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The Danger of Nonrandom Case Assignment: How the S.D.N.Y.'s 'Related Cases' Rule Has Shaped the Evolution of Stop-and-Frisk Law

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**THE DANGER OF NONRANDOM CASE ASSIGNMENT:
HOW THE SOUTHERN DISTRICT OF NEW YORK’S “RELATED CASES” RULE HAS
SHAPED THE EVOLUTION OF STOP-AND-FRISK LAW¹**

-ABSTRACT-

The Southern District of New York’s local rules are clear: “[A]ll active judges . . . shall be assigned substantially an equal share of the categories of cases of the court over a period of time.” Yet for the past fourteen years, Southern District Judge Scheindlin has been granted near-exclusive jurisdiction over one category of case: those involving wide-sweeping constitutional challenges to the NYPD’s stop-and-frisk policies. In 1999, Judge Scheindlin was randomly assigned *Daniels v. City of New York*, the first in a series of high-profile and high-impact stop-and-frisk cases. Since then, she has overseen an uninterrupted stream of equally landmark stop-and-frisk cases, which culminated in an August 12, 2013 order granting a sweeping injunction against the NYPD. The cases were assigned according to the Southern District’s “related cases” local rule, which allows judges to “accept” a new case related to an earlier-filed case already on their docket. Unlike past stop-and-frisk scholarship, this article addresses the procedural rules that have shaped the development of stop-and-frisk law, arguing that case assignment rules should not permit any district judge to exert total control over the evolution of significant Constitutional jurisprudence.

The article begins by challenging the commonly-held assumption that federal cases are assigned to district judges at random. It explains that although random assignment is widely assumed and generally heralded, it is not enforceable. Instead, district courts retain discretion to assign cases as they wish, with little (if any) obligation for transparency. The article looks specifically to the Southern District of New York’s Local Rules, examining the numerous ways in which cases are assigned to specific judges according to the cases’ subject matter, through a system hidden from the public and devoid of oversight. The article then traces stop-and-frisk litigation from its roots in *Terry v. Ohio* to the complex and protracted stop-and-frisk cases filed in federal courts across the country today. It explains how police have utilized stop-and-frisk practices before and after *Terry*, focusing on the Giuliani-era theory of “hot-spot policing.” The article turns to the stop-and-frisk litigation before Judge Scheindlin, using it to examine the serious—and substantive—consequences of nonrandom case assignment in an adversary system. Nonrandom assignment allows an interested judge to inject herself into the litigation as a player with a stake in the outcome. Giving one district judge power over an entire category of Fourth Amendment jurisprudence elevates her decisions to a quasi-appellate level of significance, violating the principle that a district court opinion is not binding on any court within the same district. The article proposes amendments to the Southern District’s Local Rules to prohibit manipulation of case assignments, and advocates for the publication of assignment decisions as well as for motion practice challenging the assignments. Finally, it warns of the impact Judge Scheindlin’s control over this area of the law may have if appealed to the Supreme Court. Her decisions take a broad view of a plaintiff’s right to enforce the Fourth Amendment. Yet because her interpretation is so broad, her decisions may be reversed, and the rights at stake narrowed.

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I. INTRODUCTION

The verdict on the NYPD's stop-and-frisk policies has been rendered. On August 12, 2013, in a 198-page order that followed a three-month bench trial, Southern District of New York Judge Scheindlin granted a sweeping injunction against the NYPD, ordering changes to NYPD policies and activities, appointing a monitor to oversee stop-and-frisk practices, requiring a "community-based joint remedial process to be conducted by a court-appointed facilitator," and, most remarkably, requiring the NYPD to place body-worn cameras on its police officers.² The verdict received worldwide attention. But this was not Judge Scheindlin's first stab at a wide-sweeping, high-impact stop-and-frisk decision. Despite the mountain of attention paid to New York City's stop-and-frisk practices and the litigation before Judge Scheindlin, it has gone remarkably unnoticed that the same judge has held court over a stream of similar cases for the past fourteen years.

How can this be? After all, the Southern District of New York's local rules are clear: "all active judges, except the chief judge, shall be assigned substantially an equal share of the categories of cases of the court over a period of time."³ Yet time and time again, cases involving wide-sweeping constitutional challenges to the NYPD's stop-and-frisk policies have been assigned to Judge Scheindlin.⁴ In 1999, she was randomly assigned *Daniels v. City of New York*, the first in a series of high-profile and high-impact stop-and-frisk cases. In the fourteen years that followed *Daniels*' filing, Judge Scheindlin

² *Floyd v. City of New York*, 08-cv-1034-SAS-HBP, Doc. 373 at 15 (Aug. 12, 2013).

³ LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, RULES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES, SOUTHERN DISTRICT ("DIVISION OF BUSINESS RULES"), RULE 1.

⁴ Joseph Goldstein, *A Court Rule Directs Cases Over Friskings To One Judge*, N.Y. TIMES, May 6, 2013, at A16.

has held court over an uninterrupted stream of additional and equally landmark stop-and-frisk cases, but not through random case assignment procedures. Instead, cases have been directed her way through the Southern District’s “related cases” rule. The rule allows judges to “accept” later-filed cases if they are related to an earlier-filed case already on their docket.⁵ The decision to accept or reject the newly-filed case is within the “sole discretion” of the judge who received the earlier-filed case.⁶

While such “discretion” may sound innocuous enough, in application, it can create serious structural problems. Leaving the decision to accept or reject so-called “related cases” to the sole discretion of one judge, who will make the decision based on an understanding of the facts alleged in the later-filed case, as well as by evaluating its subject matter, injects that judge into the cases as something other than a neutral arbiter. The procedure allows litigation to be steered to a jurist with an interest in the case’s outcome. This article contends that case assignment procedures should not permit any district judge to handpick high-impact litigation.

The article begins by examining the commonly-held assumption that federal cases are assigned to district judges at random after they are filed. It surveys the rare documented instances in which nonrandom assignment has been challenged, concluding that though random assignment is heralded, parties have no right to demand it. Instead, district courts retain broad discretion to direct the manner in which cases are assigned to their judges. In this context, the article looks to the Southern District of New York’s Local Rules, examining the numerous ways in cases are assigned pursuant to their subject matter, through a system hidden from the parties, and devoid of oversight.

⁵ See DIVISION OF BUSINESS RULE 13.

⁶ *Id.* at Rule 13(a).

The article then traces stop-and-frisk litigation, from *Terry v. Ohio* to the politically charged, complex and protracted stop-and-frisk litigation fought in federal courts around the country today. It also explains how police have utilized stop-and-frisk practices before and after *Terry*, focusing in particular on the Giuliani-era theory of “hot-spot policing.” With these procedural and substantive backgrounds in mind, the article next turns to the Section 1983 stop-and-frisk litigation in the Southern District of New York. It documents how, over the course of fourteen years, landmark stop-and-frisk cases have been repeatedly assigned to the same judge.

The article then examines the grave consequences nonrandom case assignment has and will have in the Southern District’s stop-and-frisk litigation. First, it contends that the related cases rule threatens the adversary system, allowing an interested judge to inject herself into the litigation as a player with a stake in the outcome. Second, it contends that the appearance of impartiality created by nonrandom case assignment is reason alone to halt the practice. Third, it argues that giving one district judge power over an entire category of Fourth Amendment jurisprudence elevates that judge’s decisions to a quasi-appellate level of significance within the Southern District itself, violating the principle that a district court opinion is not binding on any court within the same district. The article proposes amendments to the Southern District’s local rules. The changes would make random case assignment the default procedure, and prohibit subject-matter specific manipulation of judges’ dockets. It also advocates making all assignment decisions public and subject to challenge from the parties involved.

Finally, the article concludes with a warning. Delegating Fourth Amendment litigation to one jurist with an arguable interest in the plaintiffs’ position may lead to a

plaintiff-friendly rule at the District Court level, but may also increase the chances for appeal and eventual reversal at the Supreme Court, unintentionally broadening the very police practice the plaintiffs before Judge Scheindlin seek to narrow.

II. RANDOM ASSIGNMENT OF CASES IS VENERATED BUT UNENFORCEABLE, AND SUBJECT TO NUMEROUS EXCEPTIONS

A. Random Assignment: An Honored Practice Assumed To Be The Norm

That fourteen-years-worth of significant stop-and-frisk cases have been assigned to Judge Scheindlin suggests that all federal cases are not assigned at random. Yet the notion that a case filed in a federal district court is assigned at random to a district judge is pervasive. Treatises and legal scholarship assume random assignment.⁷ There is even a stock description of how the process occurs: after a case is filed, physical and literal wooden wheels, filled with index cards upon which the names of each district judge is printed, spin around and around, until the court clerk approaches the wheel and randomly draws a card, thus selecting the judge who will preside over the just-filed case.⁸

Not only is random assignment assumed to be the *status quo*, is also a popular, venerated practice. Southern District of New York Judge Denise Cote describes it as “a

⁷ See, e.g., 2 N.Y.P.RAC., COM. LITIG. IN NEW YORK STATE COURTS § 11:5 (3d ed. 2012) (New York “federal and state courts . . . use an ‘individual assignment system’ in which a judge is randomly assigned ‘off the wheel’ upon the filing . . . of a complaint, or, in state court, of a request for judicial intervention.”); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 812 (2012) (“Both circuit courts and district courts rely on random assignment to match cases with judges.”); Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1010 (2010) (“Judicial assignment is conducted randomly in federal district courts”); Richard Marcus, *Still Confronting the Consolidation Conundrum*, 88 NOTRE DAME L. REV. 557, 587 (2012) (“[T]he federal courts rely on a random assignment system”). Marcus is the Associate Reporter of the Judicial Conference of the United States’ Advisory Committee on Civil Rules.

⁸ Arnold H. Lubasch, *Judge-Shopping in Federal Court: Lawyers’ Quest for Leniency*, N.Y. TIMES, March 4, 1987, at B1; Goldstein, *supra* note 4 (“After an attempted police stop in 1999 led to the shooting of an unarmed Guinean immigrant named Amadou Diallo, a civil-rights group sued the New York Police Department . . . [f]rom one of the wooden wheels used to assign cases in Federal District Court in Manhattan, a judge’s name was drawn: Shira A. Scheindlin.”).

beautiful thing” that makes her docket “rich and varied.”⁹ The Judicial Conference, a committee comprised of the chief judge of each circuit and a district judge from each circuit,¹⁰ has a “long-standing position” in favor of the random assignment of federal cases.¹¹

At least part of the reason why random assignment is widely assumed is that it is sensible. In theory at least, the practice serves several important goals. First—and most practically—it divvies up a district’s docket, assigning an equal number of cases to each judge.¹² Second, it prevents any party from shopping for one judge over another.¹³ Third, it prohibits any judge from lobbying for a particular case¹⁴—a good idea, as a judge who lobbies for a particular case may have a particular interest in a particular outcome.¹⁵ Fourth, random assignment is also favored by judges who want to remain generalists, rather than be forced to specialize in, for example, patent litigation. A generalist docket permits the cross-fertilization of ideas; a judge may “look[] at cases

⁹ Hon. Denise Cote, *Making Experts Count*, 58 J. COPYRIGHT SOC'Y U.S.A. 223, 223 (2011).

