as the Americans with Disabilities Act, as well as to fluctuations in the employment market based on economic downturns.[30]

The rise in pro se cases in the Article III system is consistent with a parallel rise of filings by unrepresented litigants in state judicial systems across the country.[31] Indeed, studies indicate that at least eighty percent of the legal needs of the poor go unmet, with the largest numbers of pro se litigants found in state specialist courts, involving such matters as family relations and small commercial disputes.[32] Although an important, earlier

27. *See* PRISONER CIVIL RIGHTS COMMITTEE, FED. JUD. CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 3 (1980) [hereinafter ALDISERT REPORT].

28. *See generally* HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR 90–98 (1997) (describing the Social Security system as it relates to appeals in Supplemental Security Income cases); Jon C. Dubin, *Social Security Law*, 26 TEX. TECH. L. REV. 763 (1995) (describing cash benefit programs for persons with disabilities).

29. *See* Ellyn L. Vail, *Caseload Trends: Civil Rights Filings Increase*, FEDERAL COURT MANAGEMENT REPORT 3 (Aug.–Sept. 1996).

30. *See generally* Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1 (2001).

31. Zobel, *supra* note 16, at 1 (referring to rises in pro se filings in state judicial systems).

32. *See* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 79–80 (1997) ("Many litigants appear without counsel, a result not surprising given reports that over eighty percent of the legal needs of the poor and working poor currently are unmet."); Rhode, *supra* note 2, at 1785 ("[A]n estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two-to-three-fifths of middle-income individuals, remain unmet."). *See also* REPORT OF THE PENNSYLVANIA BAR ASSOCIATION TASK FORCE FOR LEGAL SERVICES TO THE NEEDY 7 (1990) (reporting that a telephone survey of 625 low-income households indicated that sixty-seven percent of the households surveyed had

study of lawyer access questioned whether disposable income correlates with lawyer use,[33] today the literature emphasizes expense as a barrier to meaningful judicial access, not only for poor and low-income, but also for middle-class households.[34] Congressional policies seeking to limit or inhibit civil filings by indigent litigants further exacerbate these difficulties. Congress has refused to provide adequate funding to the Legal Services Corporation, thereby reducing the availability of government-funded lawyers for civil litigants.[35] It has also restricted the kinds of legal services that government-funded lawyers can provide to their clients, for example, by prohibiting class action litigation, despite the fact that such constraints may result in inefficiency for the judicial system overall.[36] In addition, Congress has barred legal services lawyers from representing inmates who seek to press civil, including constitutional, claims before the court.[37]

A litigant's lack of counsel creates particular pressures in a legal system that depends on the parties to initiate and defend civil matters. Even in the simple case—"'ordinary,' 'routine,' 'run of the mine,' 'garden variety' (pick your metaphor)" says

---

"at least one civil legal problem within the past three years, [and] only 6% consulted a lawyer about the problem(s)").

33. *See* Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 155 (1980) (discussing the view that "experience, property ownership and personal contacts with lawyers" and not disposable income determine an individual's use of lawyer services).

34. *See* Justice Web Collaboratory, *Meeting the Needs of Self-Represented Litigants: A Consumer Based Approach*, *at* http://www.judgelink.org/Public_Access/proposal.html ("Perhaps the most fundamental criticism Americans make of the civil courts is that they are not affordable . . . . The most visible consequence of unaffordability is the growth in the number of self-represented litigants in state courts . . . ."). The problem of litigation expense and adequate legal representation extends beyond the U.S. legal system; as one commentator puts it, "Equal access to the courts is a worldwide problem. Indigent, disabled or foreign persons everywhere have difficulties in obtaining legal advice and representation." Heribert A. Hirte, *Access to the Courts for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany*, 40 INT'L & COMP. L.Q. 91, 91 (1991).

35. *See generally* Robert W. Sweet, *Civil "Gideon" and Justice in the Trial Court (the Rabbi's Beard)*, 52 THE REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 915 (1997) (discussing congressional curtailment of funds for legal services).

36. *See* 42 U.S.C. §§ 2996(a)–2996(l) (Supp. 2001). *See generally* Lawrence E. Norton II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 607 (1997) (discussing federal restrictions on class action litigation by legal services lawyers).

37. *See* 42 U.S.C. §§ 2996(a)–2996(l) (Supp. 2001). *See generally* Norton, *supra* note 37, at 608 ("Congress . . . simply took away inmates' lawyers by prohibiting any legal services organization that receives Legal Services Corporation (LSC) funds from representing any inmate in any matter whatsoever.").

Judith Resnik[38]—the inability to secure legal advice may prevent a meritorious claim from ever being presented to a judge.[39] Moreover, the legally untrained face special difficulties in navigating and carrying out the arcane requirements of pleading and instead "often submit awkward and confusing complaints."[40] Pro se claims can implicate abstruse and complex statutes, yet pro se litigants lack the resources, financial and other, to interpret the governing law or to marshal evidentiary and expert support for their claims.[41] Lack of meaningful access to judicial enforcement mechanisms can thus effectively deprive the poor of legal protection in important areas of their lives.

Pro se cases present unique challenges to the federal courts given the complexity of the issues and the importance of the constitutional values. Petitions for writs of habeas corpus dominate the federal district court's pro se caseload.[42] Although a habeas

38. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 969 (2000).

39. *See* Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14 (1983) ("The perception of grievances requires cognitive resources.").

40. Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute-Equality and Frivolity*, 54 FORDHAM L. REV. 413, 419 (1985). *See also* SMITH, COURTS AND THE POOR, *supra* note 11, at 39 (stating that "pro se litigants face a significant challenge in attempting to phrase their complaints in accordance with proper legal terminology and required court procedures").

41. Social Security claims, for example, often turn on the quality of the medical data submitted in support of the plaintiff's disability; as one commentator puts it, "Given the problems that attend the compilation of the medical data that form the heart of a disability case, the assistance that a claimant receives in presenting his case can be crucial to its outcome." Jon C. Dubin, *Poverty, Pain, and Precedent: The Fifth Circuit's Social Security Jurisprudence*, 25 ST. MARY'S L.J. 81, 92 (1993) (quoting Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 933 (1984)); *cf.* Weisbrod v. Sullivan, 875 F.2d 526, 528 (5th Cir. 1989) ("The Social Security Act is the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'") (quoting Freidman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

42. *See* Morales v. Portuondo, 154 F. Supp. 2d 706, 734 (S.D.N.Y. 2001). As the district court explained:

> The writ of habeas corpus is often requested and rarely granted. Last year, 24,945 habeas petitions were filed in the federal district courts throughout the country, and habeas petitions constitute the single largest category of civil cases filed in the federal courts. The vast majority were without merit. It is easy to become disillusioned, for "prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary."

Id. (quoting Rose v. Mitchell, 443 U.S. 545, 584 (1979) (Powell, J., concurring) (internal citation omitted)).

corpus action is civil in nature, the petition resembles a criminal proceeding in that it challenges the litigant's custody by the government and directly implicates his or her liberty.[43] A habeas petition alleges that a prisoner is confined in violation of his or her constitutional rights. Common claims include violations of the right to a fair and speedy trial or the right to effective assistance of counsel.[44] In an area in which intricate questions of constitutional law, civil procedure, and criminal procedure often converge, most inmates nevertheless proceed pro se, and the stakes run high.[45] Under current law, an inmate has only one year from the date his or her conviction is made final to seek review,[46] and is generally permitted to file only one petition per conviction.[47] Federal courts reject a majority of the petitions. But, as the Federal Courts Study Committee put it, habeas corpus proceedings are "of central concern to the nation and to its federal courts."[48] Other categories of pro se filings likewise involve important federal interests and individual protections. Civil rights cases, for example, reflect broad congressional goals in favor of equal and fair workplace conditions.[49]

B. *The Constitutional and Statutory Framework*

The Constitution and federal statutes, as they relate to an individual's right to judicial access and to legal representation, frame the federal court's response to pro se litigation. Whether rooted in the Privileges and Immunity Clause,[50] the First Amend-

43. *See* 28 U.S.C. § 2241(c) (1994) ("The writ of habeas corpus shall not extend to a prisoner unless he is in custody.").

44. *See* ROGER A. HANSON & HENRY W. K. DALEY, DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995) ("In 93% of the sampled habeas corpus cases, the prisoner was without legal counsel (pro se).").

45. *Id.* at iv.

46. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 1, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.).

47. *See* 28 U.S.C. § 2244(b)(3)(A) (Supp. 2001) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

48. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 51.

49. *See generally* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

50. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (stating that "the privileges

ment,[51] or due process,[52] the Supreme Court has consistently recognized that the right to judicial access is a fundamental right preservative of other rights in our democratic system.[53] As an ideal, an individual enjoys this right whatever the nature of his or her claim and even if incarcerated.[54] "One of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien."[55]

Civil litigants, including prisoners, have a right to appear in court unrepresented by counsel.[56] But the Constitution, as currently interpreted, does not mandate the provision of counsel to all civil litigants should they desire representation.[57] Instead, the

---

and immunities of citizens in the several states . . . [include the right] to institute and maintain actions of any kind in the courts of the state").

51. U.S CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). *See generally* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) (exploring the contours of a First Amendment right to judicial access).

52. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law"); *see* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) (stating that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). *But see id.* at 382 ("We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment . . . .").

53. *See* Chambers v. Baltimore & Ohio Ry. Co., 207 U.S. 142, 154 (1907) (Harlan, J., dissenting) ("The right to sue and defend in the courts . . . is the right conservative of all other rights.").

54. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 523 (1984) ("Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.").

55. NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).

56. *See* 28 U.S.C. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

57. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("The preeminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."); *see also* Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV., 1515, 1526 n.53 (1984) ("[T]he courts have not interpreted the petition clause to impose a state duty to supply an attorney to civil litigants."). *But cf.* Joan Grace Ritchey, Note, *Limits on Justice:*

federal courts have discretionary authority, as a matter of due process and statute, to request counsel for unrepresented plaintiffs in particular cases; the courts' decision to exercise this authority is guided by the interests at stake and public concerns that may weigh against providing counsel.[58] In addition, federal statutes authorize, but do not oblige, the federal courts to grant in forma pauperis status, waiving filing and service fees, if the facts of the case warrant.[59]

In *Coppedge v. United States*, the Supreme Court held that the same standard of frivolousness governs fee-paid as in forma pauperis appeals, explaining that "[t]he point of equating the test for allowing a pauper's [case] to the test for dismissing paid cases, is to assure equality of consideration for all litigants."[60] Despite this emphasis on formal, rather than, functional equality, the Court has also recognized that pro se litigants may require different or special treatment from the legal system at different stages of an action. For example, the Court has held that district courts are to assess pro se pleadings by "less stringent standards than formal pleadings drafted by lawyers."[61] Moreover, the Court has held that district courts must consider whether to

The United States' Failure to Recognize a Right to Counsel in Civil Litigation, 79 WASH. U. L.Q. 317, 318 (2001) ("[V]irtually all other mature industrialized societies are far more progressive than the United States in their protection of the right to counsel for all members of society, regardless of income.").

