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Legal Discourse and Racial Justice: The Urge to Cry 'Bias!'

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ARTICLES

Legal Discourse and Racial Justice: The Urge to Cry “Bias!”

BRUCE A. GREEN*

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INTRODUCTION

In Fall 2013, when federal district judge Shira Scheindlin held the New York City Police Department’s stop-and-frisk policy to be unconstitutionally discrimi-

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natory,¹ the police department and its supporters were outraged.² Even months later, when newly elected Mayor Bill de Blasio moved to fulfill his campaign pledge to accept the court's rulings and reform police policy,³ police representatives remained angry and sought to intervene in order to press forward with an appeal.⁴ One can understand why. The police viewed the rulings as an impediment to their work. Beyond that, the judge's finding that police officers' daily conduct was not just unlawful but "biased"⁵—a term sounding very much like "racist"—was a stinging rebuke to dedicated public servants of diverse backgrounds who worked hard to keep the city safe.

One can equally understand why three federal appellate judges might have been skeptical of the district court's findings when the case first came before them, even before briefing on the merits. The lower court opinions, extensively reviewing evidence submitted during two months of hearings, were not just scholarly, but, perhaps from some perspectives, excessively so. While various conservative jurists from Chief Justice Roberts on down have made sport of legal scholarship,⁶ Judge Scheindlin might have seemed to be placing legal scholars on a pedestal. She declared the plaintiffs' expert, a law and public health professor, the victor in the "battle of the experts" over academics from other disciplines proffered by the City.⁷ She endorsed non-doctrinal legal scholarship—conservative jurists' least favorite kind—arguing "that unconscious racial bias," an unseeable psychological force, "continues to play an objectively measurable

1. See *Ligon v. City of New York*, 925 F. Supp. 2d 478, 486 (S.D.N.Y. 2013) [hereinafter *Ligon 1*]; *Floyd v. City of New York*, 959 F. Supp. 2d 540, 627 (S.D.N.Y. 2013), appeal dismissed (Sept. 25, 2013) [hereinafter *Floyd 1*]; *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013) [hereinafter *Floyd 2*]. See generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189 (2014).

2. See *Bloody Outrage*, *N.Y. POST*, Jan. 9, 2013, available at <http://www.nypost.com/2013/01/09/bloody-outrage/> (referring to Judge Scheindlin as a "loony-left judge"); Rocco Parascandola et al., *NYPD's Stop-and-Frisk Blasted by Judge, Mayor Bloomberg Fights Back*, *DAILY NEWS* (New York), Aug. 13, 2013, <http://www.nydailynews.com/new-york/stop-frisk-violated-rights-judge-article-1.1424287> (claiming that Judge Scheindlin "brushed aside NYPD concerns that reforms will make the city a more dangerous place").

3. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, *N.Y. TIMES*, Jan. 31, 2014, at A1.

4. *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014) (remanding cases for settlement negotiations and expressing no view on intervention motions); *Floyd v. City of New York*, 302 F.R.D. 69, 128 (S.D.N.Y. July 30, 2014) (denying intervention motion and approving parties' proposed modification of court's Remedial Order).

5. See, e.g., *Floyd*, 959 F. Supp. 2d at 587–88.

6. See Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, *N.Y. TIMES*, Oct. 21, 2013, at A15 (quoting Chief Justice Roberts, "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."); Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, *N.Y. TIMES*, Mar. 19, 2007, at A8 ("I haven't opened up a law review in years," said Chief Judge Dennis G. Jacobs of the federal appeals court in New York. "No one speaks of them. No one relies on them."). I and others have questioned these views. See generally Bruce A. Green, *The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous*, 53 *ARIZ. L. REV.* 365 (2011).

7. See *Floyd 1*, 959 F. Supp. 2d at 578.

role in many people's decision processes," including those of the police.⁸ Perhaps most galling, the judge appointed law professors to help remedy the perceived problem by looking over the shoulders of the police⁹—and not just any law professors, but critical race theorists!¹⁰

Even so, when the Second Circuit panel hastily removed Judge Scheindlin from the lawsuit, based on a supposed "appearance of impropriety,"¹¹ many thoughtful observers were shocked, maybe even independently of their views of the merits of the civil rights lawsuit.¹² Initial criticisms focused on the appellate court's process, especially its failure to solicit briefing from the parties or to hear from the district judge before ruling. Those who dug deeper may also have noticed that the appellate court's substantive rationales for reassigning the case sharply departed from prior federal case law on judicial disqualification, which the appellate court largely ignored.¹³ One might have been prompted to ask, "what's *really* going on here?" Retired federal district judge Nancy Gertner led a group of *amici*, of whom I was one, who worried that Judge Scheindlin's poorly explained removal would chill judicial independence.¹⁴ In public commentary, Judge Gertner went further, succumbing to the temptation to accuse the appellate judges of "bias" on their own part.¹⁵ Others may have felt the same urge.¹⁶

8. *Id.* at 580 n.157.

9. See *Floyd* 2, 959 F. Supp. 2d at 676; see also Jamie Schram, *Ivory Tower Eggheads to Monitor Stop and Frisk*, N.Y. POST, Sept. 18, 2013, available at <http://www.nypost.com/2013/09/18/ivory-tower-eggheads-to-monitor-stop-and-frisk/>.

10. See Heather MacDonald, *Shira's Cop-Haters*, N.Y. POST, Sept. 20, 2013, available at <http://nypost.com/2013/09/20/shiras-cop-haters/> ("Now [Judge Scheindlin has] given further evidence of her slanted worldview with her unremittingly one-sided appointments to an 'Academic Advisory Council' for the remedial phase of the case, *Floyd v. New York*. . . . Almost without exception, the members represent that wing of the academic and advocacy world that sees race and racism as the predominant features of American life. Some examples: Tanya Hernandez teaches Critical Race Theory, employment discrimination and the 'science of implicit bias' at Fordham Law. Critical Race Theory holds that race and racism structure nearly everything about the American legal system.").

11. *Ligon v. City of New York*, 538 Fed. App'x 101, 102 (2d Cir. 2013). For an in-depth description and analysis of the Second Circuit's disqualification decision, what led up to it, and ensuing litigation, see Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043 (2014).

12. See, e.g., Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), available at <http://www.newyorker.com/online/blogs/newsdesk/2013/10/the-preposterous-removal-of-judge-scheindlin.html>; Anil Kalhan, *The Appearance of Impropriety and Partiality*, DORF ON LAW (Nov. 5, 2013), <http://www.dorfonlaw.org/2013/11/the-appearance-of-impropriety-and.html>.

13. See *infra* notes 127–38; see also Kalhan, *supra* note 11, at 1091–95.

14. Brief of Six Retired U.S. District Court Judges & Thirteen Professors of Legal Ethics as Amici Curiae Supporting Plaintiff-Appellant's Motion Reconsideration by the En Banc Court, *Ligon v. City of New York*, 538 Fed. App'x 101 (2013) (No. 13-3123).

15. Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013, 3:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html (quoting retired federal district judge Nancy Gertner: "If there is bias here, it is that of the 2nd Circuit that went out of its way to disqualify a judge—outside of the normal processes, looking beyond the record, and without giving her a chance to respond.").

In retrospect, however, despite what social scientists tell us about the prevalence of implicit bias, it is arguably unprofessional, unfair, and unproductive to accuse judges of bias, even when—indeed, especially when—their decisions seem otherwise inexplicable. Should lawyers and legal academics publicly indulge in such surmise?¹⁷ This essay examines the opportunity and temptation to do so and the legitimacy of acceding to this temptation. Part II offers the Second Circuit’s recusal of Judge Scheindlin as an example of a case in which critics could be tempted to speculate about unconscious bias. Part III offers some reflections on whether lawyers should employ implicit bias rhetoric in the criminal justice process. It concludes that implicit bias in judging may be better discussed in the abstract or in the aggregate than in the context of any particular judicial decision.

I. CRIMINAL JUSTICE DISCOURSE AND IMPLICIT BIASES

Do social science insights into implicit bias require us to think differently about how we discuss racial justice in the criminal process, especially in the judicial process? Implicit biases are unconscious, non-deliberate attitudes and stereotypes that affect individuals’ decisions for better or worse.¹⁸ Everyone has implicit biases of one kind or another. There is a burgeoning body of literature on the implications of implicit biases for criminal justice¹⁹ as for other areas of law.²⁰ We are told that implicit biases, including racial biases, may influence every player in the criminal process—police,²¹ prosecutors,²² defense

16. See Kalhan, *supra* note 11, at 1113 (“[A] number of observers have suggested that it was [the appellate judges], rather than Judge Scheindlin, who ‘breached the rules’ of judicial conduct and created an appearance of impropriety and partiality . . . by acting *sua sponte* . . . and by ousting [Judge Scheindlin] so precipitously . . . [the appellate judges] created a high risk that observers would reasonably question their impartiality on that basis alone.”).