¹⁰ JUDICIAL CONFERENCE OF THE UNITED STATES, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited July 9, 2013) (“The Conference of Senior Circuit Judges [renamed in 1948 as “the Judicial Conference of the United States] was created by Congress in 1922, to serve as the principal policy making body concerned with the administration of the U.S. Courts . . . [T]he fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the U.S. courts.”). JUDICIAL CONFERENCE OF THE UNITED STATES, MEMBERSHIP, <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> (last visited July 9, 2013) (“The Chief Justice of the United States is the presiding officer of the Judicial Conference. Membership is comprised of the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit.”).

¹¹ *Legislation Update: Bills Focus on Security, Cameras and Patents*, 39 THIRD BRANCH 4, 4 (Apr. 2007).

¹² “The system is designed to have an equal number of cases assigned to each judge over a period of time.” Brooke Terpening, *Practice Makes Perfect? An Empirical Analysis of H.R. 5418*, 4 FIU L. REV. 287, 315-16 (2008); *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (“[B]ind, random draw selection process . . . prevents judge shopping by any party, thereby enhancing public confidence in the assignment process”).

¹³ Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 292-93 (1996); Taha, *supra* note 8, at 1010 (as a result of random assignment, cases that result in outcomes that one party considers politically undesirable are the result of bad luck).

¹⁴ Theodore Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 364 (2005).

¹⁵ See, e.g., Jonathan R. Macey, *Judicial Preferences, Public Choice, and The Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994).

from one field and realize[] how an earlier decision in which [she] participated from a different field may suggest a creative answer to the problem.”¹⁶

Legal and lay respect for random assignment is further confirmed by the rare instances when the practice was not honored—indeed, deviation from random assignment in high-profile cases can result in public outrage and congressional scrutiny. In 1999, Judge Norma Holloway Johnson, Chief Judge of the U.S. District Court for the District of Columbia, chose to assign criminal cases against so-called “presidential friends” Webster Hubbell and Charlie Trie to judges appointed by then-President Clinton, as opposed to having their cases randomly assigned.¹⁷ Hubbell was accused of tax evasion, whereas Charlie Trie was accused of violating campaign finance law.¹⁸

Though local court rules permitted Judge Johnson to assign protracted cases like the Hubbell and Trie matters to specific judges she believed had enough bandwidth to handle them, Judge Johnson was aggressively criticized for her supposed “impartial administration of justice.”¹⁹ Orrin Hatch, then acting Senate Judiciary Chairman, asked Chief Justice Rehnquist to consider investigating why “two cases involving President Clinton's friends were assigned to Clinton-appointed judges.”²⁰ Hatch also expressed concern that the incident “may have repercussions on the public's confidence in the impartial administration of justice by the federal courts.”²¹

The District of Columbia Circuit’s Judicial Council asked a committee of trial and appellate judges to investigate Judge Johnson’s actions; the committee hired a

¹⁶ Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

¹⁷ Pete Yost, *Hubbell and Trie Cases Weren’t Randomly Assigned*, PHILA. ENQUIR., Aug. 1, 1999 at A02.

¹⁸ Bill Miller, *Judge Is Cleared of Impropriety; No Political Motive Found in Assignment of Sensitive Cases*, 2001 WLNR 13711689, WASH. POST, Feb. 27, 2001.

¹⁹ *Id.*

²⁰ Janelle Carter, *Hatch Asks for Probe of 2 Case Assignments*, NEW ORLEANS TIMES PICAYUNE, Aug. 6, 1999, at A4.

²¹ *Id.*

Republican former U.S. attorney to conduct interviews and issue a report.²² His report concluded that there was no evidence of a partisan “plot or scheme.”²³ Nevertheless, following the investigation, the District of Columbia rescinded the rule that permitted nonrandom case assignment in protracted litigation, and ordered that random assignment be followed.²⁴ In other words, even though no bias or wrongdoing was found, the mere appearance of impropriety and the arguable potential for bias was enough to scuttle the rule.

Moreover, even after the rule change, the scrutiny of Judge Johnson’s actions persisted. Judicial Watch, a conservative watchdog group particularly interested in the Clinton Administration and any individual associated with it, brought a complaint of judicial misconduct against Judge Johnson pursuant to the Judicial Council Reform and Judicial Conduct and Disability Act of 1980,²⁵ a statute designed to ensure that federal judges “will not ‘engage[] in conduct prejudicial to the effective and expeditious administration of the business of the courts.’”²⁶ The complaint alleged that Judge Johnson had departed from random assignment in criminal cases brought against “friends of the president,” steering them to judges appointed by Clinton so as to “tilt the cases in the administration’s favor.”²⁷ The Chief Judge of the District of Columbia Circuit, to whom the complaint was assigned, swiftly dismissed the allegation, explaining that local rules permitted nonrandom assignment of protracted cases in order to efficiently dispose of the court’s business.²⁸ However, the Chief Judge did note that the local rule allowing

²² Miller, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

²⁵ 28 U.S.C. § 372(c)(1) (1994) (section (c)(1) *repealed* 2002).

²⁶ *In re Charge of Judicial Misconduct or Disability*, 196 F.3d 1285, 1287 (D.C. Cir. 1999).

²⁷ Stephen L. Wasby, *Legal Notes*, 21 JUST. SYS. J. 323, 331 (2000).

²⁸ *Id.*

nonrandom assignment, and “the absence of ‘objective standards to govern the rule’s use,’” made ‘both actual and perceived abuses’ possible.”²⁹

B. There Is No Right To Random Assignment

Even though random assignment of newly-filed federal cases purportedly inspires public confidence in the judiciary, and deviation inspires public outrage, random assignment is not an enforceable right, even in the criminal context.³⁰ Case assignment rules are dismissively referred to as “housekeeping” measures that vest litigants with no rights.³¹ The only relevant case assignment statute provides district courts with the power to write their own case assignment rules, described as “the business of a court.”³² The district court’s chief judge is responsible for ensuring that such rules are observed,³³ and because the district court is making and applying its own rules, parties have no mechanism to require the district court to assign cases randomly.

There is, however, a limited (and illustrative) exception: in the rare event that district judges cannot agree upon the adoption of case assignment rules, the governing circuit court intervenes and implements its own case assignment rules.³⁴ In this rare case, the district court itself is subject to rules from a supervening body (the circuit court), and if those rules require random assignment, this provides a litigant with a mechanism to demand random case assignment. This was the case in *Utah-Idaho Sugar Company v.*

²⁹ *Id.* at 332.

³⁰ *Bd. of Sch. Dirs. of Milwaukee v. Wis.*, 102 F.R.D. 596, 598 (D. Wis. 1984) (“The assignment of cases does not give or deny any litigant any due process rights.”); *United States v. Keane*, 375 F. Supp. 1201, 1204 (D. Ill. 1974) (criminal defendants have no due process right to the manner in which their cases are assigned).

³¹ J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges At The Court Of Appeals*, 78 TEX. L. REV. 1037, 1096 (2000).

³² 28 U.S.C. § 137.

³³ *Id.*

³⁴ *Id.*

Ritter,³⁵ in which a plaintiff succeeded in challenging the Chief Judge of the District of Utah's decision to assign the plaintiff's case to himself, instead at random.

In 1972, when *Utah-Idaho Sugar* reached the Tenth Circuit, the Utah District's "business of the court" had been supervised by the Circuit for nearly fifteen years; during that stretch of time, the judges sitting within the District of Utah could not agree upon case assignment rules.³⁶ The rules put in place by the Circuit "requir[ed] an equal and random division of civil cases" which "balanced and apportioned the criminal, bankruptcy, immigration and naturalization cases."³⁷

In 1971, the Chief Judge of the District of Utah empowered himself to overrule the Circuit's assignment procedures, assigning himself the power to distribute cases as he saw fit.³⁸ In so doing, he chose certain cases for himself, and assigned others.³⁹ The plaintiff's case was one he kept.

Although the judge's methods did not comply with the Circuit's rule of random assignment, this alone did not invalidate his actions. Because the District of Utah had only two judges, the Chief Judge and a non-Chief district judge, and these judges did not agree on the Chief Judge's procedures, the Circuit's rules controlled.⁴⁰ The Circuit's rules happened, by chance, to provide for random case assignment. If the two District of Utah judges had agreed that the Chief Judge had discretion to hold on to certain cases and assign out others, that rule would have controlled.

³⁵ 461 F.2d 1100, 1101-02 (10th Cir. 1972).

³⁶ *Id.*

³⁷ *Id.* at 1102.

³⁸ *Id.*

³⁹ *Id.* at 1104.

⁴⁰ 28 U.S.C. § 137.

As *Utah-Idaho Sugar* confirms, any perceived right to random assignment is illusory. District courts have broad discretion to assign cases as they see fit, and there is no mechanism for parties to challenge those decisions. Moreover, in the specific example of the Southern District of New York, as described below, not only is any “right” illusory, the many exceptions to random assignment permit judges to avoid entire categories of cases they do not wish to hear, and to actively seek out the ones they want.

C. The Southern District Of New York’s Case Assignment Rules Permit Judges To Choose Cases Based On The Cases’ Subject Matter

The Southern District of New York’s Rules for the Division of Business Among District Judges—which govern how cases are assigned after they are filed— appear to mandate random assignment, stating that “[e]ach civil and criminal action and proceeding, except as otherwise provided, shall be assigned *by lot* to one judge for all purposes,”⁴¹ and further providing that “all active judges, except the chief judge, shall be assigned substantially an equal share of the categories of cases of the court over a period of time.”⁴² This is the default rule in district courts across the country, from the Eastern District of New York⁴³ to the Central District of California.⁴⁴ Yet a close examination of the Southern District of New York’s rules reveals that random assignment can be easily overcome in practice.

1. *Case Assignment In The Southern District Is Overseen By A Committee, And Makes No Use Of A “Wheel”*

⁴¹ DIVISION OF BUSINESS RULE 1 (emphasis added).

⁴² *Id.*

⁴³ LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, GUIDELINES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES, EASTERN DISTRICT, RULE 50.2(b).

⁴⁴ C.D. CAL. GEN. ORDER NO. 08-04.

Though each Southern District case is purportedly assigned “by lot,” the “by lot” system is administered by an assignment committee, consisting of the district’s chief judge and two other district judges.⁴⁵ The assignment committee rules upon “all issues relating to assignments.”⁴⁶ The assignment committee’s membership and its decision-making processes are not made public. When a case is assigned to a district judge by the assignment committee, even the district judge to whom the case is assigned remains in the dark as to why he received the case.⁴⁷

The assignment committee also assigns cases by nonrandom procedures in circumstances not contemplated by the local rules. For example, the rules are silent as to how assignment of cases transferred from other districts into the Southern District should be handled. In 2010, Southern District of New York Chief Judge Preska selected the judge to whom 15 shareholder actions against Bank of America should be reassigned after Southern District Judge Chin, who was presiding over the cases, was appointed to the Second Circuit.⁴⁸ Bank of America was before Southern District Judge Rakoff on another matter at the time (brought by the SEC), and wrote Judge Chin, on the record, asking that the cases on his docket be reassigned by lot rather than to Judge Rakoff.⁴⁹ Following submission of that letter, Judge Preska assigned the cases to another judge in the District, Judge Castel. Preska insisted that Bank of America’s letter to Judge Chin had no influence over her decision, but rather were assigned to the judge of her choosing

⁴⁵ DIVISION OF BUSINESS RULES 1, 2.