58. *See* 28 U.S.C. § 1915(e) (Supp. 2001) (providing that a court can request but cannot require an attorney to represent an indigent litigant); Mallard v. U.S. Dist. Ct., 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915(e) does not authorize a federal court to require an unwilling attorney to represent an indigent civil litigant); *see also* Rhode, *supra* note 2, at 1788 ("Although courts have discretion to appoint counsel where necessary to assure due process, they have done so only in a narrow category of cases, and legislatures have guaranteed compensation for a still more limited number of matters."); Hanson & Daley, *supra* note 45, at 14 (reporting that federal courts appointed counsel in only four percent of sampled habeas corpus cases from 1992). Appointment of counsel in a habeas corpus proceeding is governed by the Criminal Justice Act. *See* 18 U.S.C. § 3006A(2)(B) (1994).

59. 28 U.S.C. § 1915(a) (1966). *See generally* HERSHKOFF & LOFFREDO, *supra* note 28, 318–23 nn. 31–69 (1997) (discussing state and federal law governing the right of the poor to secure access to justice).

60. Coppedge v. United States, 369 U.S. 438, 447 (1962).

61. Haines v. Kerner, 404 U.S. 519, 520 (1972). *See generally* Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 660 (1988) (arguing that, in pro se civil litigation, "a discretionary regime should be preserved, in the sense that the question of how much process is due in any given case should be resolved by means of a sliding scale" reflective of the attendant circumstances).

grant leave to amend prior to dismissing a pro se complaint.[62] In addition, at least some district courts have adopted local rules governing treatment of pro se parties at the summary judgment stage of an action.[63] With respect to inmates seeking to file civil actions pro se, the Court, at various times and with varying degrees of sympathy, has emphasized that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers."[64] However, in 1996, Congress enacted the Prison Litigation Reform Act, which changes in significant ways the trial and appellate courts' processing of prisoner petitions, whether pro se or represented, in forma pauperis or fee-paid,[65] and the Act has been interpreted as reflecting a "concern[ ] with filtering out frivolous suits administratively, before they get to court."[66]

---

62. *See* Denton v. Hernandez, 504 U.S. 25, 34 (1992). *But see* Lopez v. Smith, 160 F.3d 567, 571 (9th Cir. 1998) (holding that under the 1996 Prison Litigation Reform Act, "a court can no longer, at its discretion, provide an opportunity for the pro se prisoner-litigant proceeding in forma pauperis to amend deficiencies in his complaint").

63. S.D.N.Y. CIV. R. 56.2 & E.D.N.Y. CIV. R. 56.2 (requiring the defendant to provide notice to a pro se plaintiff of the need to oppose a motion for summary judgment with affidavits or other papers).

64. Bounds v. Smith, 430 U.S. 817, 828 (1977). *But see* Nancy Biro, *Supplement to Meeting the Challenge of Pro Se Litigation: An Update of Legal and Ethical Issues* (updated Aug. 2000), *available at* http://www.ajs.org/prose/Kerry%20Update.htm (observing that pro se prison litigants "find it very difficult to proceed . . . , their access to legal materials is rather limited . . . [and they] . . . often face . . . restrictive prison rules and regulations.").

65. *See* Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, Title VIII, § 804((a), (c)–(e), 110 Stat. 1321-73, 1321-74, 1321-75 (enacted April 26, 1996). The Act amends a number of statutes involving fee waiver and the granting of in forma pauperis status, criteria for case screening, case management, and dismissal, limitations on relief, attorney fees, and sanctions. *See* 18 U.S.C. §§ 3624(b) and (b)(2), 3626 (nt); 42 U.S.C. § 1997e; 28 U.S.C. §§ 1915 (a)–(h), 1346(b) and (b)(2); and 11 U.S.C. §§ 523(a)(16)–(a)(17). For a discussion of the PLRA and how it affects the processing of prisoner petitions, see Michael Zachary, *Dismissal of Federal Actions and Appeals Under 28 U.S.C. §§ 1915(E)(2) and 1915A(B) 42 U.S.C. § 1997E(C) and the Inherent Authority of the Federal Courts: (A) Procedures for Screening and Dismissing Cases; (B) Special Problems Posed by the "Delusional" or "Wholly Incredible" Complaint*, 43 N.Y.L. SCH. L. REV. 975 (1999–2000); *see also* Lois Bloom, *Implementation of the Prison Litigation Reform Act, in* 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 2000, at 605 (PLI Litig. and Admin. Practice Course, Handbook Series No. 640, 2000).

66. Nussle v. Willette, 224 F.3d 95, 103 (2d Cir. 2000). The Act had an immediate impact on the federal courts. *See Long-term Effects of Prisoner Litigation Reform Act Not Yet Clear, in* The Third Branch 5 (July 1997) (stating that "federal question civil-rights prisoner petitions declined to their lowest lowel in five years" following enactment of the Act, but noting that "[w]hether the PLRA was responsible for this decrease, and if so, whether the downward trend will continue, are questions that cannot yet be fully answered").

C. *Article III Responses to Pro Se Litigation*

Institutional reforms within the federal courts also shape the Article III response to pro se litigation. Congress has mandated that alternative dispute mechanisms are to be available in each of the federal districts;[67] it has provided funding for central staff and pro se clerks whose job is to screen filings, to help locate counsel, and to assist pro se litigants;[68] and it has authorized the appointment of magistrate judges to serve as adjuncts to the dis-

67. In 1998, Congress required the federal courts to establish and implement a program of alternative dispute resolution. *See* Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 651 (Supp. 2001). *See* Cheryl L. Baber, *Alternative Dispute Resolution in the United States District Court for the Northern District of Oklahoma*, 36 TULSA L.J. 819, 820 (2001) (explaining that alternative dispute techniques include "arbitration, mediation, mini-trials, early neutral evaluation, or some combination of those for certain civil cases"). Even before the Act, certain districts had ADR programs in place. *Id.* at 822.

68. *See* 28 U.S.C. § 715 (1993) ("The Chief Judge of each court of appeals, with the approval of the Court, may appoint a senior staff attorney . . . staff attorneys and secretarial and clerical employees . . . ."). The number of pro se staff attorneys allotted per district is determined by a formula based on the number of prisoner filings in the court annually. Each court makes use of the pro se staff attorneys as it sees fit. Many districts limit pro se staff attorney work to prisoner filings, but others require pro se staff attorneys to review all pro se filings. In some districts, pro se staff attorneys work on a case from inception through dispositive motion or trial; in others, pro se staff attorneys are limited to the screening of complaints at the inception of the case and making recommendations for sua sponte dismissal. *See, e.g.*, CARROLL SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 85 (1985) [hereinafter SERON, NINE CASE STUDIES] (explaining that in some districts, the pro se clerk "does much of the initial screening including in forma pauperis (IFP) petitions, and does some legal research on motions before a magistrate prepares a report and recommendation for a judge"). *See generally Recommendations for Expediting Pro Se Litigation*, Pro Se Law Clerks and Staff Attorneys Association (1994). For a criticism of the use of central staff, see Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981) (referring to the growth of central staff attorneys as "cancerous"). For discussions of institutional adaptations by the U.S. Courts of Appeals, see MARILYN M. DUCHARME, PRO SE APPEALS: PRO SE PROCESSING IN THE U.S. COURTS OF APPEALS (1995); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995); Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937 (1980). For criticisms of these developments, see Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 699 (2000) (arguing that "the filtering of the case through a single individual in a central office does tend to reduce the likelihood that the case will receive a full, fresh look in the chambers of each judge on the panel"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 276 (1996) (noting that, for so-called disfavored cases, circuit judges' involvement "probably consists of limited review of the staff recommendations").

trict judges in the handling and disposition of criminal and civil filings.[69] These innovations are structurally interrelated,[70] but we focus here on the use of magistrate judges in helping to resolve pro se cases.

Established in 1968,[71] the position of magistrate judge evolved from the office of commissioner that existed in the Article III system since the eighteenth-century.[72] The appointment of magistrate judges provides a temporary and flexible solution to expanding dockets, obviating immediate pressures to increase the number of Article III judges.[73] In their original incarnation, "magistrates were limited to hearing nondispositive motions and

---

69. *See infra* notes 71–89 and accompanying text.

70. *See, e.g.*, Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712 (1994) (discussing the role of magistrate judges as mediators in federal court alternative dispute resolution programs).

71. *See* United States Magistrates Act of 1968, Pub. L. No. 90-578, Title I, § 101, 82 Stat. 1108 (codified as amended at 28 U.S.C. §§ 631–639 (Supp. 2001)); *see also* Phillip 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) ("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 of the federal courts."); Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 565 (recounting the history of the Federal Magistrate Act of 1968).

72. Richard W. Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62, 62–69 (1970) (presenting English and colonial origins to the U.S. commissioner system, and its relation to the federal magistrates); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1029 (1994) ("In 1968, Congress transformed the 'commissioner' system into a corps of judicial officials named federal 'magistrates.'"). *See generally* Linda Silberman, *Judicial Adjuncts Revisited: Masters and Magistrates in the Federal Courts of the United States*, *in* INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE: ESSAYS IN HONOUR OF SIR JACK I. H. JACOB Q.C. 129, 129–68 (I.R. Scott ed., 1990); Linda Silberman, *Masters and Magistrates, Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975); Linda Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975).

73. *See* Longan, *supra* note 70, at 718 (observing that the magistrate system needs "to be flexible so that it can adapt to changing needs and possibilities"). *See generally* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 29 (1973) ("Inflation of the number of district judges . . . will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficiency of the federal courts." (quoting Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring)); Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (stating that the appointment of adjuncts such as magistrates is inevitable given "effort[s] to circumvent the natural limits on expanding the federal court system").

conducting pre-trial conferences and hearings, [and] final decisionmaking authority in all cases was reserved for the federal judge."[74] In 1976, responding to judicial uncertainty about the scope of magistrate authority, Congress clarified that the district courts could assign to magistrates, even without party consent, "such additional duties as are not inconsistent with the Constitution and laws of the United States."[75] Three years later, aiming to "improve access to the courts for all groups, especially the less-advantaged,"[76] Congress enlarged the scope of magistrate authority, expanding their jurisdiction to include, on consent of the parties, "any or all proceedings, in a jury or nonjury civil matter."[77] The Judicial Improvements Act of 1990 further enhances magistrate authority, conferring increased status through the formal designation of "Magistrate Judge."[78]

Currently, magistrate judges "exercise the key powers of district court judges: they decide motions, take evidence, instruct juries, and render final decisions."[79] The district court may refer any nondispositive matter to a magistrate judge without party consent but retains jurisdiction to "reconsider any pretrial matter" for clear error.[80] In addition, on consent of the parties, mag-

74. J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1032 (1985).

75. *See* Pub. L. No. 94-577, 90 Stat. 2729, 2729 (codified as amended at 28 U.S.C. § 636(b)(3) (1993)).