17. For an earlier critique of the “unconscious bias discourse,” see Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?*, 58 EMORY L.J. 1053, 1064 (2009).

18. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

19. See generally, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Shima Baradaran, *Race, Prediction and Discretion*, 81 GEO. WASH. L. REV. 157 (2013); Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315 (2012).

20. See, e.g., Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391 (2006); Reshma M. Saujani, “*The Implicit Association Test*”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003).

21. See, e.g., Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333 (2010).

22. See, e.g., Carla-Michelle Adams, *Criminalization in Shades of Color: Prosecuting Pregnant Drug-Addicted Women*, 20 CARDOZO J.L. & GENDER 89 (2013); Robert J. Smith & Justin D. Levinson, *The Impact of*

lawyers,²³ jurors²⁴ and, of course, judges.²⁵

The more we hear about implicit bias, the stronger is the temptation to infer that unconscious attitudes and prejudices are present in virtually any controversial judicial decision. That is, we may easily ascribe disfavored decisions to the unseen gravitational pull of unconsciously biased thought processes rather than, as in the old days, to conscious motivations that judges intentionally hid²⁶ or just to their plain bad judgment. Recently, a retired judge accused *himself* of unconscious racial bias to explain why a ruling he issued more than a decade earlier should be set aside.²⁷ Lawyers and judges may be tempted to level similar accusations against each other. Should we give in to this temptation?

Until attention shifted to implicit bias,²⁸ discussions of racial injustice in the criminal process focused on other problems of racial injustice that were more easily detected. There was, to begin with, the historic problem of overt racism. The stories of the “Scottsboro Boys”²⁹ and the “Groveland Boys”³⁰ recall a time when overt racism and prejudice were more prevalent in the criminal justice system as elsewhere in U.S. society than today. Many Supreme Court decisions establishing procedural protections in criminal cases, particularly during the Warren Court era, responded to this problem, although the decisions were usually

Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 SEATTLE U. L. REV. 795 (2012); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393 (2009).

23. See, e.g., Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

24. See, e.g., Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).

25. See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

26. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949) (asserting that judges hide reasons of which they are conscious).

27. James C. McKinley Jr., *Ex-Brooklyn Judge Seeks Reversal of His Verdict in 1999 Killing*, N.Y. TIMES, Dec. 12, 2013, at A31.

28. The social science literature on implicit bias appears first to have influenced legal academic discussions of discrimination in the civil context. See, e.g., Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999). The legal literature on implicit bias in policing, sentencing and other criminal settings developed somewhat later. See, e.g., R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006). The idea that many individuals are unconscious of their racial prejudices predates all of the legal literature drawing on recent social science studies. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

29. See *Norris v. Alabama*, 294 U.S. 587 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932); JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1995).

30. See *Shepherd v. Florida*, 341 U.S. 50 (1951); GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012).

not cast expressly as responses to racial prejudice.³¹

Attention later turned to police and prosecution practices that have racially discriminatory effects. Sometimes the practices in question reflect explicit racial considerations, as in the case of racial profiling,³² but not always. Critics have pointed to statistical evidence of the racially discriminatory nature of the national “war on drugs”³³ and of states’ implementation of capital punishment.³⁴ Police practices, such as traffic stops, requiring quick, on-the-spot judgments, are said to be particularly susceptible to racial bias.³⁵ Supreme Court decisions make it hard for an individual criminal defendant to prove and remedy unexpressed racial discrimination,³⁶ but the New York City stop-and-frisk litigation illustrates that police policies may sometimes be challenged successfully in civil actions based in part on their aggregate discriminatory impact.³⁷

The discourse on racial injustice has grown trickier, however, with the development of social science teachings on implicit bias. Studies show that unconscious attitudes and prejudices may distort anyone’s decision making, at least absent a conscious effort and procedural counter-measures to avoid their influence.³⁸ Rather than being part of the solution, courts may be part of the problem, because well-intentioned judges, like others, are susceptible to implicit racial bias or to other biases that have the effect of advantaging whites or disadvantaging racial minorities.³⁹

31. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2080–81 & n.17 (2013) (observing that Warren Court’s criminal procedure cases were implicitly about racial justice) (citing authority); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2002 (1998) (“Although the Supreme Court’s initial forays into criminal procedure surely had been motivated in large part by concern with the racial unfairness of southern criminal justice, the Court developed a series of formally race-neutral rules for constraining police, prosecutors, and the courts.”).

32. See, e.g., Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 48–49 (2001); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002).

33. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 102 (2012); Nekima Levy-Pounds, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV’T L. REV. 563, 566 (2013).

34. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006); John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 153–54 (1998).

35. See, e.g., Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 SEATTLE U. L. REV. 673, 693 (2012); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 280–81 (1999).

36. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 470 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

37. See *Floyd I*, 959 F. Supp. 2d 540.

38. For discussions of measures to reduce the impact of implicit racial bias, see, e.g., Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315 (2013); National Center for State Courts, *Strategies to Reduce the Influence of Implicit Bias*, available at http://www.ncsc.org/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (last visited Nov. 29, 2014). For a discussion of the difficulty of successfully doing so, see Greenwald & Krieger, *supra* note 18, at 962–65.

39. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009); see also *supra* note 25 and accompanying text.

Scholars tell us that it is not only unconscious *racial* bias that may be influential. Concerns have been raised that lawyers and judges may be susceptible to implicit biases based on gender,⁴⁰ sexual orientation,⁴¹ and economic class,⁴² among others.⁴³

In addition to biases based on stereotypical attitudes toward social groups, there are other implicit biases. Scholars have identified a host of cognitive biases—or mental shortcuts—that distort individuals’ judgment without their awareness. For example, Alafair Burke has explored how prosecutors’ disclosure decisions may be influenced by, among others, “confirmation bias” (starting with a theory and then looking for evidence that confirms it),⁴⁴ “selective information processing” (“the tendency to evaluat[e] evidence based on [one’s] existing beliefs”),⁴⁵ or “belief perseverance” (“the tendency to adhere to theories even when new information wholly discredits the theory’s evidentiary basis”).⁴⁶ Bringing these sorts of heuristics together under the umbrella of “tunnel vision,” scholars have discussed generally how these cognitive biases lead to wrongful convictions.⁴⁷

Judges’ unconscious social-group stereotypes and cognitive biases are very different from the “judicial biases” defined by codes of judicial conduct and other regulatory law. Judicial conduct codes enjoin judges to perform their duties “without bias or prejudice,”⁴⁸ as well as “fairly and impartially.”⁴⁹ Further, judges are required to disqualify themselves in proceedings in which their “impartiality might reasonably be questioned,” including when they have “a bias or prejudice concerning a party or a party’s lawyer.”⁵⁰ But judges are not subject to disqualification under judicial conduct codes for unconscious, unarticulated

40. See, e.g., Mahzarin R. Banaji & Anthony Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 197 (1995); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 17 (2010).

41. See, e.g., Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 476 (2008).

42. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 142–43 (2013); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 48–49 (1994).

43. Nugent, *supra* note 42, at 48 (noting the possibility that judges may be influenced by regional bias).

44. See Alafair Burke, *Brady’s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 577–78 (2007) (discussing the role of confirmation bias in prosecutorial disclosure); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495 (2009) (same).

45. See Burke, *Brady’s Brainteaser*, *supra* note 44, at 578.

46. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1599–1600 (2006).

47. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292–94 (2006); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488–89 (2009); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

48. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.3(A) (2011) [hereinafter MODEL CODE OF JUDICIAL CONDUCT].

49. MODEL CODE OF JUDICIAL CONDUCT R. 2.2.

50. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1).

biases. Judicial bias under the law means something else entirely. Judges may be disqualified because of particular relationships, such as familial or business relationships with a party or lawyer, that justify a presumption or create an appearance that the judge will be unfairly predisposed to one side. On rare occasion, judges who otherwise would be presumed to be fair-minded have also been disqualified for giving voice to biases: Judges who make statements indicating that they are predisposed to favor one party over another—for example, a judge’s statement from the bench that he is “for the little guy, not for the government”⁵¹—have been regarded as expressing impermissible judicial bias.

Parties are entitled to an unbiased judge, in the narrow sense defined by the judicial conduct codes, and a party who believes a judge should be disqualified for bias may seek a judicial resolution by filing a timely motion.⁵² But judges are presumed to be unbiased, despite backgrounds and life experiences that they bring to the task of judging and that might shape their dispositions one way or the other. Common sense and experience suggest that philosophical biases may in fact affect judges’ decisions, but the law governing judicial conduct pretends that they do not exist or matter.⁵³ The law presumes that judges will decide cases fairly, regardless of these philosophical predispositions, and as a practical matter, it could not be otherwise, since judges are not blank slates.⁵⁴ Moreover, the right to an unbiased judge, even in the narrow, legal sense, is not absolute: A party that sits on its heels after learning of alleged grounds for judicial recusal ordinarily waives that right, because otherwise parties might wait to see how the judge rules before deciding whether to complain.⁵⁵ Of course, parties have no right or meaningful ability to remove judges who hold implicit biases; if they did, there might be no one left to judge.