⁴⁶ *Id.* at RULE 2.

⁴⁷ *See, e.g., In re Lion Capital Grp.*, 63 B.R. 199, 208 n.12 (S.D.N.Y. 1985) (noting that “[t]he actual assignment of this matter was done ‘pursuant to the instructions of the Assignment Committee,’” and that although “the assignment committee rules upon matters relating to assignments in accordance with these rules . . . [t]he considerations that led to this assignment are not known”).

⁴⁸ J. Robert Brown, Jr., *Non-Random Assignment of Federal Cases and Bank of America*, RACE TO THE BOTTOM, May 20, 2010, available at <http://www.theracetothebottom.org/miscellaneous/non-random-assignment-of-federal-cases-and-bank-of-america.html> (last visited July 22, 2013).

⁴⁹ *Id.*

because the cases were originally transferred into the Southern District from other districts.⁵⁰

2. *Certain Cases Are Expressly Exempt From Random Assignment*

Second, certain categories of civil actions and proceedings are exempt from random assignment. Applications for leave to proceed *in forma pauperis* (“IFP”) are expressly exempt from assignment by lot,⁵¹ though no corresponding rule addresses the manner in which the applications are actually assigned.⁵² Similarly, the assignment committee may certify a case as one requiring “extraordinary priority or a prompt trial or other disposition,” and allow the initially-assigned judge to decline the case.⁵³

3. *Senior Judges And Visiting Judges Can Avoid Entire Categories Of Cases*

Third, certain judges are permitted to select the number and category of cases they are willing to take. Perhaps the most important of these are the senior judges, who handle 15% of all cases in the federal courts.⁵⁴ Senior judges may request that they only receive new cases in limited subject matters, and may directly select the subject matter of the cases they are willing to accept on transfer from other districts.⁵⁵ Senior judges also have considerable discretion over their existing docket, and may furnish the assignment committee with a list of cases they want transferred off their respective dockets.⁵⁶

⁵⁰ *Id.*

⁵¹ DIVISION OF BUSINESS RULE 4(b).

⁵² One such application, made in *Liu v. Mount Sinai Sch. of Med.*, was granted by Chief Judge Preska, who was not presiding over the case in which IFP status was sought. 09-cv-9633-RJS, Dock. No. 1 (Nov. 20, 2009).

⁵³ DIVISION OF BUSINESS RULE 7.

⁵⁴ UNITED STATES COURTS, FREQUENTLY ASKED QUESTIONS, FEDERAL JUDGES, *available at* <http://www.uscourts.gov/Common/FAQS.aspx> (last visited July 18, 2013).

⁵⁵ DIVISION OF BUSINESS RULE 11.

⁵⁶ *Id.* at RULE 15.

Another significant category is visiting judges. A visiting judge assigned to the Southern District must advise the assignment committee of the number and category of pending cases he wishes to accept.⁵⁷ This is a somewhat puzzling rule, since, by statute, visiting judges may only be assigned to service in a district court in another circuit “upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.”⁵⁸ One might expect that a district’s certified necessity would arise with respect to specific cases and that the visiting judge would be expected to help relieve that burden, rather than dictate what types and number of cases he would be willing to hear.

4. *Patent Cases Can Be Rejected Following Initial Random Assignment, And Then Assigned To Specific Judges Willing To Preside Over Patent Cases*

Perhaps the best-known exception to random assignment is patent cases. A Patent Pilot Program inaugurated in November 2011 allows certain judges in the Southern District (and thirteen other “pilot” courts) who are randomly assigned patent cases to, thirty days after filing, decline the case and have it assigned by lot to one of ten district judges participating in the program.⁵⁹ Cases are then re-assigned to judges who requested to be designated as pilot patent judges.⁶⁰

⁵⁷ *Id.* at RULE 12.

⁵⁸ 28 U.S.C. § 292(d). This author suspects, based on anecdotal experience, that not every such visit is inspired by necessity—some districts are simply more pleasant than others in mid-winter. In at least one instance, a Chief Circuit Judge has refused to certify that a “necessity” required a visit from an out-of-circuit judge where “[n]either [Chief Circuit Judge] nor our Circuit Executive [were] been contacted by the Chief Judges of the [districts within our Circuit] representing that there’s a need for an out-of-circuit judge to handle these cases upon remand to their respective districts.” *In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1052 (9th Cir. 2013). “[O]ur first recourse is to try to fill the need by bringing in a visiting judge from another court within the circuit.” *Id.* at 1053.

⁵⁹ OFFICE OF THE DISTRICT EXECUTIVE, TEN SDNY JUDGES TO PARTICIPATE IN PATENT PILOT PROGRAM STARTING NOVEMBER 26, Nov. 3, 2011, available at http://www.nysd.uscourts.gov/file/news/patent_pilot_program_press_release. “The Pilot Program will be implemented over a ten-year period in fourteen pilot courts across the country In theory, as patent cases funnel to the pilot judges, these judges will hear more patent cases, which will increase their familiarity with patent law, potentially

5. *Judges Can Handpick Cases For Their Docket After The Cases Are Filed*

The most permissive rules governing nonrandom assignment allow “any judge, upon written advice to the assignment committee” to transfer any case, or any part of a case, “to any consenting judge” unless the transfer is due to disqualification or the fact that a judge “has presided over a mistrial or former trial of the same case,” in which case assignment by lot controls.⁶¹ This rule permits the consenting judge to agree to take a specific case onto his docket. Indeed, it permits the consenting judge to seek out such cases by asking a judge whether he is willing to give away the cases in question.

The transfer of related cases rules also allow a judge to preselect a case. An attorney filing a case that may be related to a previously-filed case must designate that case as related on a form that is served with the complaint.⁶² A case that is so designated is then “forwarded to the judge before whom the earlier-filed case is then pending.”⁶³ In determining relatedness, a judge may consider whether:

- (i) A substantial saving of judicial resources would result; or
- (ii) The just efficient and economical conduct of the litigations would be advanced; or
- (iii) The convenience of the parties or witnesses would be served.⁶⁴

However, these three criteria are not intended to limit the factors considered in determining relatedness; a judge may also take into account “a congruence of parties or witnesses or the likelihood of a consolidated or joint trial or joint pre-trial discovery.”⁶⁵

resulting in higher quality opinions more likely to ‘withstand appellate scrutiny.’” Etan S. Chatlynne, *On Measuring the Expertise of Patent-Pilot Judges: Encouraging Enhancement of Claim-Construction Uniformity*, 12 J. MARSHALL REV. INTELL. PROP. L. 309, 313 (2012-2013).

⁶⁰ *Id.* at 312 .

⁶¹ DIVISION OF BUSINESS RULE 14.

⁶² RULE 13(c)(i).

⁶³ RULE 13(c)(ii).

⁶⁴ RULE 13(a).

⁶⁵ *Id.*

Despite the criteria governing relatedness, the judge to whom the potentially related case is forwarded “has the sole discretion to accept or reject the case.”⁶⁶ Indeed, Rule 13, the “Transfer of Related Cases” rule, cross-references Rule 14, which permits transfer of cases by consent, stating that “[n]othing in [Rule 13] limits the use of Rule 14 for reassignment of all or part of any case from the docket of one judge to that of another by agreement of the respective judges.”⁶⁷ Combined, these two rules permit judges to transfer cases to each other, whether the case being transferred is related to one already existing on the transferee judge’s docket, or not.⁶⁸

The remainder of this article addresses the practical application and substantive consequences of the last of these categories—the “related cases” rule—in one category of case (so-called “stop-and-frisk” litigation) in one court (the Southern District of New York).

III. THE EVOLUTION OF STOP-AND FRISK LITIGATION: FROM *TERRY V. OHIO* TO MODERN CHALLENGES TO NEW YORK CITY POLICING

A. *Terry v. Ohio* Holds that Stop-and-Frisk Policing Practices Are Constitutional Even In The Absence Of Probable Cause

Over thirty years before *Daniels v. City of New York* was filed in the Southern District of New York, the Supreme Court addressed whether the Fourth Amendment requires that police officers have probable cause to stop, question and frisk people they encounter on the street.⁶⁹ *Terry* is often viewed as having legitimized and opened the door to more intrusive police practices—though, of course, *Terry* addressed police

⁶⁶ RULE 13(c)(ii).

⁶⁷ *Id.*

⁶⁸ Similar rules apply to motions for collateral relief under 28 U.S.C. § 2254, and motions for the return of property seized in a criminal case. RULE 9(a). Though these categories of motions also raise the case assignment manipulation issues addressed in this article, they are themselves beyond its scope.

⁶⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

practices that were already in force. In the decades preceding *Terry v. Ohio*, police officers across the country routinely stopped, questioned and frisked individuals without probable cause or arrest warrants.⁷⁰ The practice was commonplace, and *Terry* is better understood as having legitimized that status quo.⁷¹

Terry examined the observations made by Detective Martin McFadden on the streets of downtown Cleveland. McFadden noticed Richard Chilton and John Terry behaving “suspiciously” and believed that they were casing out a business to later rob it; these observations led him to stop and search the two men. McFadden found a gun on both, and arrested them.⁷² In a pretrial motion, Terry and Chilton argued that the frisk performed by McFadden was an arrest without probable cause, and, therefore, the evidence recovered should be suppressed.⁷³ The motion was denied, and both were convicted.⁷⁴

The *Terry* Court acknowledged that it faced “serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.”⁷⁵ It also noted that it was scrutinizing a “sensitive area” of police conduct, and carefully weighed the dueling

⁷⁰ John Q. Barrett, *Terry v. Ohio*, in CRIMINAL PROCEDURE STORIES 299 (Carol S. Steiker ed., 2006).

⁷¹ *Id.* at 300. In her seminal book on race and the criminal justice system, Professor Michelle Alexander argues that, “[o]nce upon a time, [before *Terry*,] it was generally understood that police could not stop and search someone without a warrant without probable cause.” Michelle Alexander, THE NEW JIM CROW 63 (2010). After *Terry*, she contends, “stops, interrogations, and searches of ordinary people driving down the street, walking home from the bus stop, or riding the train, have become commonplace—at least for people of color.” *Id.* at 63-64. However, the notion that *Terry* inaugurated, rather than legitimized, an era of unconstitutional police stops, is belied by Alexander’s own detailed account of the history of racist police tactics targeting minorities pre-*Terry*, as well as her account of the mobilization of “white opposition” to the Civil Rights movement. *Id.* at 40. Though there is no evidence this author is aware of suggesting that *Terry* improved the plight of people of color confronting discriminatory police practices, it is naive to suggest that probable cause was successfully combatting such practices before *Terry*.

⁷² Barrett, *supra* note 70, at 297-98.