76. S. REP. NO. 95-344, at 4 (1977).

77. *See* Pub. L. No. 96-82, 93 Stat. 643 (codified as amended at 28 U.S.C. §§ 631–39 (1982)); T. Michael Putnam, *The Utilization of Magistrate Judges in the Federal District Courts of Alabama*, 28 CUMB. L. REV. 635, 639 (1997–1998) (calling the authorization of magistrate consent jurisdiction in 1979 a "truly revolutionary change in the status of magistrate judges"). On the constitutional significance of party consent, and whether it cures separation of powers problems, compare *id.* at 641 ("Although the Supreme Court has not yet addressed directly the constitutional sufficiency of consent . . . at least one case hints that consent is an adequate basis for delegating Article III judicial power as long as the Article III court retains ultimate jurisdiction over the case or controversy.") (internal citation omitted) with Richard A. Posner, *Coping with the Caseload, A Comment on Magistrates and Masters*, *supra* note 73, at 2216 ("[The parties'] consent may well eliminate any concern founded on the due process clause of the fifth amendment; it is irrelevant (or largely so) to the concerns that animated Article III.").

78. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 1, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.). Dessem notes that the 1990 Act's expansion of magistrates' authority was contrary to the recommendations of the Brookings Institute Task Force on Civil Justice Reform. See Dessem, *supra* note 8, at 810–11.

79. Downs, *supra* note 75, at 1033.

80. *See* 28 U.S.C. § 636(b)(1)(A) (1993).

istrate judges may decide dispositive motions;[81] the magistrate's decision is entered as a judgment of the court and is subject to appeal in the normal course to the court of appeals.[82] If the parties do not consent to the magistrate judge's dispositive civil authority, the district judge can nevertheless refer the matter to the magistrate judge, who then issues a report and recommendation which, upon objection, is reviewed de novo by the district court.[83]

---

81. Some commentators question whether pro se or indigent litigants can provide meaningful consent to disposition by a magistrate judge. Congresswoman Elizabeth Holtzman, opposing passage of the 1979 Act, expressed skepticism that an indigent litigant would freely waive his or her right to an Article III decisionmaker:

> It is unlikely that a litigant will hold out for an Article III judge when he or she is poor or denied bail or is suing for badly needed money and is told by an attorney that with a magistrate the trial will be scheduled sooner and conducted more expeditiously. In cases where a lawyer is not required, it is even less likely that party could resist the lure of speed and economy.

H.R. REP. No. 95-1364, at 42 (1978). *See also* Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455, 476 (1988) ("There is a risk that poor litigants inevitably will be pressured into consenting to a magistrates' trial authority because these litigants cannot afford to wait for their cases to be heard by district judges.") [hereinafter Smith, *Assessing the Consequences*]. The Judicial Improvements Act of 1990 facilitates the securing of party consent, and districts use a number of techniques for this purpose. *See generally* MAGISTRATE JUDGES DIV., ADMIN. OFF. OF THE U.S. CTS., FACILITATING CONSENT TO THE EXERCISE OF CASE-DISPOSITIVE AUTHORITY BY MAGISTRATE JUDGES IN CIVIL CASES (1999) (Report on file with Lois Bloom, United States District Court, Eastern District of New York). The use of statutory judges could become problematic in that "a radical shift to trial by magistrate could easily result in a finding of unconstitutionality . . . ." Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984).

82. 28 U.S.C. § 636(c). The Court has not yet reviewed the constitutionality of magistrate judge civil case-dispositive authority, which has been upheld by all of the circuits that have considered its legality. *See* Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983); Gairola v. Comm'r of Virginia Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985); Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984); Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984); Orsini v. Wallace, 913 F.2d 474 (8th Cir. 1990); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985).

83. 28 U.S.C. § 636(b)(1)(B). *Accord* Thomas v. Arn, 474 U.S. 140 (1985) (holding that failure to file timely objection to the magistrate's report and recommendation generally waives any further Article III review).

District courts make varied use of magistrates in the handling and resolution of civil matters, depending on their docket needs, internal organization, and judicial philosophies.[84] Almost all districts, however, assign some pro se filings—mostly habeas corpus petitions and Social Security appeals—to magistrate judges for handling and recommended disposition.[85] The Federal Judicial Center points to three major case management approaches to the allocation of such work: blanket reference of all Social Security appeals and prisoner petitions to magistrate judges; allocation of Social Security appeals and prisoner petitions between magistrate and Article III judges; and selective assignment of Social Security appeals and prisoner petitions by individual Article III judges to magistrate judges.[86] Finally, in some districts the chief magistrate judge supervises the pro se law clerks.[87]

In the ten-year period from 1982 to 1992, the number of prisoner petitions handled by magistrates increased by forty-six percent; and in the single year from 1992 to 1993, by ten percent.[88] As a result of these developments, magistrate judges have assumed an increasing share of the federal court's work, and shoulder an even larger share of the pro se docket. As Judith Resnik reports, "Although relatively invisible, . . . magistrate

84. *See* CARROLL SERON, THE ROLES OF MAGISTRATES IN THE FEDERAL DISTRICT COURTS vii (1983) [hereinafter SERON, ROLES OF MAGISTRATES] ("The United States magistrates system has developed into a structure that responds to each district court's particular circumstances and needs."); Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2139 (1989) ("[T]he use of magistrates varies substantially from district to district—often depending upon the caseload demands of the particular district and the district's organizational philosophy about the relationship between judge and magistrate."). One writer, considering a survey of district court practice, suggests a three-part typology of function: (1) the magistrate functioning as generalist, with his or her own docket of cases; (2) the magistrate as specialist, handling particular categories of cases, such as Social Security appeals or prisoner petitions; and (3) the magistrate as a member of an adjudicative team, making recommendations on specified pretrial or other matters. *See* A. Leo Levin, *Foreword* to SERON, NINE CASE STUDIES, *supra* note 69, at x.

85. *See* SERON, ROLES OF MAGISTRATES, *supra* note 84, at ix (reporting that among 191 full-time magistrates in eighty-two districts surveyed, eighty-eight percent handled prisoners' habeas corpus petitions and civil rights cases and eighty-six percent handled Social Security cases).

86. *See* SERON, NINE CASE STUDIES, *supra* note 69, at 84. For a general discussion of the processing of pro se cases in the Southern District of Florida, see *Unusual Programs Help Southern District of Florida Deal with Pro Se Cases*, 9 FJC DIRECTIONS 20 (1996).

87. *See* SERON, NINE CASE STUDIES, *supra* note 69, at 85 (reporting that the Northern District of Georgia uses magistrates in this way).

88. Longan, *supra* note 70, at 753.

judges do a vast amount of federal adjudication . . . . Magistrate judges preside over some 500,000 judicial proceedings, including social security 'appeals,' habeas petitions, evidentiary hearings, pretrial conferences, and more than 5000 civil trials, heard on the consent of the parties."[89]

II.

The Eastern District of New York, one of the most populated and busiest judicial districts in the United States, has shared in the developments set out in Part I. Like other state and federal courts, it has experienced a tremendous rise in case filings across the board and in pro se matters in particular. The district has also adapted institutionally to meet the demands and challenges that its rising caseload creates, while also seeking to conserve Article III power as a scarce public resource. In May 2001, the district took the innovative step of designating a specific magistrate judge to handle assigned categories of pro se filings. At the same time, the district made accompanying changes to the organization of its pro se staff attorneys and writ clerks to assist in the processing of civil filings by unrepresented litigants. In this Part, we briefly describe some of the special circumstances of the Eastern District of New York, and explore the scope and content of the new magistrate judge's responsibilities.

A. *A Snapshot of the Eastern District of New York*

Spanning the counties of Kings, Queens, and Richmond in New York City, and Nassau and Suffolk Counties on Long Island, with courthouses in Brooklyn and Central Islip, the Eastern District of New York is one of the most densely populated judicial districts in the entire country. According to the 2000 Census, the district's population increased 8.5% since 1990, by over 650,000.[90] The district's large population contributes to its large caseload, with its weighted filings in 2000 ranking eleventh in the United States and first in the Second Circuit.[91] In 1999, total

89. Resnik, *supra* note 73, at 1026. She adds in a later work:

> During the following decade [between 1990 and 1999], the number of full-time magistrate judges rose from 307 to 447; by 1999 in ten districts, the number of magistrate judges was greater than the number of life-tenured judges. Some districts also put magistrate judges 'on the wheel,' assigned directly to civil cases, as are district judges.

Resnik, *supra* note 39, at 990.

90. *See* UNITED STATES COURTS, SECOND CIRCUIT REPORT 2000, at 19 (2000) [hereinafter SECOND CIRCUIT REPORT] (citing statistics and providing geographic parameters of the E.D.N.Y.).

91. *See id.*

civil case filings rose to 8000.[92] Of these, 1,217, about fifteen percent, were pro se cases.[93] Of the pro se cases, prisoners filed 783, 632 cases seeking writs of habeas corpus and 151 cases suing to vindicate civil rights.[94] Pro se litigants who were not incarcerated filed 154 employment discrimination cases, 136 civil rights cases, and 144 Social Security cases.[95]

The Eastern District of New York has grown incrementally to meet the demands of increased docket pressures. In 1938, the district had six authorized judges and no magistrates.[96] Fifty years later, the number of authorized judgeships had doubled to twelve, with four additional senior judges and five full-time magistrates.[97] Today, the court has grown even more, with twenty-one judges, six of whom have senior status.[98] The most recent Second Circuit Report emphasizes the fact that within the Eastern District of New York "the workload remained a crushing one due to an insufficient number of active judges," and points to Congress's failure to act upon the district's request for three additional judgeships.[99] Growth in case filings has been accompanied by an increased delegation of pretrial and other matters to magistrates, described by a senior judge as "a remarkably able and dedicated group."[100] In 2000, over 6,000 pending civil cases were referred to magistrate judges for pretrial preparation and final disposition, including trial on consent of the parties.[101]

---

92. Materials on file with Lois Bloom, United States District Court, Eastern District of New York.

93. *Id.*

94. *Id.*

95. *Id.* Employment claims filed by non-prisoners include complaints filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 17 (1994 & Supp. V 1999); the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621–634 (1994 & Supp. V 1999); and The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994 & Supp. V 1999); other civil rights cases filed under 42 U.S.C. § 1983 (1994 & Supp. V 1999); and appeals from adverse Social Security and Supplemental Security Income decisions under 42 U.S.C. § 405(g) (1994 & Supp. V 1999); 42 U.S.C. § 1383(c)(3) (1994 & Supp. V 1999).

96. *See* Weinstein & Wiener, *supra* note 17, at 430.