Consequently, implicit racial biases and other implicit biases are presumably ubiquitous but not disqualifying. The extent to which implicit biases are likely to influence decisions in the criminal process is open to debate.⁵⁶ That an implicit bias affected the result in any given case is inherently unprovable. And yet,

51. *In re Wood*, 720 So.2d 506, 507 (Fla. 1998).

52. *See, e.g.*, *Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 38 F.3d 1404, 1408–09 (5th Cir. 1994); *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).

53. *See, e.g.*, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 502–03 (1986) (“The bias that comes from the judge’s intellectual or political position, however, differs from the type of bias that occurs when an individual adjudicates an issue with which she has had prior involvement, either in the position of an advocate or as a judge in an earlier stage of the case. The judge then has a strong motivation to hold that her initial decision was the correct one, and to a certain extent she acts as judge in her own case.”).

54. *See, e.g.*, Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 965–67 (2002); Redish & Marshall, *supra* note 53, at 502–03.

55. *See, e.g.*, *Madsen v. Prudential Fed. Sav. & Loan Ass’n*, 767 P.2d 538 (Utah 1988).

56. *See, e.g.*, Shima Baradaran, *Race, Prediction and Discretion*, 81 GEO. WASH. L. REV. 157 (2013).

virtually whenever one disapproves of a judge's opinion, it is possible to surmise that unconscious biases and prejudices are at work, and if their role cannot be proved, it also cannot be disproved.

II. NYC STOP-AND-FRISK LITIGATION: A CASE STUDY

In the Summer of 2013, after extensive factual submissions and argument, federal district judge Shira Scheindlin issued lengthy, extensively reasoned decisions holding that New York City policing policy resulted in racially discriminatory stops and frisks.⁵⁷ Outraged critics accused the judge of being one-sided⁵⁸ and the administration of outgoing Mayor Michael Bloomberg hurriedly appealed and asked the Second Circuit to stay the decision,⁵⁹ while Bill de Blasio, the Democratic candidate to succeed him, pledged to withdraw the appeal if elected.⁶⁰

When the lawyers for the outgoing administration appeared in the Court of Appeals to argue the City's motion, the judges raised an issue that no party had formally raised, briefed, or argued either in the district court or the court of appeals—namely, whether Judge Scheindlin was impermissibly biased. Soon after the argument, only days before the election, and without ever hearing from Judge Scheindlin, the panel issued a short opinion removing her from the stop-and-frisk cases based on judicial ethics provisions requiring judicial impartiality.⁶¹ The urgency was not apparent, since no proceedings were pending in the district court. Soon after, the panel withdrew its original order and published a new opinion with a somewhat different rationale but reaching the same result.

The Second Circuit decisions are like a matryoshka doll: the district judge found that the police were biased (and implied in interviews that her judicial colleagues were, too); the court of appeals found that the district judge was biased; and a critic might suspect the circuit judges of bias. The decisions provide a vehicle for illustrating the varying meanings of "bias" in the criminal justice process, including in judging, and for exploring the legitimacy of accusing judges of "implicit bias" when they make problematic decisions.

57. See *Ligon 1*, 925 F. Supp. 2d 478; *Floyd 1*, 959 F. Supp. 2d 540; *Floyd 2*, 959 F. Supp. 2d 668.

58. See Parascandola et al., *supra* note 2; MacDonald, *supra* note 10.

59. See Benjamin Weiser & Joseph Goldstein, *City Asks Court to Vacate Rulings on Policing Tactic*, N.Y. TIMES, Nov. 10, 2013, at A31.

60. See Benjamin Weiser, *Judges Decline to Reverse Stop-and-Frisk Ruling, All But Ending Mayor's Fight*, N.Y. TIMES, Nov. 23, 2013, at A21.

61. *Ligon v. City of New York*, 736 F.3d 118, 124–27 (2d Cir. 2013); *Ligon v. City of New York*, 538 Fed. App'x 101, 102–03 (2d Cir. 2013); see also *Ligon v. City of New York*, 736 F.3d 231, 232 (2d Cir. 2013) (denying City's motion district judge's motion to appear and argue); *Ligon v. City of New York*, 736 F.3d 166, 170 (2d Cir. 2013) (denying district judge's motion to appear and argue).

A. THE LONG LEAD-UP TO JUDGE SCHEINDLIN'S REMOVAL

The civil rights class actions before Judge Scheindlin were successors to an earlier one, *Daniels v. City of New York*, which was filed during the Giuliani administration and concluded at the end of 2007. The plaintiffs in *Daniels* alleged that the New York City police engaged in racial profiling in stopping and frisking young Black and Latino men, rather than acting on reasonable, articulable suspicion as required by Fourth Amendment case law.⁶² Judge Scheindlin certified the class action in 2001. An appellate panel over which Circuit Judge Jose Cabranes presided initially agreed to stay discovery and hear an appeal from her certification decision but then concluded that its own order was improvidently granted and dismissed the appeal.⁶³ Along the way, Judge Cabranes may have formed impressions that he would recall a dozen years later when, perhaps coincidentally, an appeal in the successor cases came before him.⁶⁴

In 2003, the parties in *Daniels* reached a settlement, which the district court approved, requiring the police department to adopt a Racial Profiling policy, supervise, monitor and train its officers regarding the policy, and provide the plaintiffs with compilations of data on their ongoing stop-and-frisk practices.⁶⁵ The agreement gave the district court oversight of compliance through the end of 2007.

As the *Daniels* case was coming to a close in December 2007, the plaintiffs sought to extend the court's supervision.⁶⁶ They alleged that, by maintaining racially discriminatory policing practices, the City was violating the settlement agreement.⁶⁷ The judge commenced a hearing on the motion at 4:50 p.m. on Friday, December 21—that is, just ten minutes before federal offices closed for a four-day holiday.⁶⁸ Although she gave both sides time to be heard, Judge Scheindlin expressed little sympathy for the plaintiffs' request. Having reviewed the parties' papers, she sided with the City's argument that the settlement agreement required it only to adopt a policy, which the City had done.⁶⁹ The agreement did not obligate the City to *comply* with its policy.⁷⁰ If the plaintiffs had evidence of ongoing discriminatory practices, Judge Scheindlin observed,

62. *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

63. *Daniels v. City of New York*, 13 Fed. App'x 20, 21 (2d Cir. 2001).

64. See Kalhan, *supra* note 11, at 1073–81 (describing Judge Cabranes's role in the October 2013 oral argument on the City's motion to stay Judge Scheindlin's decisions in the later stop-and-frisk cases).

65. *Daniels v. City of New York*, No. 99 Civ. 1695(SAS), 2007 WL2077150, at *1 (S.D.N.Y. July 16, 2007).

66. *Ligon v. City of New York*, 736 F.3d 118, 132 (2d Cir. 2013).

67. *Id.* at 134–35.

68. President Bush signed an executive order that year closing federal offices on December 24, the day before the Christmas holiday, giving federal employees a four-day weekend. See Exec. Order No. 13453, 3 C.F.R. 13453 (2007).

69. *Ligon*, 736 F.3d at 124–46.

70. *Id.*

that could be the subject of a new lawsuit, but not this one.⁷¹

It was Judge Scheindlin's questions and observations during this hearing to which the Second Circuit would return six years later. But it is hard to imagine that at the close of business that Friday afternoon, the civil rights plaintiffs thought Judge Scheindlin was favoring them. She expressed no sympathy for their request, but favored the City's argument from the start.⁷² In pressing the plaintiffs' counsel, Judge Scheindlin asked questions such as, "Do you have another lawsuit to bring?,"⁷³ which may have sounded more like a challenge—"put up or shut up"⁷⁴—than encouragement. Her point, in any event, was that, given the City's fulfillment of the settlement agreement, this was the wrong context for deciding the plaintiffs' discrimination claim, particularly given the alternative of a separate lawsuit. Although the judge softened in the end, ultimately observing that if the plaintiffs did bring a lawsuit and designated it as a "related case," she would accept it, it is unlikely that anyone at the time understood that she was offering advice or encouragement or that the plaintiffs' counsel needed any. The City walked away from the hearing, for the moment, the big winner.

Counsel for the *Daniels* plaintiffs followed the next month with a class action lawsuit, *Floyd v. City of New York*,⁷⁵ that they undoubtedly had contemplated since well before the December hearing. In *Floyd*, as previously in *Daniels*, the complaint was that the police stopped individuals without suspicion based on racial profiling.⁷⁶ The plaintiffs identified the case as related to *Daniels*, and it was sent to Judge Scheindlin, who accepted it as she had said she would, in accordance with district court policy at the time giving her sole discretion whether to do so.⁷⁷ Later, in 2010, *Davis v. City of New York*,⁷⁸ a civil rights action challenging police practices in public housing, was assigned to Judge Scheindlin as a case related to *Floyd*, and in 2012, another related class action, *Ligon v. City of New York*,⁷⁹ came to her. Never once—not when Judge Scheindlin accepted these cases, not at any time during the lengthy pretrial

71. *Id.*

72. *See id.* at 124.