⁷³ *Id.* at 300.

⁷⁴ *Terry*, 392 U.S. at 4-8.

⁷⁵ *Id.* at 4.

interests—the “dangerous situations on city streets” versus the “intrusion[s] upon protected personal security.”⁷⁶ The Court foreshadowed the nature of future litigation, acknowledging the argument that stop-and-frisk tactics “exacerbate police-community tensions in the crowded centers of our Nation's cities.”⁷⁷ In the end, the balance tipped in favor of perceived policing needs. Following *Terry*, an individual suspected of criminal activity may be briefly detained based on “reasonable suspicion,” that is, less than probable cause.⁷⁸

B. The Aftermath Of *Terry*'s Conspicuous Silence Regarding Race-Based Motives For Police Stops

Terry and Chilton were African-American, and Detective McFadden, white. These facts were explicit during the *Terry* oral argument, but absent from the Court's opinion,⁷⁹ which is conspicuously silent on the question of whether McFadden had race-based reasons for his suspicions.⁸⁰ *Terry* did pause to acknowledge that “certain elements of the police community” had engaged in “[t]he wholesale harassment” of minority groups.⁸¹ Still, according to the Court, the harassment “[would] not be stopped by the exclusion of any evidence from any criminal trial.”⁸²

Terry's critics argue that requiring probable cause to stop-and-frisk might have halted the police practice of using race-specific reasons to choose whom to stop and frisk.⁸³ Indeed, *Terry*'s silence as to race-based suspicion arguably opened the door to

⁷⁶ *Terry*, 392 U.S. at 9-10; 11-12.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 30-31.

⁷⁹ Barrett, *supra* note 70, at 302.

⁸⁰ McFadden testified at the suppression hearing that upon first spotting the men, he “didn't like them;” however, at the Supreme Court oral argument, during an exchange with Justice Marshall, a race-neutral explanation was provided for McFadden's suspicions, and the issue was dropped. *Id.*

⁸¹ *Terry*, 392 U.S. at 14.

⁸² *Id.* at 14-15.

⁸³ See Alexander, *supra* note 71, at 133.

future Fourth Amendment jurisprudence *permitting* the consideration of race in *Terry* stops, as well as in more intrusive seizures.⁸⁴ There remains no Fourth Amendment exclusion remedy for searches and seizures based solely on race.⁸⁵ Moreover, the police's perceived authority to rely on "race-dependent criteria" has only served to increase feelings of "racial grievance" against law enforcement.⁸⁶

C. Policing Post-*Terry*: New York City's Targeting Of Crime "Hot Spots" And The Perception That Stop-and-Frisk Is Racial Profiling

According to former New York City Police Commissioner William Bratton, "[s]top, question and frisk" is a practice that has been around "forever."⁸⁷ It is "a basic tool," "the most fundamental practice in American policing."⁸⁸ "It is done every day, probably by every city force in America."⁸⁹

Bratton served as NYPD commissioner from 1994 through 1996, reporting to New York Mayor Rudy Giuliani. Under Bratton, the NYPD "began to make extensive

⁸⁴ Post-*Terry*, the Court has allowed a border patrol officer's perception (incorrect or otherwise) that a car is occupied by individuals of "Mexican ancestry" to constitute a relevant factor in establishing reasonable suspicion to stop individuals near the Mexican border. See Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329, 350 (discussing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). The car in *Brignoni-Ponce* was stopped 65 miles north of the Mexican border. Bernard A. Harcourt, *U.S. v. Brignoni-Ponce & U.S. v. Martinez-Fuerte*, in CRIMINAL PROCEDURE STORIES 325-26 (Carol S. Steiker ed., 2006). The Court has also rejected consideration of whether, even in the presence of probable cause, "police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants." *Whren v. United States*, 517 U.S. 806, 810 (1996). In *Whren*, the Court resoundingly rejected any examination of "the actual motivations of the individual officers involved." *Id.* at 813. ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *Whren* "quickly emerged as the leading traffic stop case," becoming "the boilerplate citation for the proposition that subjective motives of the police in making a stop are irrelevant in evaluating its [Fourth Amendment] constitutionality." Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1066 (2010).

⁸⁵ See Steiker, *supra* note 84, at 357; Alexander, *supra* note 71, at 133 ("So long as officers refrain from uttering racial epithets," or admitting that an individual was stopped *only* on account of his race, "courts generally turn a blind eye to patterns of discrimination by the police.").

⁸⁶ Randall Kennedy, RACE, CRIME, AND THE LAW 151 (1997). Professor Kennedy cites Henry Louis Gates, Jr.'s observations that African American men "swap their experiences of police encounters like war stories." *Id.*

⁸⁷ Jeffrey Toobin, *A Judge Takes On Stop-and-Frisk*, THE NEW YORKER, May 27, 2013, at 37.

⁸⁸ *Id.*

⁸⁹ *Id.* ("If the police are not doing it, they are probably not doing their job.").

use of data to identify crime-prone areas and focus resources on them.”⁹⁰ Bratton, who currently serves as the Los Angeles Police Department’s commissioner, led the development of CompStat, a computerized crime mapping system.⁹¹ According to its fans, “CompStat revolutionized policing, enabling officers to focus their efforts in problem areas, armed with real-time information, accurate intelligence, rapid deployment of resources, individual accountability, and relentless follow-up.”⁹²

Bratton’s “hot-spot policing” targeted low-level crimes, such as non-violent property offenses, which were “more prevalent in urban neighborhoods with elevated rates of poverty and social fragmentation.”⁹³ This practice also identified and targeted areas inhabited overwhelming by people of color, and, as one critic has suggested, “serve[d] to justify indiscriminate policing of th[e] targeted population.”⁹⁴ Because minority neighborhoods were disproportionately targeted under hot-spot policing, also termed “order-maintenance policing,” such policies have become synonymous with “racial policing” or “racial profiling.”⁹⁵

Yet pursuant to *Terry*, a stop-and-frisk is not *per se* unconstitutional. Still, New York City’s own comptroller has referred to the NYPD’s use of the practice as “the biggest form of systemic racial profiling we have anywhere in the United States of

⁹⁰ *Id.*

⁹¹ THE LOS ANGELES POLICE DEPARTMENT, WILLIAM J. BRATTON, CHIEF OF POLICE, available at http://www.lapdonline.org/lapd_command_staff/comm_bio_view/7574 (last visited Aug. 11, 2013).

⁹² *Id.*

⁹³ Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461-62.

⁹⁴ M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding Zero-Tolerance Policing as Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 387 (2011).

⁹⁵ Fagan & Davies, *supra* note 93, at 462.

America.”⁹⁶ The practice of “stopping-and-frisking” is frequently deemed “constitutionally offensive.”⁹⁷

For current NYPD Commissioner Ray Kelly, stop-and-frisk is a “critical—and constitutional” part of the transformation of New York City over the past two decades, during which “the annual number of murders has fallen more than 80%.”⁹⁸ In implementing stop-and-frisk, the NYPD places its officers “right in the middle of where the problems are” which Kelly describes as “mostly minority areas.”⁹⁹ Kelly fears that eliminating stop-and-frisk would embolden criminals, who would no longer fear being stopped and would also start carrying and using guns more frequently.¹⁰⁰

IV. HOW LANDMARK SECTION 1983 STOP-AND-FRISK LITIGATION FOUND ITS WAY TO JUDGE SCHEINDLIN, AND NEVER LEFT

A. Judge Scheindlin Is Randomly Assigned The Landmark *Daniels v. City of New York* Class Action

In 1999, Judge Scheindlin was randomly assigned *Daniels v. The City of New York*, a case filed by the non-profit Center for Constitutional Rights.¹⁰¹ The civil suit, brought pursuant to 42 U.S.C. § 1983 (“Section 1983”),¹⁰² alleged that the NYPD’s stop-and-frisk practices violated the Fourth Amendment,¹⁰³ and also sought to disband

⁹⁶ *Public Safety and the Mayor’s Race*, N.Y. TIMES, April 26, 2013, at A30.

⁹⁷ *Id.*

⁹⁸ James Freeman, *The Political War on the NYPD*, April 5, 2013, available at <http://online.wsj.com/article/SB10001424127887323501004578388311774675612.html> (last visited Aug. 18, 2013).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 99-cv-1695-SAS (S.D.N.Y. Mar. 8, 1999).

¹⁰² “Section 1983 provides individuals with a cause of action against persons who violate their Fourth Amendment rights under color of state law.” Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837, 869 (2010); *Brown v. City of Oneonta*, 221 F.3d 329, 340 (2d Cir. 2000) (recognizing § 1983 claim based on “allegedly unlawful Terry stop”).

¹⁰³ Center for Constitutional Rights, *Daniels, et al., v. the City of New York*, <http://ccrjustice.org/ourcases/past-cases/daniels,-et-al.-v.-city-new-york> (last visited July 9, 2013); Goldstein, *supra* note 4 (“From one of the wooden wheels used to assign cases in Federal District Court in Manhattan, a judge’s name was drawn: Shira A. Scheindlin.”).

the NYPD's Street Crime Unit ("SCU").¹⁰⁴ The *Daniels* complaint alleged that "in high crime areas, SCU officers have been repeatedly conducting stops and frisks of individuals without the reasonable articulable suspicion required by the Fourth Amendment."¹⁰⁵ The case was spurred in part by the February 1999 death of unarmed Amadou Diallo, who was shot by four SCU officers,¹⁰⁶ as well as by the release of statistics which, according to *Daniels*, demonstrated that the NYPD's stop-and-frisk encounters disproportionately targeted Black and Latino men.¹⁰⁷

The filing of *Daniels* also coincided with widespread public frustration. Police departments across the country were accused of engaging in rampant racial profiling and of detaining individuals with much less than "reasonable suspicion," the standard required to initiate a *Terry* stop.¹⁰⁸ In addition to *Daniels*, lawsuits alleging racial profiling were brought in Los Angeles, New Jersey, Philadelphia, and Hobbs, New Mexico,¹⁰⁹ both by the Department of Justice and by independent civil rights groups.¹¹⁰

Daniels was the first lawsuit to bring the NYPD's stop-and-frisk practices "under fire."¹¹¹ The plaintiffs were successful in winning class certification¹¹² and in negotiating a sweeping settlement, which required the NYPD to create a written policy regarding racial profiling compliant with the United States and New York Constitutions, to train

¹⁰⁴ Center for Constitutional Rights, *Daniels, et al., v. the City of New York*, *supra* note 103; Goldstein, *supra* note 4.

¹⁰⁵ *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001) ("Rather, SCU officers have improperly used racial profiling, not reasonable suspicion, as the basis for the stops and frisks.").

¹⁰⁶ Noah Kupferberg, *Transparency: A New role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 142 (2008).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 130.

¹⁰⁹ *Id.* at 134-140 (discussing New Jersey and Los Angeles lawsuits); Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 214-15 (2005) (discussing Philadelphia and New Mexico lawsuits).

¹¹⁰ Kupferberg, *supra* note 106, at 131.

¹¹¹ *Southern District of New York Certifies Class Action Against City Police for Suspicionless Stops and Frisks of Blacks and Latinos*, 126 HARV. L. REV. 826, 827 (2013).