97. *Id.* (citing statistics). District judges may retain the office, but retire from regular service after attaining sixty-five years of age and fifteen years of service. See 28 U.S.C. § 371 (Supp. 2001). Such status is colloquially referred to as "senior status." Senior district judges may elect not to be assigned categories of cases.

98. SECOND CIRCUIT REPORT, *supra* note 91, at 20.

99. *Id.*

100. Weinstein & Wiener, *supra* note 17, at 437–38.

101. SECOND CIRCUIT REPORT, *supra* note 91, at 20.

B. *The Evolving Approach to Pro Se Claims*

Like other federal districts, the Eastern District of New York over the years has adopted case management and other devices to meet the demands of increased civil case filings and the challenges of pro se litigation.

For the last twenty years, the Eastern District of New York employed pro se staff attorneys and writ clerks, technically a part of the Chief Judge's staff, but working under the supervision of the Clerk of the Court.[102] Their work included a broad mix of activities, such as preparing case summaries for pro bono referrals; responding to procedural questions by pro se litigants; and reviewing default judgments and preparing civil judgments in all cases.[103] In addition, particular staff attorneys undertook legal research at the request of judicial officers.[104]

During this period, the Eastern District of New York randomly assigned all pro se cases to the active district judges of the court. Each pro se case was also assigned to a magistrate judge. Thus, in practice, pro se cases were assigned, at the time of filing, to both an Article III and a magistrate judge, and the district judge would decide on a case by case basis whether and to what extent to utilize a magistrate.[105] This case management approach was consistent with the treatment of represented parties in the district: generally, all civil matters were referred to a magistrate judge for pretrial handling.[106]

C. *Appointing a Special Magistrate Judge*

In May 2001, the Eastern District of New York appointed a new, additional magistrate judge with a specific mandate: to oversee the court's pro se docket. In designing this new position, the district made strategic choices aimed at securing greater efficiency for the court overall and high quality decisionmaking for pro se litigants. The court also reorganized its pro se staff attorneys and writ clerks with an eye toward the prompt and effective screening of all pro se cases filed in the district in order to identify and draft orders in those cases that might be appropriate for sua sponte dismissal. By so doing, the district could direct

102. Materials on file with Lois Bloom, United States District Court, Eastern District of New York.

103. *Id.*

104. *Id.*

105. *See generally* E.D.N.Y. Civ. R. 72.1 & 72.2.

106. *Id.*

greater attention to those pro se cases involving potentially meritorious claims.[107]

The new magistrate judge's function is essentially two-fold. First, the magistrate judge, rather than the clerk of the court, now oversees a Pro Se Office comprising staff attorneys and writ clerks who are intended to serve a number of integrated functions. Most important, under supervision of the new magistrate judge, the pro se staff attorneys will screen all pro se civil filings and propose sua sponte dismissal orders to the assigned judge prior to the issuance of a summons.[108] They will also routinely draft orders in cases that are insufficiently pleaded but not appropriate for sua sponte dismissal, generally directing the litigant to amend the complaint. In addition, the pro se staff will provide procedural advice to individuals seeking to file claims or litigating their claims before the court, through such activities as answering questions about civil procedure and making forms and instructions available for pleadings and motions. Finally, the pro se staff will respond to inquiries made to judge's chambers when requested by the judge.[109] Second, the district will now automatically refer all pro se cases that survive screening, other than Social Security appeals and federal prisoner petitions seeking habeas corpus relief, to the new magistrate judge. She is responsible for handling all pretrial matters in such cases and may hold any conferences and hearings that are required. She may also preside at trial with the consent of the parties.[110] In carrying out

---

107. *Id.*

108. *See* Vanderberg v. Donaldson, 259 F.3d 1321 (11th Cir. 2001) (upholding 28 U.S.C. § 1915(e)(2)(B)(ii), as amended by the Prison Litigation Reform Act, which allows the district court to dismiss sua sponte before service of process, a claim of an in forma pauperis plaintiff for failure to state a claim); *see also* Christiansen v. Clarke, 147 F.3d 655 (8th Cir. 1998).

109. Materials on file with Lois Bloom, United States District Court, Eastern District of New York.

110. The new pro se magistrate judge has established a procedure by which she raises the issue of consent in her order granting in forma pauperis status. The order states:

> This information regarding the availability of a magistrate judge to hear the entire case on consent of the parties is not meant to, in any way, interfere with the parties' absolute right to decision by a United States District Judge. This is an option available to the parties, which may expedite adjudication of this case and preserve scarce judicial resources.

Materials on file with Lois Bloom, United States District Court, Eastern District of New York. The parties are then given a separate paper to sign to register their consent. *See* Aldrich v. Bowen, 130 F.3d 1364, 1364 (9th Cir. 1997) (finding that a magistrate judge's judgment was invalid where the record contained "no written consent of the parties as required").

this assignment, the new magistrate judge is assisted by two "elbow" law clerks and also supervises the pro se staff attorneys and writ clerks.[111]

The Eastern District of New York's approach thus reallocates the pro se caseload—in particular, state prisoners' habeas petitions and employment discrimination claims—away from all other judicial officers to a single initial decisionmaker who has multi-faceted responsibility for screening, processing, conferencing, and recommendations for disposition. One goal of this approach is to ensure early identification of those pro se cases that should be quickly terminated; those that need to be repleaded; and those that need to be transferred to another district. By centralizing initial decisionmaking in a judicial officer, assisted by a cadre of lawyers, the proposal seeks to foster the development of substantive and procedural expertise in the areas of law that predominate the bulk of pro se filings in the Eastern District of New York. New elbow clerks for individual judges are thus largely relieved of the responsibility of having to learn the intricacies of habeas corpus doctrine each year. In addition, the approach diversifies the new magistrate judge's caseload, by including employment discrimination and other civil rights claims along with prisoner petitions.

III.

The Eastern District of New York's model for managing pro se litigation uses the tools of centralization and specialization in an effort to promote the fair and efficient processing of claims by unrepresented litigants. The court's goal is to terminate frivolous cases quickly, so it can expend greater attention on meritorious cases that may be deserving of court-ordered relief. The assignment of these cases to a judicial officer rather than to the clerk of the court underscores the serious attention that the court expects pro se matters to receive. However, with no track record, there is no predicting how the work of the office will affect litigants. Although the district judges are required to review the new magistrate judge's reports and recommendations

111. Ordinarily, a magistrate judge is allotted one law clerk, one secretary, and one deputy clerk (sometimes referred to as a courtroom deputy or case manager). Under certain circumstances, a judge may elect to hire an additional law clerk in lieu of administrative staff. *See* GUIDE TO JUDICIARY POLICIES AND PROCEDURES, VOL. III-A, JUDGES MANUAL, CH. 1, CHAMBERS STAFF, PART A: PERSONNEL AUTHORIZED, § 1.D (Sept. 1999).

using a de novo standard,[112] one might nevertheless argue that the disposition of pro se cases in this way effectively relieves Article III judges of responsibility for areas of law that raise key federal concerns, including habeas corpus petitions and employment discrimination claims. The Eastern District of New York's approach to pro se cases could thus unintentionally stifle Article III jurisprudence by shielding district court judges from issues that disproportionately impact people without means. We might also predict racial implications given the high incidence of poverty and incarceration among people of color.[113] Over time, this concern may argue in favor of alternate systems in which Article III judges share greater responsibility to hear and to decide pro se matters. In this Part, we explore possible policy and ethical concerns raised by the district's pro se program, relating to specialization, efficiency, and impartiality,[114] recognizing

112. *See, e.g.*, Hernandez v. Estelle, 711 F.2d 619 (5th Cir. 1983) (remanding case because of district court's failure to make an independent determination regarding the magistrate's factual findings).

113. *See* Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 FORDHAM L. REV. 2007, 2010 (2001) ("We have the highest incarceration rate of any country in the world, and disproportionately our prisoners are African American."). On cutbacks in funding to investigate bias in the federal courts, *see* RICHARD H. FALLON, JR. ET AL., 2001 SUPPLEMENT TO HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 2 (4th ed.) (2001) (citing articles).

114. We do not address the possible constitutional concerns raised by a procedure that for reasons of economy and expedition refers virtually all pro se cases to a decisionmaker who lacks the independence that Article III affords through the guarantee of lifetime tenure. *See* United States v. Raddatz, 447 U.S. 667, 683 (1980) (holding that the delegation of judicial authority to a magistrate judge comports with Article III "so long as the ultimate decision is made by the district court"); *cf.* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 77, 92 (1982) (emphasizing the need to retain "'the essential attributes of the judicial power' in art. III tribunals" to pass constitutional muster, and distinguishing between Congress's power with respect to state-law claims and federally created rights (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932))). For a general discussion, see MAGISTRATE JUDGES DIV., ADMIN. OFF. OF THE U.S. CTS., *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993) [hereinafter *A Constitutional Analysis*]. The Magistrate Judges Division concluded that, "[w]hile predicting the outcome of future Supreme Court cases is a risky proposition, there appears to be little likelihood that significant elements of existing magistrate judge authority will be declared unconstitutional." *Id.* at 272; *see also* Downs, *supra* note 74, at 1034 (arguing that "the [Federal Magistrate] Act]'s constitutionality should not be considered settled"). Whether the constitutional analysis is affected by the special circumstances of the pro se docket, as they relate to litigant consent or to Article III oversight, *see, e.g.*, Vincent Aug, Jr., *The Magistrate Act of 1979: From a Magistrate's Perspective*, 49 U. CIN. L. REV. 363, 367–68 (1980) (discussing the practice "of some district judges . . . [of] forcing litigants to resolve disfavored cases before a magistrate

that the work of the magistrate judge to oversee the pro se caseload in the Eastern District of New York is still in its infancy.

A. *Concerns about Specialization*

The Eastern District of New York takes a specialist approach to the magistrate judge's function, assigning only pro se matters, which some may regard as burdensome or disfavored, to the newly appointed judicial officer. It thus runs counter to recent suggestions by the Magistrate Judge's Committee of the Judicial Conference as to how best to utilize magistrate judges. "Absent unusual circumstances," the Committee explains, "a court normally benefits most from developing and using the full array of judicial skills of its magistrate judges rather than assigning them only specified case categories."[115] Specialization may carry distinct advantages and disadvantages in the context of magistrate judge jurisdiction. On the one hand, commentators warn that the assignment of only Social Security cases or prisoner petitions is likely to be "repetitive" and could produce "less careful judgments" by the magistrate judges charged with their disposition.[116] On the other hand, at least one important commentator questions whether Article III judges would give such matters any closer attention.[117] In this section, we explore the advantages and disadvantages of the Eastern District of New York's approach, recognizing that experience will prove or disprove some of these theoretical considerations.