73. *See id.* at 124 ("[W]hy don't you file a lawsuit? . . . So instead of struggling to tell[] me about a stipulation of settlement, why don't you craft a lawsuit? . . . I don't understand why we have to potentially have, you know, months of briefing when it does fit under this stipulation or it doesn't. . . . Why do you need that if you have a lawsuit? Bring it. They have a written policy, right? . . . If you think they are violating their written policy, sue them.").

74. Courts have appropriated the concept. *See, e.g.,* *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010) ("We often call summary judgment the 'put up or shut up' moment in litigation . . . by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case. And by evidence, we mean evidence on which a reasonable jury could rely." (citations omitted)).

75. *Floyd v. City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. 2010).

76. *Id.* at 378.

77. *See infra* note 121 and accompanying text; Kalhan, *supra* note 11 at 1102–09.

78. *Davis v. City of New York*, No. 10 Civ. 0699(SAS), 2011 WL 1742748, at *1 (S.D.N.Y. May 5, 2011).

79. *Ligon v. City of New York*, 910 F. Supp. 2d 517 (S.D.N.Y. 2012); *see* Kalhan, *supra* note 11, at 1058.

proceedings, and not in the end when she conducted the trial—did the City ask Judge Scheindlin to consider sending these cases to another judge on the theory that the cases were unrelated to *Daniels* or to each other or on the theory that during the hearing in the *Daniels* lawsuit she had expressed bias in favor of the civil rights plaintiffs or against the City.

Judge Scheindlin tried these cases over the course of two months from March to May, 2013.⁸⁰ The cases were prominent in New York City.⁸¹ In anticipation of a ruling, several journalists were interested in profiling Judge Scheindlin and sought to interview her.⁸² Although judicial ethics rules restrict judges from making public statements about pending and impending cases⁸³ and from engaging in various other extrajudicial activities that might undermine judicial impartiality or interfere with the administration of justice,⁸⁴ they do not require judges to be cloistered.⁸⁵ Judges may speak or write about themselves, their general approach to judging, their judicial philosophy, the law, or many other matters.⁸⁶ Some judges stay out of the public spotlight but others choose to make themselves and their ideas publicly available in any of several ways, including by writing books or articles, or through participation in lectures and continuing legal education programs.⁸⁷ Supreme Court Justices and other judges who are nationally or locally noteworthy sometimes submit to interviews, while avoiding discussing particular current cases.⁸⁸ With the stop-and-frisk cases, Judge Scheindlin's day had come, and she agreed to sit for several interviews, including with *New Yorker* writer Jeffrey Toobin, who had interviewed Supreme Court

80. *Floyd I*, 959 F. Supp. 2d at 572.

81. See *supra* note 2 (explaining that each of the major city newspapers—the New York Times, the Daily News, the New York Post, and Newsday—published multiple stories about the hearings).

82. *Ligon v. City of New York*, 736 F.3d 118, 131 n.2 (2d Cir. 2013).

83. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A). See generally Nancy Gertner, *Remarks of Hon. Nancy Gertner*, 64 N.Y.U. ANN. SURV. AM. L. 449 (2009); Mark I. Harrison & Keith Swisher, *When Judges Should Be Seen, Not Heard: Extrajudicial comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct*, 64 N.Y.U. ANN. SURV. AM. L. 559 (2009); Michael D. Schoepf, Note, *Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases*, 93 MINN. L. REV. 341 (2008).

84. See MODEL CODE OF JUDICIAL CONDUCT R. 3.1.

85. See generally Green, *supra* note 54, at 967–68.

86. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(D)–(E).

87. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit is the most prolific contemporary jurist. For a list of his publications, see *Richard A. Posner: Publications*, THE UNIV. OF CHI. L. SCH. (Oct. 19, 2014, 10:59 PM), <http://www.law.uchicago.edu/node/79/publications>.

88. See, e.g., *ABC News: Interview by Katie Couric with Justice Ruth Bader Ginsburg, Associate Justice, United States Supreme Court* (ABC television broadcast July 31, 2014), <http://www.abcnnews.com/WNT/video/ruth-bader-ginsburg-interview-katie-couric-24782947>; *The Daily Show: Interview by Jon Stewart with Justice Sonia Sotomayor, Associate Justice, United States Supreme Court* (Comedy Central television broadcast Jan. 21, 2013), <http://thedailyshow.cc.com/videos/hjb44w/exclusive-sonia-sotomayor-extended-interview-pt-1>; *CBS News: Interview by Lesley Stahl with Justice Antonin Scalia, Associate Justice, United States Supreme Court* (CBS television broadcast April 24, 2008), <http://www.cbsnews.com/news/justice-scalia-on-the-record/>.

Justices for prior profiles.⁸⁹

As required by judicial ethics rules, Judge Scheindlin avoided discussing the pending stop-and-frisk cases. She discussed some uncontroversial subjects such as her background, her family, and her preference as a judge for writing opinions over presiding over trials.⁹⁰ But the interviews were not entirely innocuous. Evidently in all of the interviews, the judge talked about judicial independence.⁹¹ This is itself unobjectionable—indeed, judicial ethics canons regard independence as an essential judicial trait⁹²—but in affirming her own independence, Judge Scheindlin stressed an unwillingness to show the government the favoritism that, apparently in her view, it receives from judges who come from a prosecutorial background.⁹³ On their face, the judge’s remarks did not express impermissible judicial bias—that is, favoritism toward one side or the other—just the opposite. Although some, including her judicial colleagues, might have taken umbrage at the suggestion that she was fairer than other judges, Judge Scheindlin was expressing a commitment to ruling even-handedly without favoring either side. And she did not express a novel insight in observing that some judges, especially those who were former prosecutors, were more favorably disposed toward the government.⁹⁴

Judge Scheindlin also responded to City representatives’ apparent efforts to discredit her in anticipation of her rulings by misleadingly characterizing her record in prior criminal cases. The Mayor’s office had recently claimed that in her published decisions Judge Scheindlin ruled in favor of individuals’ Fourth Amendment claims more often than other judges.⁹⁵ She responded that the figure was meaningless since most decisions did not result in published opinions, and described the report as painful, inappropriate and intimidating.⁹⁶

One might have wondered whether Judge Scheindlin’s concern over the City’s conduct outside the context of the pending lawsuits would affect her disposition

89. Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, NEW YORKER, May 27, 2013, at 36. See Kalhan, *supra* note 11, at 1063–64.

90. See *Ligon v. City of New York*, 736 F.3d 118, 151 (2d Cir. 2013) (reprinting articles).

91. See, e.g., *id.* at 159, 161.

92. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (“A judge shall uphold the integrity and independence of the judiciary.”).

93. See Toobin, *supra* note 89 (quoting Judge Scheindlin: “Too many judges, especially because so many of our judges come out of that office, become government judges. . . . I don’t think I’m the favorite of the U.S. Attorney’s office for the Southern District. Because I’m independent. I believe in the Constitution. I believe in the Bill of Rights. These issues come up, and I take them quite seriously. I’m not afraid to rule against the government.”); Larry Neumeister, *NY “Frisk” Judge Calls Criticism “Below-the-Belt,”* ASSOCIATED PRESS, May 19, 2013, <http://www.bigstory.ap.org/article/ny-frisk-judge-calls-criticism-below-belt>.

94. Before his appointment to the federal bench, Judge Jed Rakoff leveled a more emphatic charge against the judiciary, and evidently, his belief was not held to disqualify him from judicial service. See Jed S. Rakoff, *How Can You Defend Those Crooks*, N.Y.L.J., Sept. 25, 1990 (“When it comes to criminal cases, . . . too many judges evidence a blatant and continuing bias in favor of the prosecution.”).

95. See Kalhan, *supra* note 11, at 1068–69.

96. Neumeister, *supra* note 93.

toward the City in the litigation. But the City never sought to disqualify Judge Scheindlin on this basis, and for good reasons. First, a judge cannot avoid having general attitudes, positive or negative, toward the administration of a locality in which she lives. A government entity is unlike an individual party: a judge who lives and works in a locale cannot avoid interacting with its representatives and forming attitudes toward it, and, as an engaged member of the public, a judge cannot avoid forming impressions of public officials. The law presumes that judges put such feelings aside. And, as a practical matter, utter indifference toward the sovereignty cannot be a prerequisite for deciding cases in which it is a party. Here, of course, the judge's consternation was a response to the City's extrajudicial attack on her professional work. But if a party could move to disqualify the judge based on displeasure that the party itself deliberately fostered, litigants would have a formula for engineering the removal of any judge they disfavored. What is key is that neither the City's attack on Judge Scheindlin's prior work nor the judge's response specifically addressed the cases pending before her.