¹¹² STIPULATION OF SETTLEMENT, *DANIELS V. CITY OF NEW YORK*, available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf (last visited July 10, 2013).

officers regarding the same, and to ensure compliance with the policy.¹¹³ The named plaintiffs were awarded damages totaling \$167,500,¹¹⁴ and their counsel received over \$3.5 million in costs and fees.¹¹⁵

Unusually—and crucially for future litigation—the settlement also required police to complete a written form each time they conducted a stop-and-frisk (known as “UF-250 Reports”),¹¹⁶ and to provide plaintiffs’ counsel with quarterly data regarding the same “on a quarterly basis from the last quarter of 2003 through the first quarter of 2007.”¹¹⁷ Judge Scheindlin retained jurisdiction over the case and oversaw implementation of the settlement.

The parties in *Daniels* returned to Judge Scheindlin’s courtroom in 2007. The plaintiffs accused the NYPD of a “surge” in the very kind of illegal stops at issue in their original complaint.¹¹⁸ Instead of reopening *Daniels*, Judge Scheindlin suggested another approach.¹¹⁹ ““If you got [sic] proof of inappropriate racial profiling in a good constitutional case, why don’t you bring a lawsuit?”” the judge asked.¹²⁰ “You can certainly mark it as related,”¹²¹ she added.

B. Subsequent Landmark Stop-And-Frisk Cases Are Assigned To Judge Scheindlin

¹¹³ *Daniels v. City of New York*, No. 99 Civ. 1695(SAS), 2007 WL 2077150, at *1 (S.D.N.Y. July 16, 2007).

¹¹⁴ Kupferberg, *supra* note 106, at 176 n.91

¹¹⁵ 99-cv-1695-SAS, Dock. No. 170 (S.D.N.Y. July 15, 2005). Plaintiffs’ counsel Debevoise & Plimpton received approximately \$1.7 million; the Center for Constitutional Rights received approximately \$700,000; Moore & Goodman, LLP received approximately \$925,000; and Van Lierop Burns and Associates received approximately \$132,000. *Id.*

¹¹⁶ *Daniels*, 2007 WL 2077150 at *1.

¹¹⁷ CENTER FOR CONSTITUTIONAL RIGHTS, *FLOYD ET AL. V. CITY OF NEW YORK, ET AL.*, available at <http://ccrjustice.org/floyd> (last visited July 16, 2013).

¹¹⁸ Goldstein, *supra* note 4.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

On January 31, 2008, the Center for Constitutional Rights and an attorney named Jonathan Moore, both of whom served as plaintiffs' counsel in *Daniels*, brought *Floyd v. City of New York*. Like *Daniels*, *Floyd* was brought pursuant to Section 1983, and alleged that the NYPD engaged in stop-and-frisk practices that violated the Fourth Amendment.¹²² Like *Daniels*, *Floyd* is a landmark case.¹²³ Judge Scheindlin described it as one of “great public concern,” so grave that “twenty-seven of the fifty-one members of the New York City Council” filed an *amicus* brief arguing that the practices create “a growing distrust of the NYPD on the part of Black and Latino residents.”¹²⁴

The *Floyd* plaintiffs also won class certification. The class was broadly-defined, consisting of:

All persons who since January 31, 2005 have been, **or in the future will be**, subjected to the New York Police Department's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion . . . persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.¹²⁵

Its forward-looking definition of the class members as including all person who “in the future will be [] subjected to the [NYPD’s policies . . . of . . . stopping and frisking[] persons” without reasonable suspicion is so broad that it potentially includes any resident of New York City.

¹²² 08-cv-01034-SAS-HBP, Dock. No. 1. (S.D.N.Y. Jan. 31, 2008).

¹²³ CENTER FOR CONSTITUTIONAL RIGHTS, *FLOYD ET AL. V. CITY OF NEW YORK, ET AL.*, PRESS KIT, available at <http://ccrjustice.org/floyd-trial-presskit.html> (last visited July 12, 2013) (describing *Floyd* as “the culmination of more than 15 years of work by the Center for Constitutional Rights and the solid determination of a citywide movement that has made stop and frisk a central issue in New York City politics”).

¹²⁴ *Floyd v. City of New York*, 283 F.R.D. 153, 159-60 (S.D.N.Y. 2012).

¹²⁵ *Id.* at 160 (emphasis added).

The *Floyd* lawsuit benefitted from the terms of the *Daniels* settlement, and in particular its requirements that the police complete a written form each time they conducted a stop-and-frisk, and that the City of New York provide data regarding the forms to plaintiffs' counsel.¹²⁶ The data was "indispensable" evidence for the *Floyd* plaintiffs' counsel; in fact, *Floyd*'s filing was prompted by an analysis of the data, which allegedly revealed that "the NYPD has continued to engage in suspicion-less and racially pretextual stop-and-frisks."¹²⁷

On the same date *Floyd* was filed, a docket entry unattributed to either plaintiffs or defendants noted that *Floyd* had been referred to Judge Scheindlin as "possibly related" to *Daniels*.¹²⁸ On February 15, 2008, a "Notice of Assignment" officially sent *Floyd* to Judge Scheindlin.¹²⁹ The Notice stated that the case was assigned pursuant to "the memorandum of the Case Processing Assistant,"¹³⁰ which was not attached and is not available on the docket.

The Southern District's rules regarding related cases do not contemplate any role for a case processing assistant. Rather, any civil action, once filed in the Southern District, is to be "assigned by lot . . . to a district judge for all purposes."¹³¹ That is, it is not automatically referred to the judge who may have a related case. According to the rules, after being randomly assigned, a related case may then be transferred to the judge presiding over an earlier-filed related case after a party designates it as potentially related

¹²⁶CENTER FOR CONSTITUTIONAL RIGHTS, *FLOYD ET AL. V. CITY OF NEW YORK, ET AL.*, available at <http://ccrjustice.org/floyd> (last visited July 16, 2013).

¹²⁷Toobin, *supra* note 87, at 39.

¹²⁸08-cv-01034-SAS-HBP (S.D.N.Y. Jan. 31, 2008).

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹DIVISION OF BUSINESS RULE13.

to another matter.¹³² Next, the judge with the earlier-filed case decides whether to accept or reject the transferred case.¹³³

Though the *Floyd* complaint referenced *Daniels* several times,¹³⁴ it did not designate *Floyd* as related to *Daniels*, even though the Southern District’s local rules impose a duty on “each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge.”¹³⁵ Though Judge Scheindlin accepted *Floyd* as a case related to *Daniels*, she did so according to a procedure not contemplated by the local rules.

On January 28, 2010, *Davis v. City of New York*,¹³⁶ a case challenging the NYPD’s “vertical patrols” in New York public housing on the grounds that certain detentions made during those patrols lacked reasonable suspicion,¹³⁷ was also referred to Judge Scheindlin on the date it was filed. It was accepted as related to *Floyd* several days later.¹³⁸

Davis is also an important case. According to Judge Scheindlin, it implicates “[t]he long line of cases concerning the power of the police to stop and frisk,” and “illustrates the tensions between liberty and security in particularly stark form, because it deals with police practices in and around the home, where the interests in both liberty and

¹³² DIVISION OF BUSINESS RULE 4(b).

¹³³ *Id.* at RULE 13(c)(i),(ii).

¹³⁴ 08-cv-01034-SAS-HBP Dock. No. 1 at ¶¶ 26, 46 (S.D.N.Y. Jan. 31, 2008).

¹³⁵ The Southern District’s local rules impose a “continuing duty of each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge, in order to avoid unnecessary duplication of judicial effort.” S.D.N.Y. L. CIV. R. 1.6(A).

¹³⁶ 10-cv-00699-SAS (S.D.N.Y. Jan. 28, 2010).

¹³⁷ 10-cv-00699-SAS, Dock. No. 1 (S.D.N.Y. Jan. 28, 2010).

¹³⁸ 10-cv-00699-SAS, Dock. No. 1 (S.D.N.Y. Feb. 8, 2010).

security are especially strong.”¹³⁹ In denying the City of New York’s partial motion for summary judgment as to the plaintiffs’ Fourth Amendment claims, Scheindlin cited the testimony of the president of a New York City public housing resident group, who compared New York Public housing to a “penal colony” supervised by the NYPD.¹⁴⁰

On March 28, 2012, *Ligon v. City of New York*, a class action case challenging the NYPD’s trespass arrest policy, or “Operation Clean Halls,” through which NYPD officers patrol private housing across New York City,¹⁴¹ was referred to Scheindlin as potentially related to *Davis*, and soon after accepted as a related case.¹⁴²

In January 2013, Judge Scheindlin granted the *Ligon* plaintiffs a preliminary injunction, finding sufficient evidence that certain trespass arrests violated the Fourth Amendment.¹⁴³ *Ligon*, like *Daniels*, *Davis* and *Floyd*, also raised significant legal issues.

In her injunction ruling, Scheindlin waxed philosophical:

For those of us who do not fear being stopped as we approach or leave our own homes or those of our friends and families, it is difficult to believe that residents of one of our boroughs live under such a threat. In light of the evidence presented . . . however, I am compelled to conclude that this is the case.¹⁴⁴

¹³⁹ *Davis v. City of New York*, __ F. Supp. 2d __, No. 10 Civ. 0699(SAS), 2013 WL 1288176, at *2 (S.D.N.Y. March 28, 2013).

¹⁴⁰ *Id.*; see also LEGAL DEFENSE FUND, CASE: *DAVIS V. CITY OF NEW YORK*, <http://www.naacpldf.org/case/davis-vs-city-new-york> (last visited July 12, 2013) (describing the questions presented by *Davis* as, *inter alia*, whether “residents of public housing in New York City entitled to be free from police harassment in their homes just like other New Yorkers” and whether “NYC criminalized traveling home or visiting a friend while black or brown”).

¹⁴¹ NYCLU, *LIGON V. CITY OF NEW YORK (CHALLENGING THE NYPD’S AGGRESSIVE PATROLLING OF PRIVATE APARTMENT BUILDINGS)*, available at <http://www.nyclu.org/case/ligon-v-city-of-new-york-challenging-nypds-aggressive-patrolling-of-private-apartment-building> (last visited July 22, 2013).

¹⁴² 12-cv-02275-SAS (S.D.N.Y. March 28, 2012).

¹⁴³ *Ligon v. City of New York*, No. 12 Civ. 2274 (SAS), __ F. Supp.2d __, 2013 WL 628534, at *1-2 (S.D.N.Y. Feb. 14, 2013); Goldstein, *supra* note 4.

¹⁴⁴ *Ligon*, 2013 WL 628534, at *3.

Scheindlin postponed imposing any remedy in *Ligon*, instead choosing to consolidate the remedies hearing in *Ligon* with the remedies hearing in *Floyd*.¹⁴⁵ At the time, the liability portion of the *Floyd* trial—in fact any portion of the *Floyd* trial—had yet to commence.