1. The Literature on Specialization

Judicial specialization is a term of art that typically refers to courts of limited, and often exclusive, jurisdiction in a prescribed subject matter.[118] Commentators maintain that judicial specialization promotes efficiency and expertise, emphasizing three pri-

by intimations of lengthy delays should the litigants exercise their right to appear before the court"), remains an open question.

115. SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, *supra* note 14, at 2.

116. *See* Smith, *Assessing the Consequences*, *supra* note 81, at 484.

117. *See* McCree, *supra* note 69, at 788 ("While I have no statistics to support my conjecture, I would not be surprised if the press of business might tempt some judges to give the briefs in cases deemed unworthy of judicial attention a cursory look at best.").

118. *See* American Bar Association Central and East European Law Initiative, *Concept Paper on Specialized Courts* (1996), *available at* http://www.abanet.org/ceeli/conceptpapers/speccourts/spc1.html [hereinafter ABA Initiative] ("With reference to courts, specialization usually signifies that a court has limited, and frequently exclusive, jurisdiction in one or more specific fields of the law.").

mary benefits: the encouragement of high quality decisionmaking, as specialist judges become expert in arcane or technical areas of law;[119] reduction of docket backlog, as generalist judges are relieved of the presumed tedium and weight of the specialist's caseload;[120] and expedition of decision, as specialist judges develop customized procedures and direct attention to issues that might otherwise be relegated to the margins of the court's docket.[121] For these reasons, the Federal Courts Study Committee in 1990 suggested the establishment of a specialized court to resolve Social Security claims, explaining that "[t]he interests of a class of vulnerable citizens are promoted, not sacrificed, when a system of adjudication can be tailored to their particular needs."[122]

The literature emphasizes, however, that specialization carries potential costs: generalist judges no longer have to consider particular areas of law,[123] while specialist judges risk being iso-

119. *See* Arie Freiberg, *Problem-Oriented Courts: Innovative Solutions to Intractable Problems?*, 11 J. JUD. ADMIN. 8, 12 (2001) (stating that "[t]he advantages of specialisation include improved judicial decision-making through the use of judicial expertise, more efficient court processes . . . and reduced backlogs in the generalist courts.").

120. *See* Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 113 (1995) (stating that "a specialist judge might well preside over case processing that is faster, less costly (in both judicial and attorney time), and more frequently correct.").

121. *See* Silberman, *supra* note 85, at 2131, 2133 (discussing the development of "ad hoc proceduralism" that departs from the uniformity of transsubstantive approaches); *see, e.g.*, SERON, NINE CASE STUDIES, *supra* note 69, at 86 (reporting that it is "the practice of the magistrates [in the Northern District of Georgia] to hold a hearing in Social Security cases" to resolve summary judgment motions).

122. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 17. *But see* Edward V. Di Lello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 506 (1993) (expressing concern that "[a] 'Social Security' judge . . . might lose sight of broader values").

123. Owen Fiss warns that even generalist magistrates subject Article III judges to this risk. "The use of the magistrate," he cautions, "insulates the judge from the presentation of the facts and the law on that particular issue, thus accentuating the incompleteness of his perspective, and it relieves him of some of his obligation to explain and justify." Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1455 (1983). *Accord* McCree, *supra* note 69, at 780 ("We expect the judge, regardless of how inconsequential a case might seem to be, to bring all his intellectual power and judgment to bear on the issues before him, with the expectation that he will reach the correct result for the right reasons."). *But see* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 112 (1995) (recommending, as to pretrial management, "increased use of magistrate

lated from the mainstream of legal thought.[124] The specialist's steady diet of routine matters may, moreover, tend toward "routinized decision making"[125] (with the attendant "risk of burnout or stultification inherent in a severely limited docket"),[126] compounding problems of recruitment that are associated with lower status judicial positions.[127] As applied to magistrate judges, the empirical evidence about caseload specialization seems to be mixed.[128]

The Eastern District of New York's model uses specialization but is not specialist in the technical sense of limited subject matter. The new pro se magistrate judge reviews all cases involving unrepresented litigants and manages broad categories of the pro se docket. Any federal question case may be filed pro se, and the filings range from the predominant habeas corpus petitions, to the less frequent copyright and tax refund cases,[129] so the docket is therefore varied.[130] Adjudicating the many cases before the pro se magistrate judge thus requires a broad knowledge of the interplay between procedure and substance, as well as a firm grounding in constitutional doctrine. Additionally, the district

judges [to] restore the possibility of review while separating the functions of managing and substantive decision-making").

124. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989) ("Even with the best motives, a court's doctrinal isolation may lead to a body of law out of tune with legal developments elsewhere.").

125. Smith, *Judicial Lobbying*, *supra* note 8, at 196.

126. SERON, NINE CASE STUDIES, *supra* note 69, at 112.

127. *See* Dreyfuss, *supra* note 125, at 3 (acknowledging the view that a specialist's "isolation, coupled with the repetitive nature of the workload, is unlikely to attract the most talented jurists"). *Accord* ABA Initiative, *supra* note 119 ("[T]he narrowness of the work and the doctrinal isolation may make it difficult to attract the most talented and qualified jurists to judicial careers.").

128. *Compare* SERON, NINE CASE STUDIES, *supra* note 69, at 88 (reporting that in the Eastern District of Missouri, "delegation of Social Security and prisoner petitions to magistrates works smoothly, though they are difficult cases to deal with on a repetitive basis"), *with* Smith, *Assessing the Consequences*, *supra* note 81, at 486 ("[O]ne district judge warned the author that 'I never let law clerks handle prisoners' cases for too long because they become cynical about them.'").

129. *See, e.g.*, Miller v. U.S., 2000 WL 105864 (EDNY 2000) (tax refund); *cf.* Rauma & Sutelan, *supra* note 20, at 9, fig. 6 (listing ten major categories of non-prisoner pro se cases in ten federal districts for the period fiscal years 1991–1994).

130. *Cf.* CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES 178 (1990) [hereinafter, SMITH, UNITED STATES MAGISTRATES] ("Several judges [interviewed] said that they always give their districts' magistrates an interesting variety of tasks so that the subordinate judges do not become bored, stultified, and ineffective from only working on prisoner and Social Security cases").

specifically excluded Social Security cases, which some magistrate judges reportedly consider burdensome,[131] from the magistrate's substantive assignment.[132] As to recruitment, in general the pool of applicants for magistrate judges has increased substantially over the years, as Congress and the courts accord the position greater status and responsibility.[133] Moreover, by establishing a new position rather than allocating pro se matters to the existing magistrate pool, the Eastern District of New York likely attracted applications from lawyers who derive professional satisfaction from working with the indigent and prison populations. Nevertheless, the concerns that commentators associate with specialist courts are significant, and whether they will arise in the context of the new magistrate judge will have to be monitored over time.

2. Structural Disadvantages for Pro Se Litigants

Some commentators warn that the use of magistrate judges for pro se cases will lead to the "ghetto-ization" of indigent persons' claims:[134] "the possibility of creating a two-track system of justice—district judges for wealthy litigants and magistrates for poor litigants."[135] Although the appearance of disparate treatment is significant in itself, we focus here on the content of such treatment: whether the quality of decisionmaking by a magistrate judge in a pro se case will be different from that of an Article III judge and whether specialization puts the pro se litigant in a structurally worse off position due to a greater risk that repeat organizational players will capture the magistrate judge assigned to the pro se docket.[136]

---

131. *Cf.* SMITH, COURTS AND THE POOR, *supra* note 11, at 69 ("[A]lthough some magistrates have a special interest in Social Security cases, many others consider such cases boring and burdensome.").

132. Materials on file with Lois Bloom, United States District Court, Eastern District of New York.

133. *See A Constitutional Analysis, supra* note 114, at 271–72 (finding a "growing confidence in the magistrate judges system").

134. One commentator writes:

> The slow, incremental broadening of magistrate judge authority caused a degree of specialization, or 'ghetto-ization,' in many district courts that resulted in magistrate judges' being limited to handling preliminary criminal matters (such as those assigned to the earlier commissioners), pro se prisoner litigation (both habeas corpus actions and 'conditions of confinement' cases), and social security appeals."

Putnam, *supra* note 78, at 642–43 (footnotes omitted).

135. SMITH, COURTS AND THE POOR, *supra* note 11, at 53.

136. *See* Dreyfuss, *supra* note 125, at 3 (considering the argument that "specialization will produce a court . . . with judges . . . who are susceptible to 'capture' by the bar that regularly practices before them"); Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1006 (1991)

One might argue that Article III judges, as an independent and elite corps within the federal system, will provide better, or at least different, decisionmaking, from that of non-life tenured judicial officers.[137] Carroll Seron's nine case studies of district court use of magistrates, although now fifteen years old, specifically examine the charge of "second-class attention," finding "that when magistrates come to be seen by the bar as subject-matter specialists—particularly in Social Security and prisoner matters—lawyers often view the result as more careful and expert attention."[138] Moreover, David L. Shapiro's earlier study of habeas corpus in the Massachusetts federal court gave high marks to magistrates for their treatment of prisoner petitions:

> In many instances, habeas corpus applications appear to receive fuller and more careful consideration than they did before magistrates came into office. District judges, in turn, are relieved of a large share of a burden which they tend to regard as weary, stale, flat, and unprofitable, are able to focus on those few cases that raise important and difficult questions.[139]

Other commentators likewise emphasize that at least some magistrates are more likely than Article III judges to expend time on the pro se cases to which they are assigned, and thereby produce higher quality decisions.[140] The empirical evidence so far is

---

(reciting criticism that a specialized court will "risk capture of a court by one class of litigants or viewpoint").

137. *See* Fiss, *supra* note 124, at 1444 (stating that Article III judges are "thought to be the fullest embodiment of the judicial ideal"). *But see* Stempel, *supra* note 121, at 81 (suggesting that district courts in urban areas "may be on their way to becoming specialized drug courts").

138. A. Leo Levin, *Foreword* to SERON, NINE CASE STUDIES, *supra* note 69, at ix (1985).

139. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 366 (1973); *see also* Roger A. Hanson, *What Should be Done When Prisoners Want to Take the State to Court?*, 70 JUDICATURE 223, 224 (1987) (underscoring the lack of empirical support for the view that prisoner petitions are resolved "hastily or without a careful consideration of the facts and the law"). *But see* William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 625 (1979) ("There are many indications that [prisoner petitions] were bureaucratically processed rather than adjudicated.").

140. *See* Francis E. McGovern, *Use of Masters and Magistrates in Complex Litigation*, *in* ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 221, 223 (1987) ("The increasing load of litigation necessarily reduces the amount of time a judge has available for any given lawsuit. A master or magistrate has more time to spend on a specific case.").

inconclusive,[141] and whether this concern turns out to be more theoretical than real will turn, in part, on the motivation and attitude of the new magistrate judge as she carries out her mandate, as well as the scrutiny afforded by Article III review.