In August 2013, several months after the interviews, Judge Scheindlin issued an almost 200-page opinion, extensively reviewing the evidence and the law.⁹⁷ The opinion was dispassionate; it did not express any kind of disqualifying bias. In brief, Judge Scheindlin found that the police department had a practice of making unconstitutional stops and unconstitutional frisks (i.e., without the requisite level of suspicion), that the police department disproportionately targeted blacks and Hispanics, and that the City was liable because of its deliberate indifference to the police practice.⁹⁸ In a separate opinion, she ordered preliminary remedial measures, including the appointment of a monitor, revisions to police policies, training materials and documentation, a pilot project for recording stops, and a "joint remedial process for developing supplemental reports."⁹⁹ The following month, Judge Scheindlin denied the City's motion to stay these remedial measures while it appealed, and she advanced the remedial process by appointing an Academic Advisory Council to participate in the process.¹⁰⁰

The judge's findings must have stung, not simply because she ruled against the City, but because she found that the conduct of the police and the City were influenced by unconscious *racial bias*. In large part, this finding relied on the plaintiffs' expert's analysis of police reports of stops and frisks. The expert's

97. *Floyd 1*, 959 F. Supp. 2d 540.

98. *See id.*

99. *See Floyd 2*, 959 F. Supp. 2d at 686. This opinion addressed remedies in both *Floyd* and *Ligon*.

100. *See* Charisma L. Miller, *Brooklyn Law School Professor to Head Stop-and-Frisk Committee*, BROOKLYN DAILY EAGLE (Sept. 23, 2013), available at <http://www.brooklyneagle.com/articles/brooklyn-law-school-professor-head-stop-and-frisk-committee-2013-09-23-120000>. *See also* notes 9 & 10 and accompanying text, *supra*.

statistical analysis showed that (1) racial composition is a better predictor than crime rate of the rate of stops in a locale, (2) blacks and Hispanics are more likely to be stopped than whites, (3) after a stop, blacks were thirty percent more likely than whites to be arrested, (4) blacks and Hispanics who were stopped were more likely to be subject to force, and (5) cases against blacks were more likely to be dropped than those against whites, suggesting that the stops were less likely to be justified by objective evidence.¹⁰¹ The judge discredited the defense expert in part because he appeared to proceed from the premise that it is not “plausible that officers’ decisions regarding whether to stop a person may be swayed by conscious or unconscious racial bias,” and in part because he could not identify any race-neutral factors to explain why blacks and Hispanics were stopped at a disproportionate rate.¹⁰² Judge Scheindlin’s opinion also referred to social science research on unconscious racial bias. In particular, she observed that police justified their stops of blacks and Hispanics based on “furtive movements” more often than stops of whites, and suggested that this may be explained by the influence of unconscious bias on police officers’ “rapid, intuitive impressions” of individuals’ movement.¹⁰³

B. THE SECOND CIRCUIT’S QUESTIONABLE PROCESS

Others have remarked on the procedural irregularity of what came next.¹⁰⁴ In a nutshell, the City asked the Second Circuit to stay the judge’s remedial process pending its appeal. The case was assigned to a three-judge panel of which the presiding judge was Judge Cabranes, who coincidentally had presided over an appeal in *Daniels* twelve years prior. On October 31, 2013, two weeks after hearing argument on the motion, the panel issued an opinion staying proceedings pending appeal, scheduling the filing of briefs, and, on its own initiative,

101. *Floyd I*, 959 F. Supp. 2d at 560.

102. *Id.* at 586–87.

103. *Id.* at 578 (finding that “an officer’s impression of whether a movement was ‘furtive’ may be affected by unconscious racial biases”). Judge Scheindlin further observed:

Other recent psychological research has shown that unconscious racial bias continues to play an objectively measurable role in many people’s decision processes. It would not be surprising if many police officers share the latent biases that pervade our society. If so, such biases could provide a further source of unreliability in officers’ rapid, intuitive impressions of whether an individual’s movements are furtive and indicate criminality. Unconscious bias could help explain the otherwise puzzling fact that NYPD officers check “Furtive Movements” in 48% of the stops of blacks and 45% of the stops of Hispanics, but only 40% of the stops of whites. There is no evidence that black people’s movements are objectively more furtive than the movements of white people.

Id. at 580–81.

104. Kalhan, *supra* note 11, at 1085–1113; Jeffrey Toobin, *The Last Word on Stop and Frisk?*, NEW YORKER, Nov. 11, 2013, <http://www.newyorker.com/news/daily-comment/the-last-word-on-stop-and-frisk> [hereinafter Toobin, *The Last Word*]; Louis J. Virelli III, *What “Stop-and-Frisk” Can Teach Us About the First Amendment and Judicial Recusal*, 47 CONN. L. REV. 13, 17 (2014).

removing Judge Scheindlin from the case.¹⁰⁵ The court's explanation was spare: it stated that Judge Scheindlin "ran afoul" of the judicial code provision requiring judges to "avoid the appearance of impropriety in all activities" (1) by improperly applying the "related case rule" and (2) "by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court."¹⁰⁶ The panel remanded the case solely for the purpose of assigning a new district judge whose task would be to "implement this Court's mandate staying all proceedings and otherwise await further action by the Court of Appeals on the merits of the ongoing appeals."¹⁰⁷ It appended to its opinion the December 21, 2007 *Daniels* transcript and three articles recounting interviews with the district judge.¹⁰⁸ In *The New York Post*, a former prosecutor hailed the decision, calling Judge Scheindlin "the quintessential liberal activist judge with an obvious anti-police bias."¹⁰⁹

The opinion was procedurally unusual and perhaps unprecedented for reasons on which others have remarked,¹¹⁰ among them being: the City had never sought Judge Scheindlin's removal or argued that she violated the judicial code, the related case rule, or any other provision cited by the Second Circuit governing judicial conduct, and Judge Scheindlin never addressed the question on her own initiative.¹¹¹ The appellate panel launched its inquiry into the district judge's conduct without any prompting.¹¹² It then proceeded to conduct its own fact-finding, reaching outside the record for the *Daniels* transcript and the three articles.¹¹³ While the panel might have remanded for additional fact-finding, it declined to do so and later rebuffed Judge Scheindlin's request to be heard.¹¹⁴ Believing that it "was in full possession of the relevant facts,"¹¹⁵ the court did not consider whether additional evidence or explanation might have put the transcript and articles in a different light or might have suggested a different construction than the one that the panel ascribed to them. It issued a hurried and curt opinion in a context where there was no evident reason to rush: once the panel issued the stay, there was nothing for a district judge to do other than wait.

105. *Ligon v. City of New York*, 538 F.3d 118, 121 (2d Cir. 2013).

106. *Id.* at 123–24.

107. *Id.* at 123.

108. *Id.* at 130–65.

109. Michel E. Bongiorno, *The Slapdown the Stop-and-Frisk Judge Deserved*, N.Y. POST (Oct. 31, 2013, 11:46 PM), available at <http://www.nypost.com/2013/10/31/the-slapdown-judge-shira-deserved>.

110. See, e.g., Nancy Gertner, *Which Judges Breached the Rules?*, N.Y. TIMES, Nov. 3, 2013, available at <http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/which-judges-breached-the-rules>; Kalhan, *supra* note 11; Toobin, *supra* note 12; Dan Wise, *Removing the Judge Who Ruled 'Stop and Frisk' Unconstitutional Is a Blow to Justice*, THE NATION (Jan. 8, 2014), <http://www.thenation.com/article/177845/removing-judge-who-ruled-stop-and-frisk-unconstitutional-blow-justice#>.

111. Kalhan, *supra* note 11, at 1080–82.

112. *Id.* at 1080.

113. *Id.* at 1081.

114. *Ligon v. City of New York*, 736 F.3d 166 (2d Cir. 2013).

115. *Ligon v. City of New York*, 736 F.3d 231, 233 (2d Cir. 2013).

To many, the abbreviated process offended fundamental ideas of procedural fairness.¹¹⁶ It is ordinarily assumed that, to achieve fair outcomes in an adversarial system, the parties with a stake in a factual and legal question must have an opportunity to be heard, so that each side may argue the facts and factual inferences supporting its position, argue how the law should be interpreted, and argue how the law should apply to the facts. It is unusual for an appellate court to make factual and legal findings without assistance from the parties. Further, even if a court were to assume that the facts and law were foregone conclusions and that it needed no assistance, it would ordinarily give the parties an opportunity to be heard, if only so that the parties would perceive that the court was treating them fairly and respectfully. One can imagine exceptions where, for example, a trial judge must swiftly impose order or where the court is making ministerial decisions, but that was not the case here.