On August 12, 2013, following a three-month bench trial in *Floyd*, Judge Scheindlin entered a 198-page “Opinion and Order.” She granted a sweeping injunction against the NYPD (a) ordering changes to NYPD policies and activities, (b) appointing a monitor to oversee stop-and-frisk practices, (c) requiring a “community-based joint remedial process to be conducted by a court-appointed facilitator,” and, most remarkably, (d) ordering that one precinct in each of New York City’s boroughs place body-worn cameras on their police officers.¹⁴⁶ The ruling received widespread national, and even international, press coverage.¹⁴⁷

C. Scheindlin’s Control Over Stop-and-Frisk Litigation Earns Press Attention And Disparate Reactions From Those Involved In The Litigation

The New York Times noticed the case assignment pattern described above, and reported that “new stop-and-frisk lawsuits are routed directly to Judge Scheindlin” because “civil rights groups, sometimes at the judge’s suggestion, have designated the subsequent cases as ‘related’ to similar cases,” ever since *Daniels* was filed.¹⁴⁸ The paper noted that Judge Scheindlin’s has effectively acquired “near exclusive jurisdiction” over stop-and-frisk practices.¹⁴⁹ According to *The New Yorker*, ever since *Daniels*, when civil

¹⁴⁵ *Id.* at *42.

¹⁴⁶ *Floyd v. City of New York*, 08-cv-1034-SAS-HBP, Dock. No. 373 at 15 (Aug. 13, 2013).

¹⁴⁷ See, e.g., Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, at A1; Ryan Deveraux, *New York’s stop-and-frisk policy is unconstitutional, judge rules*, THE GUARDIAN, Aug. 12, 2013, 2013 WLNR 19891540;

¹⁴⁸ Goldstein, *supra* note 4.

¹⁴⁹ *Id.*

rights groups challenged the stop-and-frisk policies of the N.Y.P.D., they “have made sure that the cases went before Judge Scheindlin.”¹⁵⁰

Christopher Dunn, attorney for the *Ligon* plaintiffs, told the Times that “[i]t would make no sense to have different judges handle the three stop-and-frisk cases.”¹⁵¹ “These are precisely the types of cases to have before a single judge,” he added.¹⁵² Jonathan Moore, co-counsel for the plaintiffs in *Daniels*, in which his firm won approximately \$925,000 in costs and fees,¹⁵³ is also one of the plaintiffs’ counsel in *Floyd*. During the *Floyd* trial, “Moore and his colleagues bound[ed] in and greet[ed] the Judge with confident half-smiles.”¹⁵⁴

The City of New York has tried to convince Judge Scheindlin to send stop-and-frisk cases back to the clerk for random assignment.¹⁵⁵ NYPD Commissioner Ray Kelly believes that the judge “is very much in [the plaintiffs’] corner and has been all along throughout her career.”¹⁵⁶

Judge Scheindlin has acknowledged that “some judges are less inclined to accept a case as related, [and] some judges are more inclined to accept it as related,”¹⁵⁷ but declined to characterize herself as a judge more inclined to accept related cases. Nevertheless, the facts remain what they are—following random assignment of *Daniels*, Judge Scheindlin has presided over every single significant stop-and-frisk case in the Southern District. Some of this has been by operation of the “related cases” rule, and some apparently outside of it, but all of it has been expressly encouraged by the Judge

¹⁵⁰ Toobin, *supra* note 87, at 40.

¹⁵¹ Goldstein, *supra* note 4.

¹⁵² *Id.*

¹⁵³ *See supra* note 115.

¹⁵⁴ Toobin, *supra* note 87, at 39.

¹⁵⁵ Goldstein, *supra* note 4.

¹⁵⁶ Freeman, *supra* note 98.

¹⁵⁷ Goldstein, *supra* note 4.

herself and by a group of plaintiffs' counsel, some of whom have made millions from these cases.

V. NONRANDOM CASE ASSIGNMENT FUNDAMENTALLY ALTERS THE ROLE OF A DISTRICT COURT JUDGE

A. Judicial Integrity Requires Neutral Case-Assignment Rules With No Role For Judicial Self-Selection Of Cases

“[J]udges are human and bring a basket of biases to the bench.”¹⁵⁸ As a result, “the particular judge assigned to a case . . . can be outcome determinative.”¹⁵⁹ When judges can pick cases, including through the unlimited possibilities offered by the Southern District of New York’s transfer and related cases rules, they may gain access to cases to affect the cases’ outcomes for any number of reasons.¹⁶⁰ “Some may do so for jurisprudential reasons or out of perceived expertise,” while others may believe that the law has been misapplied and wish to correct a mistake.¹⁶¹ “They may seek [a case assignment] to promote a judicial philosophy or set of moral principles,” or for very human reasons, such as a desire for notoriety.¹⁶² To protect against the influence of a judge’s bias, a judge must play no role in the case assignment process.¹⁶³ Maintaining judicial integrity requires neutral assignment of cases.¹⁶⁴ Drawing an unfavorable judge is fair when it is a matter of luck, and nothing more.¹⁶⁵

¹⁵⁸ J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges At The Court Of Appeals*, 78 TEX. L. REV. 1037, 1041 (2000).

¹⁵⁹ J. Robert Brown, Jr., *Non-Random Assignment of Federal Cases and Bank of America*, The Race To The Bottom, May 20, 2010, available at <http://www.theracetothetbottom.org/miscellaneous/non-random-assignment-of-federal-cases-and-bank-of-america.html> (last visited July 22, 2013).

¹⁶⁰ Brown & Lee, *supra* note 158, at 1066.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1069.

¹⁶⁴ *Id.* at 1041.

¹⁶⁵ *Id.* at 1041.

When neutrality is abandoned, the possibility that assignments were made in an effort to influence a case's outcome becomes very real.¹⁶⁶ Indeed, there is at least one instance of documented, deliberate, results-oriented case assignment in the federal court system. In the 1960s, panels in the Fifth Circuit Court of Appeals hearing civil rights cases were purposefully stacked with pro-civil rights majorities to ensure pro-civil rights outcomes.¹⁶⁷ In the Fall of 1963, the Fifth Circuit was divided, with four members consistently voting in favor of civil rights plaintiffs and desegregation, and other members stubbornly refusing to extend the Fourteenth Amendment in civil rights cases.¹⁶⁸ The Circuit's assigning judge steered certain cases he euphemistically deemed "touchy" to weeks in which certain judges, in particular, those who did not favor civil rights extensions, would be unable to participate.¹⁶⁹

The judge who steered civil rights cases to panels more likely to enforce desegregation had an honorable, and morally just, end game. Yet the method was unjustifiable, and especially risky given the controversial nature of the subject matter. Judges who side with the rights of minorities, but do so by skirting the system, risk jeopardizing any advances they make for the groups they seek to protect by introducing bias into the judicial system.

In the Fifth Circuit cases, questionable means were put to unquestionably just ends, but if court packing can happen in a case that results in a morally acceptable outcome (desegregation), the opposite is also true. If the Fifth Circuit's assigning judge had been a segregationist, he just as easily could have shifted these "touchy" cases

¹⁶⁶ *Id.* at 1040.

¹⁶⁷ *Id.* at 1043.

¹⁶⁸ *Id.* at 1047-48.

¹⁶⁹ *Id.* at 1060-65.

toward the segregationist members of the court, rather than away from them. Nonrandom assignment of cases could permit a wrong-minded judge to affect a case's outcome.

Nonrandom assignment also has implications for the adversary system. Although party representation is “basic to our system of adjudication,”¹⁷⁰ when a judge chooses a case based on its subject matter, the judge steps out of his classic role as neutral adjudicator of the issues. This, like a judge who raises a point *sua sponte* when it is not argued by the parties, risks converting the federal system, one whose hallmarks is its adversary nature, into one that looks more like an inquisitorial one.¹⁷¹ When a judge picks a case for his own reasons, he starts to look less like a judge and more like someone with a stake in the litigation.

The Southern District's permissive related cases rule permits a judge to make a preliminary finding about two cases' facts, and, before the later-filed case has even begun, make conclusions based on the later-filed complaint's unproven factual allegations. This effectively allows a plaintiff to plead his way to a particular judge, regardless of the actual facts. For example, *Ligon v. City of New York*, filed on March 28, 2012, addressed the NYPD's trespass arrest policy, through which NYPD officers patrol private housing across New York City. On April 3, 2012, Judge Scheindlin accepted *Ligon* on the grounds that it was related to *Davis v. City of New York*, filed in 2010.¹⁷² By the time *Ligon* was filed, the *Davis* litigation had been through several rounds of heated discovery motions, and the parties' substantial differences were well-known.

¹⁷⁰ *Arizona v. California*, 530 U.S. 392, 413 (2000); William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 130 (2012) (“The hallmark of an adversary system is two advocates pitted against each other in attempts to persuade a neutral judge.”).

¹⁷¹ *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., dissenting).

¹⁷² 12-cv-02275-SAS (S.D.N.Y. April 3, 2012).

None of this was true in *Ligon*. The plaintiffs were different, the individual defendants were different—indeed, the only common defendant was the City of New York, an institutional defendant sued multiple times virtually every day—and the policies were different—public versus private housing. There was no real basis to deem these cases related. The thread connecting *Ligon* to *Daniels* is even thinner: *Daniels* has nothing to do with housing, either public or private.

In a pure adversarial system “[t]he trier of fact . . . does not independently investigate the facts, but instead remains neutral so as to avoid reaching a premature decision. Judges rely on the parties to frame the dispute and to present evidence as they see fit.”¹⁷³ When a judge plays a role in the case assignment process (to determine relatedness) by comparing the facts *alleged* in a later-filed case to those *established* in an earlier-filed, and more developed matter, the judge is acting less like a neutral arbiter and more like an interested investigator in the civil law mode (or even like a grand jury in a criminal case).

B. Judge Scheindlin’s Appearance Of Bias Is Reason Alone To Randomly Assign Stop-And-Frisk Cases

1. Judge Scheindlin Has Evidenced An Appearance Of Anti-Police Bias

Judge Scheindlin’s involvement in high-profile stop-and-frisk decisions, and her history of ruling against the NYPD, can be traced back to a case that appeared on her docket during the Bratton era. In 1995, Antonio Fernandez, known as “King Tone,” leader of the Latin Kings, a notorious drug gang targeted by the United States Attorney’s office for the Southern District of New York, was arrested by an NYPD officer following

¹⁷³ Henry S. Noyes, *The Rise of the Common Law Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 864 (2012).

a stop-and-frisk that revealed a small amount of marijuana on his person.¹⁷⁴ According to the arresting officer, as he approached Fernandez, “he smelled marijuana.”¹⁷⁵ He then frisked Fernandez along his waistband, the outside of his jacket, and down his pants leg; when he passed over the pants’ pocket, the officer heard a crinkling sound. He then recovered a small amount of marijuana from Fernandez’s pocket.¹⁷⁶ Fernandez was taken to a police precinct, and frisked again, at which point a loaded .38 caliber revolver was found in his pants.¹⁷⁷

Officers arrived on the scene of Fernandez’s arrest after receiving a radio run directing them to investigate a 911 call reporting a Latin Kings meeting in a Bronx park. “An anonymous caller had reported that at least one of the gang members was armed with a gun;” the armed individual was described as “a male Hispanic wearing a white jacket with black stripes.”¹⁷⁸ Fernandez was wearing a jacket “similar” to the one described in the 911 call.¹⁷⁹

The case was (randomly) assigned to Judge Scheindlin, who found that the officers lacked reasonable suspicion to stop Fernandez, due in part to the paucity of details provided by the anonymous caller, and the fact that Fernandez’s jacket did not exactly match the description provided by the caller.¹⁸⁰ As a result, Fernandez’s initial detention was held unconstitutional, and all evidence obtained pursuant to the stop was suppressed.¹⁸¹

¹⁷⁴ Toobin, *supra* note 87, at 38.