Commentators also emphasize another concern with adjunct decisionmaking that relates to the structural position of magistrate judges in the Article III hierarchy: dependent on the district judges for their appointment, magistrate judges are said to be more risk-averse and less likely than Article III judges to be innovative or to break new ground in their approach to legal issues.[142] Carroll Seron reports attorney perception that in one district, magistrates go "'a bit more slowly' into new territory," and that their treatment of novel claims depends on "cues from the judges in their district."[143] On one reading, the Eastern District of New York's approach provides a "cue" that pro se matters are important and to be accorded significant institutional resources: a judge, rather than a court clerk, now oversees the pro se office and supervises the screening of unrepresented cases, and the district is providing the magistrate with resources and support needed to carry out the job at a highly professional level.[144] On the other hand, differences in decisionmaking may result from the specialized nature of the new magistrate judge's assignment. In an analogous context, Rochelle Cooper Dreyfuss warns that specialist courts may suffer from "tunnel vision, with judges who are overly sympathetic to the policies furthered by the law that they administer.[145] In particular, the circumstances of pro se litigants could cause a special adjudicator to stray from general law as she creates new law highly tailored to the situa-

141. *See, e.g.*, SMITH, UNITED STATES MAGISTRATES, *supra* note 131, at 175 ("[M]agistrates [surveyed] who indicated that they gave particular attention to each Social Security or prisoner case were in the minority.").

142. *See id.* at 53 (recognizing "concerns that magistrates might avoid making controversial decisions in order to protect their jobs by gaining renewal of their eight-year terms in office"); Smith, *Assessing the Consequences*, *supra* note 81, at 479 ("[T]here are potential incentives for magistrates to confine their decision making within boundaries that are acceptable to the district judges."); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting* View, 88 YALE. L.J. 1023, 1056–57 (1979) (arguing that magistrates "may be encouraged to adopt a risk-averse strategy of adjudication by the pressure of judicial scrutiny, a strategy eschewing unconventional decisions that might otherwise be prompted by novel legal claims or pressing factual idiosyncrasies").

143. SERON, NINE CASE STUDIES, *supra* note 69, at 89–90.

144. *See supra* notes 108–11 and accompanying text.

145. *See* Dreyfuss, *supra* note 125, at 3. For a discussion of the ethical issues that this approach to the magistrate judge's position raises, see *infra* Part III.C.

tions that unrepresented and frequently indigent litigants face. Whether Article III review will provide the critical generalist context for the new magistrate judge's decisions is an open question to be assessed in the light of experience.[146]

Perhaps more problematic is the suggestion that specialization will systematically disadvantage pro se litigants if repeat players—organizational defendants and government agencies—enjoy strategic advantages not shared by one-shot litigants or are able to capture the magistrate judge.[147] Drawing on Marc Galanter's work, the argument is that recurrent litigation actors are better positioned than individuals "to play for rules as well as immediate gains," meaning (among other things), that they can settle cases where the rule outcome is likely to be unfavorable in the long run.[148] The individual pro se litigant, challenging, for example, the legality of her boss's unwanted sexual advances, is unlikely to trade an immediate damage award for a future change in the rules. "Thus," Galanter predicts, "we would expect the body of 'precedent'—i.e., cases capable of influencing future outcomes—to be relatively skewed in favor of the recurrent litigant."[149]

Establishing a specialist magistrate judge to handle particular categories of pro se claims could exacerbate these concerns by creating a forum for a distinct set of government actors and institutional defendants.[150] Galanter emphasized, however, that a court could use various procedural devices to overcome some of the advantages that repeat players enjoy and so work to level the playing field for one-shot litigants.[151] These approaches include court-ordered aggregation and consolidation of claims and also the assignment of claims to a non-profit or membership association to represent the interests of individual claimants.[152] At least one important judicial commentator has confirmed this

146. E.D.N.Y., Civ. R. 72.1–72.2.

147. *See generally* Marc Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 Law & Soc. 225, 231–35 (1976).

148. *Id.* at 232.

149. *Id.* at 233

150. *Id.* at 235 ("If we take an isolated individual with his claim or grievance or ambition, it is indeed a rare instance in which the kinds of options that are routine for large organizations will be feasible and effective."); *see, e.g.*, Smith, Courts and the Poor, *supra* note 11, at 49 (reporting that although small claims courts were intended to "create greater access to courts for poor people who lack the resources to enter regular civil litigation . . . [a] high proportion or plaintiffs in small claims courts are businesses that use the processes to collect debt claims against individuals").

151. *See* Galanter, *supra* note 147, at 235–40.

152. *Id.*

insight with practical experience. In justifying his decision to consolidate prison petitions in the actions that eventually became *Ruiz v. Estelle*,[153] Judge William Wayne Justice explained that he ordered class certification and the participation of the United States in order to boost the litigation capability of the underresourced plaintiffs.[154]

Other factors may also come into play. Institutional counsel, such as the Office of the United States Attorney or the State Attorney General, frequently represent defendants in pro se cases. These offices have professional reputations to preserve, as well as public values to protect, and both are likely to be undermined if counsel undertake repeated procedural maneuvers that seek, among other things, to delay or avoid the hearing of a pro se matter. Whether the Eastern District of New York's model reinforces or mitigates the structural advantages of repeat organizational players will depend, to some extent, on the magistrate judge's case management approach to her docket and the reaction it triggers in well-resourced parties to her authority.

B. *Concerns about Efficiency*

Yet another potential cost of the Eastern District of New York's approach is that it may produce inefficiency, rather than efficiency, of judicial effort.[155] Although we do not have specific information about the pro se docket, the literature in general questions whether parties routinely challenge a magistrate's recommendation, thereby creating "wasteful duplication of decisionmaking."[156] Authors of somewhat older empirical studies were surprised to find that appeals from a magistrate's recom-

---

153. 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd* and *vacated by* 679 F.2d 1115 (5th Cir. 1982), *cert. denied* 460 U.S. 1042 (1983).

154. Justice stated the following:

> In most class action litigation . . . the plaintiffs provide the impetus for maintaining the proceeding as a class action. In contrast, the decision in Ruiz to classify and consolidate the representative petitions that became the basis on which the case was litigated was my own.
> * * *
> The prisoners had . . . no earthly idea of how to present their contentions in a legally significant way. To allow them to present their grievances in a halting and semi-literate fashion may have offered them some formal right of participation, but that participation would have been, and indeed, was, a nullity.

Justice, *supra* note 12, at 1, 10.

155. SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, *supra* note 14, at 2 (stating that "duplication of judicial work is inefficient. It wastes time and increases costs and delay for litigants . . . .").

156. Levin, *Foreword*, *supra* note 69, at ix.

mendation are not routine: the Federal Judicial Center reported in 1985 that "[p]erhaps the most interesting, and significant finding to emerge . . . is that attorneys do not challenge magistrates' work on dispositive or nondispositive motions as a matter of course."[157] In reviewing a magistrate judge's report and recommendation, the district court uses a de novo standard, but it exercises this authority only if objections are filed, and only with regard to that portion of the report to which the parties object.[158] However, even without objections, inefficiency may occur if the magistrate judge feels compelled to overjustify a recommendation or avoids dismissal of cases on the merits, relying, instead, on procedural grounds. Moreover, the literature specifically questions whether a magistrate judge can review a habeas corpus petition as effectively as an Article III judge.[159]

Some commentators might contend that the Eastern District of New York's approach will create perverse incentives for the filing of frivolous claims and so increase the workload of the Article III system overall. As the new magistrate judge's work gains attention, pro se litigants will be arguably encouraged to file an even greater number of claims with the court, thereby further overloading the federal court's docket with frivolous lawsuits. As one commentator has noted, in forma pauperis plaintiffs "have little to lose by bringing numerous meritless actions. No economic disincentives temper their enthusiasm for filing complaints."[160]

Variations on this argument appear frequently in the literature on equalization of judicial access.[161] Early discussions of fee-waiver provisions in the state and federal courts emphasize the important gatekeeping role that fees play in "discourag[ing] captious or frivolous litigation."[162] Moreover, in the fee context, at

157. SERON, NINE CASE STUDIES, *supra* note 69, at 108.

158. *See* 28 U.S.C. § 636(b)(1) (1994).

159. *See* CIVIL JUSTICE REFORM REPORT, *supra* note 20, at 42–43 (noting that the trial judge may be more familiar with a particular case than magistrate, but urging that "trial judges should have the discretion to refer cases to magistrate judges in any case . . . where reference seems desirable").

160. Feldman, *supra* note 41, at 428–29; *see also* Braden v. Estelle, 428 F.Supp. 595, 598 (S.D. Tex. 1977) ("[I]ndigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain. The temptation to file complaints that contain facts which cannot be proved is obviously stronger in such a situation.").

161. *See, e.g.*, Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 272–74 (1985) (questioning whether subsidies should be extended to the indigent to afford or facilitate judicial access).

162. Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21, 26 (1967).

least, commentators assume that the litigant will be represented by counsel, who can "be expected to discourage a nuisance suit."[163] Precisely because the lawyer acts as a filter for frivolous cases, the Aldisert Report twenty years ago urged that compensated counsel be provided in § 1983 challenges to an inmate's conditions of confinement.[164]

Whether the Eastern District of New York's approach creates these perverse incentives is an empirical question to be studied over time. One needs to take into account the likely effect of the Prison Litigation Reform Act on the prisoner pro se docket;[165] greater judicial attention to the termination of pro se matters before issuance of the summons will also affect the new incentive structure. Moreover, local rules provide that related cases are to be assigned to the same judge and that "all pro se civil actions filed by the same individual shall be deemed related."[166] These mandatory consolidation mechanisms, which also serve as a filtering device, can be expected to produce some economies. Finally, in reviewing pro se filings, the new magistrate judge will need to identify litigants who repeatedly file frivolous actions and to take appropriate action.[167]

---

163. *Id.* at 27.

164. *See* ALDISERT REPORT, *supra* note 28, at 14.

165. The Prison Litigation Reform Act requires prisoners, even if granted in forma pauperis status, to pay the full $150 filing fee. Moreover, although non-prisoners can still be granted waiver of the court's filing fees, the plaintiff in an employment or Social Security case must first pursue administrative remedies as a condition precedent to filing in court. *See* 42 U.S.C. § 2000e-5(e)(1) (1994) (employment); 42 U.S.C. § 405(g) (1994) (Social Security). *See generally* Marie Cordisco, *Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases*, 9 FJC DIRECTIONS 25 (1996).