Adding to the strangeness of the appellate process in the stop-and-frisk cases was that the panel withdrew its opinion two weeks later and substituted a new one that ostensibly “explain[ed] in greater detail the basis for our decision to reassign the cases,”¹¹⁷ but that actually substituted new explanations. First, the opinion “clarif[ied]” that it did not mean to “imply” that the judge violated the judicial code of conduct¹¹⁸—although it had previously said precisely that. Rather, the panel maintained, Judge Scheindlin’s disqualification was required by a federal statute, 28 U.S.C. § 455(a), requiring judges to disqualify themselves in proceedings in which their “impartiality might reasonably be questioned.”¹¹⁹ Second, the panel did not re-assert that the trial judge improperly applied the “related case rule.”¹²⁰ It may have realized that there was no precedent for disqualifying a trial judge for violating this court rule. Alternatively, it may have decided on reflection that the judge reasonably applied the rule: as knowledgeable critics pointed out, the new cases were in fact related to the earlier ones and to each other; the district judge’s application of the rule was consistent with how other district courts applied the rule; and, in any event, the rule at the time contained no criteria for determining whether cases were sufficiently related and gave unguided and unreviewable discretion to the district court.¹²¹ Instead, in the new opinion, the panel took the view that the judge’s comments in the *Daniels*

116. Kalhan, *supra* note 11, at 1083.

117. *Ligon v. City of New York*, 736 F.3d 118, 123 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

118. *Id.* at 128.

119. *Id.* at 123–124.

120. *Id.* at 130.

121. At the time, the rules of the Southern District of New York required a lawyer filing a civil case to disclose when the case might be related to another pending one, at which point the new case would be referred to the judge presiding over the one filed earlier. That judge would have sole and unreviewable discretion whether to accept or reject the new case. See generally *Chevron Corp. v. Danziger*, 11 Civ. 0691 (LAK), 2011 U.S. Dist. LEXIS 50724 (S.D.N.Y. Mar. 7, 2011). The court rule was subsequently amended. See generally Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related*

colloquy, which the panel quoted extensively, would lead a reasonable observer to “conclude that the appearance of impartiality had been compromised.”¹²² Additionally, although not re-asserting that Judge Scheindlin’s media interviews provided an independent basis for disqualifying her, the panel maintained that the interviews exacerbated the appearance of partiality.¹²³

The new opinion attempted to justify the court’s odd process. The court acknowledged that neither the parties nor the trial judge herself had raised the possibility of recusal, but asserted that it is not unusual for the court to “reassign” a case to ensure that it is decided by a different district judge who was “without even an *appearance* of partiality.”¹²⁴ The panel noted that often the Second Circuit “reassign[ed] a case without the issue having been raised or briefed by the parties or considered by the district judge.”¹²⁵ It quoted a 1941 Supreme Court decision recognizing that in “exceptional cases . . . where injustice might otherwise result,” reviewing courts can consider legal questions that were never raised or considered by the trial court.¹²⁶

This explanation overlooks that the panel was not reassigning the case but was disqualifying the trial judge—a crucial distinction.¹²⁷ The cases cited by the panel involving reassignments on remand were based on 28 U.S.C. § 2106, which allows an appellate court, upon reviewing a district court’s judgment and remanding the case for further proceedings, to issue any order “as may be just under the circumstances.”¹²⁸ After deciding a party’s appeal and concluding that the district court ruled erroneously, the appellate court sometimes (though rarely) orders reassignment to prevent what would now be recognized as cognitive bias—namely, that the original judge would, if only unconsciously, remain influenced by his or her earlier, erroneous way of thinking.¹²⁹ Section 2106 provided no authority in the stop-and-frisk cases since the appeals court had not

Cases” *Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199 (2014) (criticizing the earlier court rule and noting that it was amended after the Second Circuit decision).

122. *Ligon*, 736 F.3d at 123.

123. *Id.* at 126–27.

124. *Id.* at 128–29.

125. *Id.* at 129.

126. *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

127. See Kalhan, *supra* note 11, at 1098–99; see generally Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1 (2014).

128. 28 U.S.C. § 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

129. See, e.g., *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977). But see *In re Kellogg Brown & Root*, 756 F.3d 754, 763 (D.C. Cir. 2014) (“[A]ppellate courts on rare occasions will reassign a case sua sponte But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge’s conduct is ‘so extreme as to display clear inability to render fair judgment.’”) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). See generally Jack B. Weinstein, *The*

yet ruled on the district court's judgment. Further, the panel did not purport to invoke this provision. According to the panel, "the cases were reassigned . . . solely pursuant to 28 U.S.C. § 455(a),"¹³⁰ which provides that a judge "shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned."¹³¹

Under the disqualification statute, it is doubtful that an appellate court has the authority to act on its own initiative except perhaps in egregious circumstances. A party must not only seek a judge's disqualification but do so in timely fashion,¹³² rather than waiting to see how the judge rules before objecting and squandering judicial resources in the process. If appellate courts cannot consider untimely disqualification motions, it is anomalous for them to disqualify the trial judge in the entire absence of a motion.¹³³ The Second Circuit had previously noted the possibility that disqualification of a district judge might be justified even absent a timely motion if "the damage done to the appearance of justice is so egregious,"¹³⁴ but it did not purport to apply that standard in the stop-and-frisk cases.

C. THE SECOND CIRCUIT'S QUESTIONABLE EXPLANATIONS

Even assuming that the Second Circuit has authority to disqualify a district court on its own initiative, one might be skeptical of its reasons for doing so in the stop-and-frisk cases. While taking pains to avoid "suggest[ing] that a district court can never . . . advise[] the party of its legal or procedural options," the panel concluded that "in combination with [Judge Scheindlin's] public statements" more than five years later, the *Daniels* colloquy might lead "a reasonable observer [to] question the [judge's] impartiality."¹³⁵ This was based on the assumption that in the *Daniels* colloquy Judge Scheindlin affirmatively advised the plaintiffs to file a new claim. But this is not the only possible interpretation. One might equally say that the trial judge disclosed why she was disinclined to review police stop-and-frisk practices in the pending proceeding—namely, that there was a better context in which to do so—and offered the plaintiffs a chance

Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge, 120 F.R.D. 267 (1988) (criticizing reassignments by appellate courts).

130. *Ligon*, 736 F.3d at 169.

131. 28 U.S.C. § 455(a).

132. See, e.g., *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 146 (10th Cir. 1991) ("Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time." (citation omitted)); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987).

133. See, e.g., *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980) (Kennedy, J.) (stating that the issue of disqualification must be presented to trial judge before it can be raised on appeal).

134. *United States v. Bayless*, 201 F.3d 116, 130 (2d Cir. 2000) ("[T]here may well be circumstances in which no timely recusal motion is made, but in which the damage done to the appearance of justice is so egregious that, despite the moral hazard created, recusal would be warranted under § 455(a).").

135. *Ligon*, 736 F.3d at 125.

to change her mind. Surely judges need some latitude to question litigants and probe their arguments without fear that judicial comments and questions, viewed in the harshest light, will be construed as evidence of partiality. That is in part why an earlier appellate decision, cited several times by the panel on other issues, noted that “courts are loath to require recusal based on statements made in a judicial context (e.g., in a status hearing or a decision rendered from the bench), even when such statements might suggest, to some extent, pre-determination of the merits.”¹³⁶

Further, even if one might interpret Judge Scheindlin’s words as encouraging a future lawsuit, that would not itself reflect disqualifying partiality. While judges may not “force, require or coerce” a party to take a procedural route, judges may engage in “inquisitive colloquy” in which they question a party’s procedural choices or call attention to procedural alternatives.¹³⁷ As active participants in the adjudicatory process, judges may even encourage procedural options that would promote fair outcomes.¹³⁸

The panel’s criticism of Judge Scheindlin’s quoted comments to the media seem equally uncharitable. Judge Scheindlin expressed no favoritism to either side, and she was evidently careful not to talk about pending cases. Consequently, the appeals court could not claim that she violated the judicial conduct rule regulating extrajudicial communications. Further, even if she made some implicit reference to the stop-and-frisk cases, disqualification would not necessarily be warranted. In an earlier civil rights case that was similarly contentious, the Second Circuit rejected a party’s disqualification motion where the presiding trial judge gave an interview to a local newspaper that expressly touched on the pending litigation.¹³⁹ The court reasoned: “In his interview, [the trial judge] only restated what he had been saying in open court for the past few years and did not discuss the details of remedy implementation,” which was the issue pending before the court.¹⁴⁰

Ultimately, the question of whether to submit to an interview, particularly while one is presiding over a high-profile case, seems to be a matter of taste and judicial philosophy. One might believe that judges should keep a low profile to avoid what Chief Justice Roberts has termed “the personalization of judicial politics”¹⁴¹ or to promote what might be described as a misleading “vener of

136. *In re Boston’s Children First*, 244 F.3d 164, 169 n.9 (1st Cir. 2001) (citing *United States v. Grinnell*, 384 U.S. 563, 581–82 (1966)); *United States v. Lopez*, 944 F.2d 33, 37 (1st Cir. 1991).

137. *United States v. Wilkerson*, 208 F.3d 794, 798 (9th Cir. 2000).

138. *See Ramirez v. Elgin Pontiac GMC, Inc.*, 187 F. Supp. 2d 1041 (N.D. Ill. 2002).

139. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180 (2d Cir. 1991).

140. *Id.* at 182; *see also United States v. Haldeman*, 559 F.2d 31, 134–36 (D.C. Cir. 1976) (per curiam) (en banc) (finding that district judge’s interview statements, even if they could be viewed as referring to a pending legal question, did not warrant disqualification).

141. Jeffrey Rosen, *Robert’s Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 112.

neutrality.”¹⁴² That is a view more easily maintained by appointed rather than elected judges, who, at least in contested elections, have a legitimate and constitutionally protected interest in submitting to interviews.¹⁴³ But the judicial conduct rules leave room for different philosophies and give individual judges, including appointed judges, substantial latitude to act in accordance with their own philosophies. The appeals court decision in the stop-and-frisk cases did not give much explanation for singling out the trial judge’s public statements in this particular case.

D. THE OPPORTUNITY TO ATTRIBUTE QUESTIONABLE JUDICIAL DECISIONS TO THE JUDGES’ BIASES

It is hard to come to the Second Circuit decisions objectively. One’s views of whether the disqualification of Judge Scheindlin was procedurally fair or whether the appeals court’s justifications were persuasive will likely be influenced by one’s view of the police stop-and-frisk policy and of Judge Scheindlin’s decisions. Fans of Judge Scheindlin’s rulings will likely be foes of her disqualification, and vice versa.

But suppose you look at the Second Circuit decisions and think they do not make sense procedurally or substantively. You wonder why three very bright federal appellate judges with very bright law clerks removed a federal district judge from a case over which she presided for years and in which she wrote scholarly, lengthy, meticulous opinions; why the appellate judges ruled even before hearing argument on the merits of the opinions, and did so based primarily on comments the district judge made on the record in another related case years earlier about which no one ever formally complained; and why the judges took this extraordinary procedural step without hearing the trial judge’s side of the story and with questionable legal justifications. Many might conclude that the three appellate judges simply got it wrong and leave it at that. But one who is troubled by the Second Circuit decisions will be tempted to look beneath the surface and to ask, “what’s really going on here?”

One might consider whether the judges had some secret motivation known only to themselves. One possibility was that they were attempting to influence the mayoral election,¹⁴⁴ but this seems highly unlikely because the polls put the

142. Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, N.Y.U. ANN. SURV. AM. L. 497, 551–54 (2008).

143. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

144. See Kalhan, *supra* note 11, at 1101 (arguing that “a reasonable observer with knowledge of all relevant facts might easily conclude that” the appellate judges were “acting strategically” with the goal of influencing the election, “whether consciously or unconsciously”).

eventual winner way out in front.¹⁴⁵ Another possibility was that, having prejudged the merits of the appeal, they sought to discredit the district court opinions or to give a small victory to the police, precisely because there would never be a chance to rule on the merits of the appeal. This seems more plausible. But given the high repute in which the judges and their court are held, the far greater likelihood is that the judges had no hidden objective but were convinced that they were wisely exercising their authority given the law and facts.

One might also consider, however, whether the judges had secret reasons hidden even from themselves. One lesson of the implicit bias literature, consistent with what the legal realists taught decades ago, is that prejudices and other irrational thought processes may unconsciously influence judges who, after all, are only human.¹⁴⁶ Knowing this, critics might be tempted to dig deeper into the judges' psyches and to speculate that the judges were affected by biases of which they were not necessarily themselves aware.¹⁴⁷ The Second Circuit decisions illustrate various ways in which one might employ the rhetoric of implicit bias, because so many implicit biases arguably could have been at play.

The most obvious candidate is implicit racial bias. This was, of course, the central theme of the stop-and-frisk cases. One might speculate that, like the New York City police, the appellate judges were influenced by unconscious racial attitudes or assumptions. Perhaps, notwithstanding the judicial panel's racial and ethnic diversity, the judges were unconsciously prejudiced against the young people of color who comprised the plaintiff class, and were therefore predisposed to rule against them or to devalue their civil rights and, therefore, inclined to remove any district judge whose fact-findings favored the plaintiffs. Or perhaps their decision was influenced by an unconscious assumption that young black and Hispanic men are more likely than young white men to be criminals. This might have led the court to assume that Judge Scheindlin erred in finding biased policing practices and that her error must have been influenced by a judicial bias against the City, which the appellate court was then inclined to read into her colloquy in *Daniels* and her interviews with the media. Or perhaps the judges were unconsciously skeptical of the very idea of implicit racial bias as a force influencing police on-the-spot decision-making and were inclined to believe that we are living in a post-racial world.¹⁴⁸ This, too, would have led the judges to assume that the district court's contrary determination must have been

145. Michael Schwartz, *Mayor's Race Intrudes on Stop-and-Frisk Case, Judges Say*, N.Y. TIMES, Oct. 30, 2013, at A23 (reporting on Oct. 30, 2014 that "polls indicate [Bill de Blasio] is on course to trounce his opponent in the election next week").

146. See note 25, *supra* (citing authority).

147. See Greenwald & Krieger, *supra* note 18, at 965–67 (arguing that, given our knowledge of the pervasiveness of racial bias, when there are no plausible racially neutral explanations for pervasive racial discrimination, one can assume that implicit racial bias is at play even in individual cases).

148. See generally Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial World*, 91 N.C.L. REV. 1555 (2013).

distorted—or biased—to explain her ruling against the City. Of course, there would be no basis whatsoever to accuse the appellate judges of *conscious* racial bias, and no one has suggested that a study of their individual judicial records reveals systematic implicit bias on their part. But, if not readily discernible, implicit racial bias in the United States is nonetheless pervasive, not readily disproved, and invisible even to oneself.

Alternatively, one might imagine that the judges fell prey to implicit gender bias.¹⁴⁹ The three male judges on the appeals panel may have been unconsciously predisposed against, perhaps even jealous of, an outspoken female jurist who garnered publicity, gave interviews to the press, and seemingly bullied the City and its police department. The removal decision gave the judges an opportunity to take her down a few pegs. Some might have doubted whether the appellate judges would have disqualified one of their male colleagues under comparable circumstances.

A third possible bias was suggested by Judge Scheindlin's interviews: one might speculate that the appellate judges harbored an unconscious pro-government bias. In recent presidential administrations, many more former prosecutors than former defense lawyers have been appointed to the federal bench.¹⁵⁰ Perhaps for that reason, the defense bar widely perceives the federal bench as tilted against their clients—e.g., federal judges are unduly disposed to credit the police, to discredit criminal defendants, and to accept prosecutors' arguments and recommendations. One who takes this view of the federal bench might perceive the removal of Judge Scheindlin as one in a line of decisions explained by the federal court's predisposition toward law enforcement.

A fourth explanation for the Second Circuit panel's decision, suggested semi-seriously at the outset of this article, might be an anti-academic or anti-liberal-academic bias. It is a conservative trope, undoubtedly accepted by some conservative jurists, that universities are dominated by liberal professors. So, one might posit that the somewhat conservative appellate judges, once they had read Judge Scheindlin's opinions, were put off by her reliance on seemingly left-leaning academics with regard to both her fact-finding and her proposed remedy. This might have influenced the appellate judges to be skeptical of her fair-mindedness. It might be noted that two of the appellate judges were Clinton appointees and none would be numbered among the most conservative judges nationally, but on the other hand, even the more "liberal" judges are centrist by comparison with left-leaning academics.

149. Cf. Toobin, *The Last Word*, *supra* note 104 (observing that federal prosecutors "tend to describe Scheindlin as 'difficult,' 'shrill,' and 'demanding,' terms that never seem to be applied to male judges, or to men generally").

150. See, e.g., Bob Egelko, *Obama Nominations Heavy on Ex-Prosecutors*, SFGATE (Feb. 3, 2013), <http://www.sfgate.com/nation/article/Obama-nominations-heavy-on-ex-prosecutors-4248122.php> (reporting statistics).

Finally, two other possibly relevant cognitive biases are unrelated to group prejudices. First, the appellate judges may have been influenced by confirmation bias. In theory, the question of whether Judge Scheindlin's impartiality might reasonably be questioned because of her comments on or off the bench should have been determined independently of the appellate court's prior impressions of the judge's even-handedness. But the appellate judges may have been predisposed to believe that she was biased. For example, they might have been aware of Judge Scheindlin's anti-government reputation. Or they may have concluded from their preliminary review of her opinions that her fact-findings in the stop-and-frisk cases were one-sided. Either way, they may have read Judge Scheindlin's colloquy and interviews, both of which were subject to interpretation, in light of an assumption that she was not impartial.