¹⁷⁵ *United States v. Fernandez*, 943 F. Supp. 295, 297 (S.D.N.Y. 1996).

¹⁷⁶ *Id.* at 297.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 296.

¹⁷⁹ *Id.* at 297.

¹⁸⁰ *Id.* at 298.

¹⁸¹ *Id.* at 299.

Scheindlin also criticized the manner in which the revolver was discovered, stating that “[i]t is extremely difficult to believe that the [officer who located the marijuana in Fernandez’s pant pocket] could have missed a bulky .38 caliber revolver hidden in Defendant’s pants.”¹⁸² No reason was provided for the judge’s belief that the officer’s testimony was “extremely difficult” to believe. Indeed, that a gun may be found during a stationhouse frisk, but not at the scene of an arrest, is imminently plausible. An initial stop-and-frisk, made hastily and in public, where police are vulnerable to attacks from those who resent their mere presence, let alone their decision to make an arrest, is likely swift and not as thorough a search that occurs in the controlled environment of a precinct. Moreover, it may not be too surprising if the leader of a notorious gang were skilled in hiding weapons.

The ruling in the Fernandez case “set a template for [Judge Scheindlin’s] handling of criminal cases.”¹⁸³ A 2013 report commissioned by New York City Mayor Bloomberg’s office concluded that Scheindlin is “biased against law enforcement” because “she issues an unusually high number of written opinions finding that the NYPD and other law enforcement agencies make illegal searches and seizures.”¹⁸⁴ “Scheindlin came down against law enforcement in 60% of her written ‘search-and-seizure’ opinions dating to when she started on the bench in 1994 . . . the highest rate of any of the 16 current and former Manhattan federal judges the study looked at since 1990.”¹⁸⁵ One of Scheindlin’s law clerks has reported that Scheindlin “thinks cops lie.”¹⁸⁶ “In decision

¹⁸² *Id.*

¹⁸³ Toobin, *supra* note 87, at 38.

¹⁸⁴ Ginger Adams Otis & Greg B. Smith, *Judge vs. the NYPD*, NEW YORK DAILY NEWS, May 15, 2013 at 8.

¹⁸⁵ *Id.*

¹⁸⁶ Toobin, *supra* note 87, at 38. This quote was unattributed.

after decision, [Scheidlin] has found that cops have lied, discriminated against people of color, and violated the rights of citizens.”¹⁸⁷

In Scheindlin’s own words, she believes that “judges have a duty to protect individual rights because that’s what the Bill of Rights is all about.”¹⁸⁸ “Sometimes there is no precedent that constrains you and you can really strike out and write what you think is the right answer.”¹⁸⁹ The *Floyd* trial was her “greatest chance yet to rewrite the rules of engagement between the city’s police and its people.”¹⁹⁰

The evidence that Judge Scheindlin believes that NYPD officers lie, coupled with her handpicking of a stream of high-profile Section 1983 stop-and-frisk cases, and plaintiff-friendly outcomes in every single one of those cases, suggests at least an appearance of bias against the NYPD. This alone is reason enough to do away with the related cases rule, which, as it stands, permits an outcome-oriented judge to manipulate the case assignment system so that a particular type of case accumulates on her docket alone.

ii. An Appearance Of Bias Is Itself Reason To Eliminate Procedural Rules That Open The Door To Judicial Case-Shopping

Several courts have recognized that nonrandom case assignment procedures can lead to the appearance of bias, which on its own should be avoided. In *Cruz v. Abbate*, four defendants in criminal cases pending in Guam Superior Court each moved for random assignment of his case to one of the seven judges on the court.¹⁹¹ The practice of

¹⁸⁷ *Id.* at 36.

¹⁸⁸ Mark Hamblett, *Stop-And-Frisk Judge Relishes Her Independence*, N.Y. L.J., May 20, 2013.

¹⁸⁹ *Id.*

¹⁹⁰ Toobin, *supra* note 87, at 36.

¹⁹¹ *Cruz v. Abbate*, 812 F.2d 571, 572 (9th Cir. 1987)

the Superior Court’s Presiding Judge was to assign each case to the judge of his choice.¹⁹² Though Judge Kozinski, writing for the Ninth Circuit, noted that “a defendant has no right to any particular procedure for the selection of the judge” before whom his criminal case is heard, nevertheless, “he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome.”¹⁹³

Though the court ultimately deemed the allegations of arbitrariness and unfairness too vague to address, the question raised was troubling enough for the opinion to include the pronouncement that courts “must take great pains to avoid any inference that [case] assignments are being made for an improper purpose,” because “[t]he suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow.”¹⁹⁴

A similar principle was also recognized in *Yagman v. Baden*, a case brought in the Central District of California, which was transferred shortly before trial when the presiding judge became ill. The case was re-assigned to District Judge Manuel Real, not by random assignment, but through an order executed by both the original and transferee judge.¹⁹⁵ The local rules expressly permitted voluntary transfer from one judge to another, so long as both consented.¹⁹⁶ Though the Ninth Circuit again deemed the allegations that the transfer was “suspicious” too vague, it did note that “[c]ourts must be meticulously careful, when invoking direct transfer provisions . . . to avoid any improper appearance.”¹⁹⁷ The court invoked the principle that guided the Supreme Court in *In re*

¹⁹² *Id.*

¹⁹³ *Id.* at 574.

¹⁹⁴ *Id.* at 574.

¹⁹⁵ 796 F.2d 1165, 1177 (9th Cir. 1986).

¹⁹⁶ *Id.* at 1177.

¹⁹⁷ *Id.* at 1178.

Murchison: “to perform its high function in the best way, justice must satisfy the appearance of justice.”¹⁹⁸

In *Murchison*, the Court overturned a Michigan conviction involving a trial court judge who had also served as a one-man grand jury on the very charges tried before him.¹⁹⁹ The Court noted that the judge was likely unable to “free himself from the influence of what took place in his ‘grand-jury’ secret session,” and that “[h]is recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings.”²⁰⁰ Also, “the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness.”²⁰¹

The procedure allowed by the Michigan court was itself unconstitutional, even in the absence of proof of actual prejudice, because it raised a probability of unfairness.²⁰² In the criminal context, fairness requires both the absence of “actual bias,” and also the absence of “the probability of unfairness.”²⁰³ At the extreme of this principle is the established notion that “no man can be a judge in his own case,” but the far subtler question is whether a judge can try cases in which he “has an interest in the outcome.”²⁰⁴

What counts “an interest in the outcome” is a slippery question. Traditional notions of familial or financial interest of course would apply, but a judge may also be “interested” in an outcome for personal reasons, intellectual interest, political agendas, or

¹⁹⁸ *Id.* (internal quotations and citations omitted).

¹⁹⁹ *In re Murchison*, 349 U.S. 133, 138 (1955).

²⁰⁰ *Id.*

²⁰¹ *Id.* “In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.” *Id.* at 139.

²⁰² *Brown & Lee*, *supra* note 158, at 1100.

²⁰³ *Id.*

²⁰⁴ *Id.*

even by the chance of case-related notoriety (good or bad). But precisely because “an interest” cannot be defined, the safer course, at least in the criminal context, is to avoid procedures which offer even a temptation “not to hold the balance nice, clear, and true between the State and the accused,” as such procedures, on their own, violate due process.²⁰⁵ This is true even though such a rule “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.”²⁰⁶ “[J]ustice must satisfy the appearance of justice.”²⁰⁷

The related case rule raises the same concern: in *Murchison*, the judge may not have been able to “free himself from the influence of what took place in his ‘grand-jury’ secret session,” and in making the related cases decision, the judge deciding whether to accept a later-filed case may be unable to free herself from the influence of what occurred in the allegedly-related first-filed matter, over which the judge has also presided.

Though they do not implicate an individual’s personal liberty, the stakes in civil rights litigation are also high. The stop-and-frisk litigation before Judge Scheindlin has already cost the City of New York millions of dollars in fees, costs, and damage awards. The August 12, 2013 decision will also deplete city coffers. As former NYPD first deputy commissioner John Timoney has explained:

The training regimen laid out by Judge Scheindlin will require transferring dozens of officers from precincts and permanently reassigning them to the police academy as trainers. Because minimum staffing levels are required by the department, much of the new training will have to be done on overtime, unless the city spends money to expand the number of officers.

²⁰⁵ *In re Murchison*, 349 U.S. at 136 (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

Front-line ranking officers (sergeants and lieutenants) will likely require one week of training, while patrol officers and detectives will require at least two days. My estimate is that this remedial process will cost tens of millions of dollars and last at least 10 years. This does not include the incalculable but sizable costs of taking an officer off patrol for training. Nor does it include the cost of the monitor, staff, expert advisers or the yet-to-be-named facilitator and his or her staff.²⁰⁸

The public interest at stake in stop-and-frisk litigation is twofold: not only do residents of the City of New York have a right to their personal liberties, the same group of people also have a right to, for example, public housing, trash collection, and safe streets, amenities whose budgets are all affected by costly litigation, especially that which requires the purchase of bodyworn cameras and training officers on overtime pay.

C. The Related Cases Rule Converts District Judges Who Hoard One Category Of Case Into Quasi-Appellate Judges

The decisions of a single judge in one district are not binding on other judges in that same district.²⁰⁹ This principle respects the hierarchal structure of the federal court system. Yet allowing one judge to collect a stream of factually distinct cases in order to affect a distinct area of the law elevates that judge over other judges in her district. Because no other judge has the opportunity to hear landmark stop-and-frisk cases, the judge who does hear the cases has the opportunity to shape the law in the same manner an appellate court would.

Also, once an issue as important as the NYPD's stop-and-frisk procedures reaches the appellate level of review, it will only have been vetted by one jurist. A difference in

²⁰⁸ John Timoney, *The Real Costs of Policing the Police*, N.Y. TIMES, Aug. 19, 2013 at A19.

²⁰⁹ *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2540 (2011) (“[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.”).

opinion may have guided the Second Circuit's, and ultimately the Supreme Court's, analysis of a complicated area of the law. Yet when these cases are appealed, the higher courts will only have one voice to consider: that of Judge Scheindlin. This is, of course, her point.

VI. THE SOUTHERN DISTRICT'S LOCAL RULES SHOULD BE AMENDED TO AVOID MANIPULATION OF CASE ASSIGNMENT PROCEDURES

As this article highlights, it is far too simple to use the Southern District of New York's case assignment rules to manipulate case assignments. The current case assignment rules create an appearance of bias and facilitate case-shopping by district judges interested in a given case's subject matter and outcome. The below-proposed amendments to the Southern District's rules would reinstate random case assignment as the default procedure.