166. E.D.N.Y. CIV. R. 50.3(e), Rules for the Division of Business Among Judges.

167. The in forma pauperis statute deals specifically with prisoners deemed too litigious with a "three strikes" rule. *See* 28 U.S.C. § 1915(g) (Supp. IV 1999) ("In no event shall a prisoner bring a civil action or appeal . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated . . . brought an action or appeal . . . that was dismissed on the grounds that it is frivolous . . . ."). Treatment of noninmate plaintiffs is at the court's discretion. *See, e.g.*, Malley v. New York City Bd. of Educ., 112 F.3d 69 (2d Cir. 1997) (affirming injunction prohibiting frequent litigant from filing suit in Southern District of New York without permission); *In re* Martin-Trigona, 9 F.3d 226 (2d Cir. 1993) (approving nondisclosure of identity of judge assigned to review pro se plaintiff's applications for leave to file suit); *In re* Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984) (holding that issuance of injunction to halt repetitive filing by a pro se plaintiff is appropriate where plaintiff "abuse[s] the process of the Courts to harass and annoy others with meritless, frivolous, vexatious or repetitive . . . proceedings") (quotation marks omitted)).

We emphasize, however, that although many pro se actions are frivolous,[168] not all are. A recent empirical study of case dispositions in the Eastern District of California found that thirty-one percent of prisoner cases survived summary judgment or early dismissal as compared with forty-two percent of noninmate cases.[169] Meritorious actions may implicate important matters such as denial of medical treatment in a prison facility or abusive police practices.[170] One might reply, however, that encouraging an increase in any number of new claims, even if meritorious, produces unnecessary costs by judicializing grievances that might otherwise lay dormant, inchoate, and out of court.[171] Failing to judicialize these hurts, however, also has its costs in terms of lost deterrent effects and dignitary concerns.[172] The value of a claim, in particular a constitutional claim that implicates a litigant's liberty or potentially sets forth norms of conduct, should be quantified not only in dollars and cents, but also in terms of social stability and bonds of solidarity.[173] Judge Weinstein explains, "[T]he real consequence . . . can be measured, not in wasted

168. CIVIL JUSTICE REFORM REPORT, *supra* note 20, at 38 (stating that "many [prisoner] cases lack merit"); *see also* SMITH, COURTS AND THE POOR, *supra* note 11, at 39–40 ("[M]ore than 90 percent of prisoners' civil rights cases are dismissed prior to any hearing by a judge. The high rate of summary dismissals is frequently attributed to the prevalence of frivolous complaints by prisoners.").

169. *See* Mueller, *supra* note 20, at 1284–85.

170. *See* CIVIL JUSTICE REFORM REPORT, *supra* note 20, at 39 ("But the remaining cases can be substantial . . . . For example, in a recent case involving the California Medical Facility at Vacaville, the court ordered substantial changes in medical, psychiatric and other health-care services.").

171. Marc Galanter thus questions the use of the term "legal needs," explaining that they are "not a primitive given, but an institutionally and ideologically contingent selection from a vast pool of amorphous 'proto claims.'" Galanter, *supra* note 148, at 227.

172. On deterrence effects, see Michelman, *supra* note 6, at 1168 n.46 (suggesting "the possibility that expansion of the ability of impoverished persons to vindicate their legal rights would effect a saving in the social costs of violations thereby deterred, a result which would to some extent offset any increases in total outlays on litigation and related activities"). On dignitary effects, see *id.* at 1173–75. ("Perhaps there is something generally demeaning, humiliating, and infuriating about finding oneself in a dispute over legal rights and wrongs and being unable to uphold one's own side of the case.").

173. *See* Phillip L. Spector, *Financing the Courts through Fees: Incentives and Equity in Civil Litigation*, 58 JUDICATURE 330, 331 (1975) ("While settling private disputes, the courts are also establishing through precedent general rules of conduct which order the myriad human relations in a complex society."); Richman & Reynolds, *supra* note 69, at 296 (arguing against using "economic impact [as] the only measure of the judicial system"); *cf.* Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981) ("To put it in economic terms, justice is not a commodity, the production of which can be analyzed

resources, but in meritorious claims discouraged and never brought."[174] Nevertheless, the effect of the Eastern District of New York's approach on patterns of litigation overall is an important consideration, and suggests the need to study trends in pro se filings as part of a general assessment of filing patterns across the board.

Finally, in considering the efficacy the Eastern District of New York's approach to pro se litigation, one should consider the comparative advantages of alternative reforms. No doubt some critics will urge the provision of counsel in all pro se cases as a fairer and more efficient approach to the problem of unrepresented parties.[175] The government shows no sign of providing sufficient funding for this purpose, and bar associations across the country are likewise not able to fill the gap by mobilizing their members to offer pro bono services to all litigants in need.[176] Indeed, as Russell Engler observes, "[e]ven staunch supporters of an increase of lawyers for the poor have recognized that 'there will necessarily be a permanent condition of scarcity in the availability of lawyers.'"[177]

---

apart from its distribution. Who gets justice very much determines what it is they are getting, whether, that is, it is justice.").

174. Weinstein, *supra* note 11, at 659.

175. *See* Feldman, *supra* note 41, at 437 ("Ideally, Congress should provide mandatory appointed counsel for any in forma pauperis plaintiff—whether a prisoner or not—whose complaint is not frivolous.").

176. *See* William W. Schwarzer, *Let's Try a Pro Se and Small-Stakes Civil Calendar in the Federal Courts*, 9 FJC DIRECTIONS 14, 16 (1996) ("The major obstacles to success have been lack of interest among most of the bar and lawyers' well-founded fear of malpractice claims brought by disgruntled litigants. Even under the best of circumstances, volunteer legal assistance cannot be expected to provide representation to more than a small fraction of pro se litigants.").

177. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 157 (1997) (quoting Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 380 (1978)). Alan W. Houseman emphasizes:

> Equal access to legal representation, important as it may be, will not necessarily assure equal justice. Equal justice requires much more: substantive laws that do not have a discriminatory effect on the poor, a system of dispute resolution that assures at least minimum equality between the parties, and an end to arbitrary governmental and private actions.

Alan Houseman, *Equal Protection and the Poor*, 30 RUTGERS L. REV. 887, 887–88 (1977). Even if counsel were provided, the quality of representation would remain a significant concern. *See, e.g.*, Elliott Andalman & David L. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L. REV. 43, 44 (1974) ("[A]ttorneys appointed by courts for nominal fees to represent allegedly ill persons rarely spend any effort on their clients' behalf.").

Nevertheless, one ought to consider the special magistrate judge approach against the background of innovative programs that other district courts have adopted to meet the pressures of pro se cases. Data and analysis by the Federal Judicial Center on this subject should prove very useful for comparative study.[178] A range of other options also deserves attention: the government could fund class action litigation for pro se claims; the courts could require mediation in categories of cases;[179] and administrative agencies could be required to acquiesce to decisions of the courts of appeal in prescribed situations.[180] As the Eastern District of New York collects information about the processing and disposition of pro se cases, additional approaches, as well as systemic solutions, may develop.[181]

C. *Concerns about Judicial Impartiality*

One might object to the Eastern District of New York's approach for ethical reasons: it implicates the magistrate judge and pro se staff in functions that run counter to adversarial assumptions. This argument rests on the idea that a judge best preserves his or her impartiality by acting as a neutral umpire, dependent on the parties to initiate and prosecute the action.[182]

---

178. *See generally Special Issue on Pro Se Litigation, supra* note 8; *see, e.g.*, Cordisco, *supra* note 25, at 18 (describing innovative efforts by the District of Nevada to use "triage hearings" in pro se civil rights cases).

179. *See* Charles V. Craver, *The Use of Non-Judicial Procedures To Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141 (2001). *But see* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2176 (1993) (arguing that court-annexed programs "will tend to systematically disadvantage poorer and more risk-averse litigants, precisely the litigants the programs were designed to help"); Schwarzer, *supra* note 177, at 16 ("ADR is rarely practical or successful in cases brought by prisoners and other pro se litigants.").

180. *Compare* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989), *with* Matthew Diller & Nancy Morawetz, *Intracircuit Non-acquiescence and the Breakdown of the Rule of Law; A Response to Estreicher & Revesz*, 99 YALE L.J. 801 (1990).

181. *See* JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 33 (1995) (calling for the collection and study of data regarding pro se filings in the federal courts); *see, e.g.*, Michael E. Penick & James G. Woodward, Expanded Utilization of Federal Magistrate Judges: Lessons from the Eastern District of Missouri (1998) (unpublished manuscript, on file with Lois Bloom, United States District Court, Eastern District of New York) (reporting on one federal district court's case management approach to magistrate judges).

182. "Judges expect to play the traditional role of passive arbiter in the litigation process, and operate on the assumption that attorneys representing the parties will invoke the appropriate procedural rules and rules of evidence on behalf of their clients in the pretrial and trial stages of litigation." GOLDSCHMIDT ET AL., *supra* note 9, at 3. Commentators tend to discuss the adversary

"Americans tend to assume," one federal judge explains, "that an impartial judge must be a passive judge, to whom the case is brought and before whom the case is constructed by the parties."[183] Impartiality as passivity prevents the judge from "prematurely committing himself to one version of the facts," and also serves "to convince society that the judicial system is trustworthy."[184]

The conventional view assumes that the parties possess adequate resources to present and defend their positions. Indigent pro se litigants, however, suffer significant structural disadvantage when they appear before the court, lacking the equipage needed for an effective presentation.[185] Mirjan R. Damaska, for example, emphasizes the fact that "there is relatively little an untutored person can extrapolate from his or her ordinary life experience that can be used in forensic proof-taking without

---

system in heroic terms. See, e.g., Frank A. . Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269, 270 (1978) ("Those of us who believe that the common law has produced the finest (though far from perfect) system of justice which man has yet devised are committed to the adversarial rather than the inquisitorial approach.").

183. Justice, *supra* note 12, at 7; *see also*, Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983) ("The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute. . . .").

184. Landsman, *supra* note 184, at 714; *see* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 538 (1994) ("The ABA's Model Code of Judicial Conduct and the federal statute governing the conduct of federal judges mandate impartiality."). Adversarial assumptions form the basis of ethical codes that govern judicial conduct. *See* George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 323 (1998) ("[I]n the codes of judicial conduct of many states, the rules or commentaries provide that judges may not independently investigate facts in a case and must consider only the evidence presented at trial.").

185. *See, e.g.*, Hiram E. Chodosh et al., *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. INT'L L. & POL. 1, 28–29 (1997–1998) ("[T]he adversarial model appears poorly designed to meet the needs of a . . . population with widespread poverty, illiteracy, and unfamiliarity with formal legal procedure."). P. N. Bhagwati writes:

> Where one of the parties to a litigation is weak and helpless and does not possess adequate social and material resources, he is bound to be at a disadvantage under the adversarial system, not only because of the difficulty in getting competent legal representation, but more than anything else because of the inability to produce relevant evidence before the Court.

Judicial Activism and Public Interest Litigation, 23 COLUM. J. TRANSNAT'L L. 561, 573 (1985).

much lawyerly intermediation."[186] Similarly, a recent empirical study of pro se prisoner petitions in the Eastern District of California reports that the absence of counsel is "one of the most difficult aspects" of these cases because the plaintiffs "often file complaints that are difficult to decipher . . .; often make procedural errors, engage in inappropriate ex parte correspondence with the court, or require clarification of the court's orders."[187] The pro se litigant thus places the conscientious judge on the horns of a dilemma: the court can ignore the claimant's obvious position of disadvantage, adhering as a formal matter to ethical norms;[188] or the court can intervene in ways that attempt to ensure a fair and accurate result but deviate from the norm of passivity.[189] As Russell Engler observes, "Despite the vast number of unrepresented litigants, and the significant impact on the courts in which the unrepresented litigant is the norm, the roles of the players remain largely those developed for an idealized world in which all litigants are represented by lawyers."[190]

Commentators recognize, however, that the formal ideal of adversarial justice does not accurately describe the U.S. court system as it operates in practice. Not only do they question the

---

186. MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 11–12 (1997).

187. Mueller, *supra* note 20, at 1280 (quoting ALDISERT REPORT, *supra* note 28, at 21) (quotation marks omitted).

188. *See, e.g.*, Canon 3B(7) of the 1990 CODE OF JUDICIAL ETHICS (stating in the Commentary that "a judge must not independently investigate facts in a case and must consider only the evidence presented"), quoted in Marlow, supra note 185, at 292 (1998); *see also* Weinstein, *supra* note 185, at 539 ("A rigid conception of the judge as presiding passively and neutrally over an adversarial proceeding in which the litigants bear the whole burden of presentation is sometimes inaccurate and unwise.").

189. As stated by Goldschmidt et al.:

> The judge who provides any form of assistance to a self-represented litigant whose adversary is represented risks being accused of unfairness by the opposing attorney. Yet, by maintaining complete passivity when a self-represented litigant makes errors jeopardizing the claim or defense sought to be made, some would argue that the judge runs afoul of the meaningful hearing requirement of the due process clause and the rights of access to the court, self-representation, and an open court.

GOLDSCHMIDT ET AL., *supra* note 9, at 25; *see also* Engler, *supra* note 178, at 1987–88 ("Some lawyers and judges even express concern that unrepresented litigants are using their status to gain an unfair advantage over represented parties, who are trying to play by the rules.").

190. Engler, *supra* note 178, at 1988; *see also* Duniway, *supra* note 15, at 1285–86 (observing that an indigent litigant with a meritorious claim "needs legal advice before he ever gets to court; he needs to have his case investigated and prepared. These are not things that the courts can or should be expected to do for him.").

bright line distinction between adversarial and inquisitorial justice,[191] but they also emphasize the "many nonadversarial elements [that] have become important parts of the American adjudicatory system."[192] Managerial judging is now a conventional aspect of the U.S. judicial function[193] and involves the court in many activities that do not fit the adversarial model.[194] Some state judicial systems have adopted rules and regulations to govern pro se matters in specialist courts that require the presiding judge to depart from the passive umpire's role.[195] And judges presiding over mass tort cases have been said to "have sneaked away from the traditional U.S. adversarial model of justice, . . . not by design, but by necessity and ad hoc innovation."[196] As one state court judge explains: "the heavy responsibility of ensuring a fair trial in . . . [a pro se matter] rests directly on the trial judge . . . . [T]he judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not

191. Although the terms "passive" and "active" recur in the literature, many proceduralists question the stark division these categories suggest. *See, e.g.*, J.A. Jolowicz, *The Active Role of the Court in Civil Litigation*, *in* PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION 157, 157–68 (Mauro Cappelletti & J. A. Jolowicz eds., 1975) ("Neither the 'absolutely active' nor the 'absolutely passive' judge is even theoretically possible, and every legal system is bound to strike a balance between the two extremes . . . ."). *Id.* at 157; Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM L. 1, 13 (1995) (noting "considerable confusion" in the distinction between adversarial and inquisitorial legal systems); Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 125 (1999) ("The distinctiveness of the American 'common law' trial process in civil cases from that of European continental 'civil law' countries is a generally accepted, but too infrequently questioned, truism.").

192. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301, 301–02 (1989).

193. *See* SERON, NINE CASE STUDIES, *supra* note 69, at 15 (stating in 1985 that "[i]ncreasingly, judges are being called upon to remove their 'umpire's' hat and take more active and direct control over their cases—to monitor and to manage their cases") (internal citation omitted)).

194. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing and criticizing this trend).

195. *See, e.g.*, FL. SM. CL. R. RULE 7.140 (providing that the court shall assist unrepresented parties with "order of presentation of material evidence); MASS. R. SM. CL. RULE 7(c) (requiring court to "conduct the trial . . . as it deems best suited to discover the facts and do justice in the case").

196. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999). *But see* Adam J. Siegel, Note, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 198–212 (2000) (criticizing this trend).

require pointing out."[197] Federal administrative law judges similarly have a regulatory duty to assist unrepresented litigants that includes a "basic obligation to develop a full and fair record."[198]

In a number of contexts, courts and commentators are thus coming to recognize the authority, if not the responsibility, of a judge to depart from the ethical norms of adversarial justice in order to ensure a fair and accurate result and, in particular, to take an activist stance in cases involving unrepresented litigants.[199] To the extent that specialized courts are themselves a deviation from adversarial norms,[200] they create a different context within which to assess the judge's ethical obligations. At the same time, however, commentators caution against the wholesale removal of adversarial constraints on the judicial role, urging the development of alternative guidelines for appropriate behavior.[201]

The Eastern District of New York has recognized the special circumstances that particular stages of litigation present for pro se litigants. For example, summary judgment motions are often filed in employment discrimination cases when the defendant-employer has proffered a legitimate non-discriminatory reason

197. Oko v. Rogers, 466 N.E.2d 658, 661 (Ill. App. Ct. 1984).

198. Lashley v. Sec'y of Health & Human Servs., 708 F.2d 1048, 1051 (6th Cir. 1983) (internal quotation marks omitted). Courts refer to the "dual hats" of adjudicator and investigator that the administrative law judge wears, but emphasize that the ALJ is not an advocate. *See* Richardson v. Perales, 402 U.S. 389, 410 (1971) ("Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."); Pastrana v. Chater, 917 F. Supp. 103 (D.P.R. 1996) (reversing decision of biased administrative law judge); Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 297–98 (1997) ("Unlike her adversarial counterpart, the Administrative Law Judge is . . . active, with a scope of inquiry fundamentally co-extensive with that of the individual whose claim now appears before her.").

199. *See* Schwarzer, *supra* note 177, at 16 (describing an activist role for federal judges in pro se cases). Indeed, one Article III judge justifies an interventionist approach to pro se prison litigation as a way to preserve traditional adjudicative forms: "If I was an activist judge in the initial phases of the case, that activism really came from a straightforward commitment to the traditional goals of adjudication, in a situation in which the necessary balance of forces that underlies the traditional concept of adjudication did not exist." Justice, *supra* note 12, at 9.

200. *See* Sward, *supra* note 193, at 338 ("Special courts might . . . be seen as a non-adversarial development in adjudication. Judges in specialized courts acquire expertise that may-indeed, is intended to-influence their decisions to some extent.").

201. *See* Weinstein, *supra* note 185, at 568 (acknowledging that adversarial norms "provide powerful boundaries to both discretion and abuse").

for taking the adverse employment action, and the plaintiff-employee cannot rebut the employer's "good faith" justification to prove discrimination in the hiring or firing decision.[202] By local rule, the district requires the party seeking summary judgment to give separate notice to a pro se plaintiff of the requirements for opposing such a motion and setting forth the consequences for failing to respond.[203] The new magistrate judge has likewise customized discovery procedures to meet the needs of her pro se employment discrimination docket by mandating the exchange of basic information, such as plaintiff's full personnel file, in lieu of the discovery plan contemplated by Rule 26(f) of the Federal Rules of Civil Procedure, recognizing, among other things, that requiring the presence of a pro se litigant at a conference to plan discovery may not be an efficient use of court time. Undoubtedly, other circumstances will arise on the magistrate judge's pro se docket that will require her to depart from adversarial assumptions and strike a balance among the requirements of fairness, impartiality, and efficiency.

CONCLUSION

In this Article, we have explored innovative efforts by one federal district to deal with the rise in pro se civil filings and the consequent pressures that these cases create for the courts. Whether the Eastern District of New York's approach improves access to justice must be revisited as the district acquires experience with the work of its new magistrate judge and its reorganized pro se office. In the meanwhile, lawyers can assist the courts in affording greater judicial access by providing pro bono services to those in need. They can also take a collective stance, by persuading bar associations to mandate community service requirements and lobbying the government for increased legal services funding.[204] Lawyers also share in a structural obligation,

202. At least one commentator urges that "litigants are entitled to at least be warned that when confronted with a motion for summary judgment they must obtain counter-affidavits or other evidentiary material to avoid the entry of judgment against them. Biro, *supra* note 65 (citing Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975)). However, "courts do not have a duty to inform a pro se litigant of the need to respond to a motion for summary judgment." *Id.*

203. S.D.N.Y. CIV. R. 56.2; E.D.N.Y. CIV. R. 56.2.

204. David Luban writes:

> The obligation to perform pro bono service and the obligation to engage in law reform activities . . . are familiar and important parts of the American landscape of American legal ethics . . . . It is not entirely right to describe these as uncontroversial parts of legal ethics, because the bar as a long history of resisting proposals for mandatory pro bono service, and the Supreme Court has upheld the First Amendment

to evaluate existing institutions to ensure that the basic court structure meets the demands of justice as those demands evolve and change. As Liam B. Murphy explains: "[T]he responsibility that people have in respect of justice must be to support and bring about just institutions . . . . Since institutions are not agents and don't actually have any responsibilities at all, it is only people who can ensure that institutions satisfy principles of justice."[205]

The Eastern District of New York's approach to pro se litigation is no doubt imperfect,[206] raising vexing questions about the future role of the Article III courts and the appropriate use of federal judicial power. But given nonideal conditions and imperfect alternatives, the use of a special magistrate judge to oversee the pro se docket warrants further consideration as an experiment in institutional adaptation. Even with the problems of specialization, the assignment of pro se cases to a single magistrate judge may provide greater attention to the problems of pro se litigants and so increase the possibility of developing systemic solutions. We hope that this Article generates further discussion about the needs of pro se litigants and of the ways that the federal courts might evolve to move us closer to the ideal of equal justice for all.

---

right of protesting lawyers to a rebate of that portion of their mandatory bar dues used on law reform activities with which they disagree."

David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 955–56 (1995).

205. Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF., 251, 271 (1999).

206. *See generally*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949). Frank writes:

> I see defects that I believe can be eradicated, but that will never be intelligently dealt with unless they are publicized. On the other hand, I have no fatuous notion that the judicial process can be made perfect. It is a human process, involving inherent human failings and weaknesses. Yet its substantial betterment is nevertheless possible. Indeed, to better it, requires recognition of its unavoidably human, fallible, character.

Id. at 2.