A. All Rules Permitting Subject-Matter-Specific Case Selection Should Be Eliminated

There is no reason to permit senior judges or visiting judges to pre-select the "category" of cases he is willing to undertake. First, with respect to senior judges, their caseloads can be lessened by permitting them to advise the Southern District as to the number of cases they are willing to take—a consideration already in place in the Southern District. There is no reason to also allow them to craft a specialized docket, as this sort of subject-matter-specific case selection could result in assignment of an entire category of cases (Section 1983, habeas, securities) to one judge alone. Senior or otherwise, district judges are appointed to the federal bench to hear all cases. And there are opportunities within the federal courts for judges who want to hear only a limited category of cases, such as bankruptcy court and the United States Court of Appeals for the Federal Circuit.

The Southern District of New York, however, is not a specialized court, and any judge appointed to the Southern District should not become a specialized judge.

Second, there is also no reason to allow visiting judges to pre-select the category of case he is willing to accept. Again, the workload given to visiting judges can be lessened by limiting the number of cases a visiting judge takes on—a safeguard already in place in the Southern District’s rules. Moreover, visiting judges are only permitted to visit a court other than the one to which they were appointed when the need for such a visit arises in the court they visit. Allowing visiting judges to pre-select the category of cases permits them to pre-select the kind of cases they wish to hear, which risks assigning an entire category of cases disproportionately to one judge. In addition, this practice undermines the purpose of allowing judges to visit other courts; the practice is intended to service the courts’ certified needs, not the judge’s jurisprudential interests.

Third, the transfer of related cases rule, which gives the judge to whom a case is referred as potentially related with “sole discretion” to accept or reject a later-filed case, precludes any examination of actual relatedness, and facilitates the hoarding of cases based on subject matter. Similarly, the “transfer of cases by consent” rule, which allows any judge to “transfer directly any case or any part of any case . . . to any consenting judge” on the Southern District, endorses a secret conversation between judges about which kind of cases they want on their dockets, and then permits transfer of cases for reasons both proper and improper. These practices eviscerate random case assignment, and endorse case transfer for any reason the transferor or transferee judge has in mind. Perhaps worst of all, the reason is never made public and is not subject to challenge by the affected parties.

B. All Assignment Committee Decisions Should Be Made Public

Given the complicated nature of federal litigation, there is obviously a need for district-wide committees that oversee and manage certain aspects of case assignment. But there is no reason to keep such decisions hidden from the public. Moreover, the members of the assignment committee should be made known. The Southern District of New York’s assignment committee “rule[s] upon all issues relating to assignments,” but what exactly “issues related to assignments” are is not explained. Without full disclosure of case assignment decisions, the Southern District risks an appearance of bias and impropriety in its case assignment methods. If the system is fair, there is no reason to hide it from the public and the parties subject to the committee’s decisions.

C. The Related Cases Determination Should Be Subject To Motion Practice

As written, the related cases rule leaves the decision to accept a later-filed case as related to an earlier-filed matter within the sole discretion of the judge to whom the potentially related case is referred. As explained above, this creates the appearance of bias and incentivizes judicial case-shopping. But even if the rule is rewritten to take the decision out of the hands of the judge to whom the case is referred, the related cases rule remains problematic.

A party who advocates for the related case designation likely wants to appear in front of the judge who handled the earlier case—as has clearly happened in stop-and-frisk litigation. Given the potential granting of the assignment, that party should be required to move for the related case designation, and the other party allowed to oppose. Moreover, that motion should not be heard by the judge to whom the case is originally assigned, as that judge may have self-interested reasons to avoid a case’s subject matter, nor should be

it heard by the judge presiding over the earlier-filed case, who may have reasons to take on the case's subject matter. Rather, this is precisely the kind of motion appropriately heard by the assignment committee.

VII. CONCLUSION

That the NYPD stop-and-frisk litigation is venued in the Southern District of New York is significant. The Southern District is one of the most influential federal courts.²¹⁰ An appointment to the Southern District of New York is prestigious, and may lead, as in the case of Justice Sonia Sotomayor, to the Supreme Court.²¹¹ The Southern District is also “an ‘important venue for corporate and white-collar prosecutions, and its pronouncements are highly influential.’”²¹² Judge Scheindlin herself is an oft-cited jurist, whose opinion in *Zubulake v. UBS Warburg LLC*²¹³ is regarded as one of the most important decisions regarding e-discovery;²¹⁴ her decisions are “must-reads.”²¹⁵ She has also issued important orders in the context of the federal material witness statute.²¹⁶

Additional reasons suggest that the Fourth Amendment litigation pending before Judge Scheindlin will have far-reaching impact. *Daniels, Davis, Floyd* and *Ligon* have

²¹⁰ William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41-42 (2006).

²¹¹ Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANO-LATINO L. REV. 97, 100 (2011).

²¹² Trent O. Bridges, *U.S. v. Stein: Federal Prosecutors Twisting the Arm of Corporate America While Its Employees Cry Uncle (Sam)*, 43 TULSA L. REV. 739, 764 (2008).

²¹³ 382 F.Supp.2d 536 (S.D.N.Y. 2005).

²¹⁴ Kevin F. Brady, *Recent Key Delaware Corporate and Commercial Decisions*, 6 N.Y.U. J. L. & BUS. 421, 474-57 (2010).

²¹⁵ *Id.* at 457.

²¹⁶ Nadine Strossen, *Freedom and Fear Post 9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 314 (2007) (“Judge Shira A. Scheindlin . . . issued an important decision concerning . . . Osama Awadallah, a Jordanian-born student who was charged with making false statements at a grand jury proceeding.”); Toobin, *supra* note 87, at 43 (Scheindlin threw out the case against Awadallah pre-trial; Awadallah’s name was discovered on a scrap of paper in a car rented by one of the September 11, 2001 hijackers. Scheindlin was reversed by the Second Circuit, but Awadallah was ultimately acquitted.)

each already garnered attention in academic scholarship.²¹⁷ The *Floyd* trial was the subject of multiple New York Times op-ed pieces, all highly critical of the NYPD's stop-and-frisk practices.²¹⁸ At least one scholar has argued that the burdens *Terry* stops inflict "are most visible in New York."²¹⁹ A June 2012 protest against the NYPD's stop-and-frisk practices was covered extensively not only by New York media outlets, but also by The Guardian and Al Jazeera.²²⁰

"National experts have publicly debated the role of the stop-and-frisk program in either producing or threatening New York City's vaunted crime drop of the past two decades."²²¹ The survival or demise of New York City's stop-and-frisk regime may impact the decision to pursue similar police tactics in other large metropolitan areas, such as Philadelphia and San Francisco.²²² Philadelphia and Los Angeles compile data, as New York did, on "stops and frisks,"²²³ and a ruling in the Scheindlin cases may encourage costly litigation in those cities.

The NYPD's current stop-and-frisk practices are arguably a reflection of the Supreme Court's extension of police authority post-*Terry*.²²⁴ If any of Scheindlin's

²¹⁷ See, e.g., Kupferberg, *supra* note 106, at 141-44 (discussing the impact of the terms of the *Daniels* settlement); Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792-93 (2012) (discussing the *Davis* litigation in the context of challenges to racial profiling and stop-and-frisk policing); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1102 (2013) (discussing the *Ligon* litigation); Steiker, *supra* note 84, at 330-31 (discussing *Floyd* and its connection to *Daniels*).

²¹⁸ See, e.g., *Stop-and-Frisk On Trial*, N.Y. TIMES, May 22, 2013, at A26 (addressing the *Floyd* trial, and concluding that "stopping hundreds of thousands of law-abiding residents -- who don't need to be deterred from violent behavior -- does not reduce crime"); *Mr. Bloomberg's Logic*, N.Y. TIMES, July 2, 2013, at A24 (discussing *Floyd* and New York City Mayor Bloomberg's position regarding stop-and-frisk, stating that "[i]f . . . Bloomberg was trying to stem the criticism of his constitutionally suspect stop-and-frisk policy over the weekend, he took a rather strange approach with his loopy logic and discredited arguments").

²¹⁹ See Harmon, *supra* note 217, at 792.

²²⁰ See Steiker, *supra* note 84, at 329-31.

²²¹ *Id.* at 331.

²²² *Id.* at 331-32.

²²³ STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER, CENTER ON RACE, CRIME AND JUSTICE, JOHN JAY COLLEGE OF CRIMINAL JUSTICE at 5 (March 2010).

²²⁴ Cf. Steiker, *supra* note 84, at 332-33. Steiker places the blame for the expansion of police authority post-*Terry* at the feet of Chief Justice William Rehnquist. *Id.* at 357-58. She contends that in *Terry*, Chief

decisions are appealed to the Supreme Court, they may have the opposite outcome of the one Judge Scheindlin intended. The current Court has not hesitated to expand police authority. If given the chance to review Judge Scheindlin's broad expansion of Fourth Amendment rights, the Court may reverse her decisions, and contract the rights at issue.²²⁵

Like the Fifth Circuit judge who packed civil rights cases with desegregationist judges, Judge Scheindlin's positions may be guided by the right moral compass and ultimately vindicated, if not by the Supreme Court, then by history. But the manner in which the Southern District of New York's local rules have allowed one judge to select certain cases, and use them to shape the development of important Constitutional law, gives off such an appearance of impropriety that the procedures that allow for such practices must be eliminated. "[T]o perform its high function in the best way, justice must satisfy the appearance of justice."²²⁶

Justice Earl Warren meant to announce a limited rule, confined to narrow bounds that recognized "the seriousness of the intrusion imposed by police stop-and-frisks." *Id.* at 334. By contrast, "Rehnquist's views and innovations . . . shaped a constitutional doctrine that is flexible or pernicious enough . . . to prompt law enforcement practices like the NYPD's current stop-and-frisk program." *Id.* at 333. "Current stop-and-frisk practices are the legacy of Rehnquist's Promethean *Terry*, much more than Warren's 'bounded' version." *Id.* at 358.

²²⁵ The *Floyd* decision also treats disparate impact as an established manner of proving discriminatory intent for purposes of an Equal Protection claim. See *Floyd v. City of New York*, 08-cv-1034-SAS-HBP, Dock. No. 373 at 29 (S.D.N.Y. Aug. 12, 2013) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). But civil rights attorneys, including the former chief of the Department of Justice's Civil Rights division Thomas Perez, have resisted bringing any disparate impact litigation that would potentially be appealed to the Supreme Court, because the current Court is likely to reject disparate impact theories. See, e.g., Terry Eastland, *Thomas Perez Makes a Deal*, THE WEEKLY STANDARD, 2013 WLNR 14868004, May 27, 2013. For this reason, Perez successfully negotiated the dismissal of a case set for oral argument before the Supreme Court on February 29, 2012; the case would have given the Court the opportunity to decline to extend disparate impact theory to the housing discrimination context, and also might have eviscerated the theory in its entirety. *Id.*

²²⁶ *Yagman*, 796 F.2d at 1178 (internal quotations and citations omitted).