One who reads the Second Circuit opinions skeptically may also see belief perseverance at work. Awareness of this cognitive bias explains why appeals courts sometimes reassign cases after they reverse the district court: the original district judge would have a tendency to adhere to his or her prior, but erroneous, opinion.¹⁵¹ Belief perseverance on the part of the appellate judges would explain why, after deciding to withdraw its initial hasty opinion, the appeals court issued a new one reaching the same conclusion based on different rationales. Even after deciding that their initial rationales were inadequate, it would have been cognitively difficult for the judges to have acknowledged that they made a mistake in disqualifying Judge Scheindlin, and easier to come up with new explanations. Perhaps, in hindsight, after withdrawing its original opinion, the panel should have reassigned the case to a different group of appellate judges who could look at the question of judicial bias—as well as the merits—without an unconscious pre-commitment to the outcome.

Were any of the judges on the panel actually affected by any of these unconscious biases—and, if so, which judges and which biases? Individuals can be tested to ascertain the extent to which they hold inappropriate stereotypes,¹⁵² but the appellate judges have not been publicly tested. And, as the stop-and-frisk cases illustrate, data can sometimes be aggregated and analyzed by experts to determine whether an individual's or institution's recurring conduct appears to be influenced by unconscious biases. But one cannot prove implicit bias from a single decision, and no one has analyzed the decisions of the Second Circuit judges in an attempt to ascertain whether the appellate judges act on unconscious racial or gender stereotypes or unconscious pro-government or anti-academic tendencies. At the same time, one might assume that, by training and experience,

151. *United States v. Johnson*, 387 Fed. App'x 105 (2d Cir. 2010); *see also supra* note 46 and accompanying text.

152. *See* Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) (discussing Implicit Association Test).

judges are practiced at putting biases, even unconscious ones, to the side.¹⁵³ The appellate deliberative and writing processes, one might suppose, minimize the role of implicit biases by emphasizing explicit reasoning and justification, and by promoting dialogue among judges and law clerks, that may counterbalance individual biases. But the fact remains that we will never know one way or the other. And the uncertainty gives lawyers latitude, if not in serious scholarship then in the popular press, in blogs or in informal discussion, to speculate or postulate that the judges were biased—not overtly and not in the disqualifying sense, but unconsciously or implicitly. This raises the question of whether lawyers should give voice to such ruminations: Should lawyers accuse judges of implicit bias?

III. THE TROUBLE WITH “BIAS”

When a court goes astray, as many believe the Second Circuit did in disqualifying Judge Scheindlin, one might speculate that the court was implicitly biased. There may be value to such speculation. But on balance, public discourse about judging would be better if critics left this rhetorical arrow in their quiver.

In the short term, the obvious reason to suggest that judges were biased is to discredit a decision with which one disagrees. Given the judicial norm of impartiality, an accusation of bias, if taken seriously, will weaken public respect for, and undermine the legitimacy of, the opinion. If there are any readers inclined to believe that judges are infallible, the discussion of implicit bias may also help explain how it is possible that judges can get it wrong.

In the longer term, if one is correct that a judge’s decision is wrong, speculation about implicit bias might be a legitimate step in an effort to try to understand why the court went wrong and ultimately to improve its process. One might point to the possibility of implicit bias in a particular decision in order to promote greater public awareness and more robust public discussion of the role of implicit bias in judicial decision making generally, toward the aim of encouraging efforts to diversify the bench¹⁵⁴ or of encouraging judges to take remedial measures. Discussing implicit bias in the context of a discredited decision may also contribute to a more realistic public understanding of how judges decide cases, and, in particular, that the judicial process is not a scientific or mechanical one.

In the end, however, these justifications do not seem especially compelling. If a critic makes a persuasive case that an opinion is poorly reasoned, then the opinion already will be discredited, and there is little need to put another nail in the coffin

153. Cf. JOEL COHEN, *BLINDFOLDS OFF: JUDGES ON HOW THEY DECIDE* 99 (2014) (quoting District Judge Alvin Hellerstein’s observation that “[j]ustice does not require absolute purity, but a check on bias”).

154. Cf. Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 *DRAKE L. REV.* 591, 614 (2009) (“As the federal judiciary continues to diversify, positive associations with colleagues may erode some implicit associational biases.”).

by speculating about whether unconscious stereotypes or other unconscious processes led the judges astray. If one's legal analysis of the court's ruling is unpersuasive, however, the charge of implicit bias may undeservedly bolster the critique and discredit the judge's decision for reasons unrelated to its quality.

One might also be skeptical that exploring the possible role of implicit bias in an individual decision will promote valuable public awareness and discourse. The informed public knows "that judges . . . bring to the bench ideologies, preconceptions, and intuitions."¹⁵⁵ In particular, there is public discussion drawing on social science research regarding how implicit biases affect judging. While continued discussion is important, it is questionable whether accusing an individual judge of bias in an individual case will add much to the efforts of social scientists and others who have been teaching lawyers and judges about implicit bias based on serious research. Using a single case as an anecdote about implicit bias may even be counterproductive, because the judge responsible for the opinion in question and other judges may respond defensively.

Whatever utility there may be in accusing a judge of implicit bias is substantially outweighed by the harms. Most importantly for those concerned with fair and accurate discourse, implicit bias cannot be fairly inferred from a single decision. As Judge Scheindlin's stop-and-frisk decisions illustrate, it takes a great deal of work to discern whether implicit bias is influencing conduct, and to make that determination, one needs more than a single reference point—one needs recurring conduct. In the stop-and-frisk cases, for example, lawyers and witnesses undoubtedly spent thousands of hours amassing and analyzing the evidence and even then, the answer was disputed. Based on statistical analyses, it could be said that implicit racial bias generally influenced how police implemented stop-and-frisk policy, but it would have been impossible to conclude that any particular stop-and-frisk was the product of implicit bias. While there is nothing wrong with accusing a judge or the judiciary of bias if an analysis of a large enough sample of opinions supports that conclusion, no social scientist could validly infer from a single bad opinion that a judge was unconsciously biased. A charge of implicit bias leveled against a single decision, such as a charge against the Second Circuit's disqualification of Judge Scheindlin, can never be more than speculation: it is as likely to be wrong as right. Most would consider it unfair to criticize others, including judges, based on mere conjecture of this sort.

As the stop-and-frisk cases illustrate, unprovable accusations of bias are just too easy to make. Those who disliked Judge Scheindlin's rulings accused her of political (liberal) and anti-government biases, while, as discussed, the appellate judges could have been accused of a host of other implicit biases. The very fact that one can posit so many different biases without a clue as to which, if any, were

155. Green & Roiphe, *supra* note 142, at 524.

at play, points to the emptiness of this rhetoric.

Besides the risk that critics will often be wrong in attributing bad decisions to implicit bias, there is the likelihood that critics will employ the rhetoric as a substitute for a close and persuasive critique. Judges tend to write persuasive opinions, and those who favor the outcome of an opinion are particularly disposed to find its reasoning convincing. Persuading others that the court employed an unfair process, got the facts wrong, or bungled the law, is no easy task. The implicit bias charge may detract from the more important task of persuasive analysis or be used to discredit an opinion that was not wrong at all.

In addition to being unenlightening, an unprovable accusation of implicit judicial bias may be considered unprofessional. Lawyers have sometimes been sanctioned for making unfounded bias charges against judges or other lawyers.¹⁵⁶ To be sure, robust speech about judges, judging and judicial qualifications is crucial in a democracy, and lawyers, as knowledgeable observers, most especially should participate, leveling harsh criticism of judges where well-founded.¹⁵⁷ But a charge of implicit bias, which is inherently unprovable, brings down the quality of discourse and clouds understanding.

Yet another problem is the ambiguity of the accusation of judicial “bias.” Perhaps there is a need for a new vocabulary so that “bias” is not used to describe so many different concepts relevant to the judicial process. When a critic speculates that a judge’s decision was influenced by implicit bias, others may easily misunderstand. One may assume that the judge is being accused of having conscious prejudices—for example, holding racist beliefs—when the reference is to unconscious attitudes. Or one may understand that an accusation of implicit bias implies that the judge should be removed from the case, whereas the unconscious attitudes or thought processes in question will not implicate the judicial conduct codes. Even if the implicit bias claim is correctly understood, it may be unclear what kind of implicit bias is being suggested. One may assume the suggestion is that the judge is unconsciously prejudiced against social groups (e.g., influenced by implicit racial or gender bias), while what is meant is that the judge was influenced by cognitive biases such as confirmation bias to which everyone is susceptible.

Finally, there is some danger that unsubstantiated charges of implicit bias will cheapen the concept of bias and detract from the seriousness of legitimate claims. There is substantial litigation about bias and prejudice in employment, criminal

156. See Amy R. Mashburn, *Making Civility Democratic*, 47 Hous. L. Rev. 1147, 1163 (2011) (noting that in cases in which courts found lawyers to be uncivil, offensive or unprofessional, the second largest category involved “speech that accused judges or other members of the legal system of general bias against the lawyer and his/her client”).

157. See generally Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599 (2013).

law enforcement and other contexts.¹⁵⁸ In the stop-and-frisk class actions before Judge Scheindlin, for example, the evidence of implicit racial bias played an important role in establishing the illegality of police practices and the City's indifference. Judge Scheindlin's finding that police conduct was affected by implicit bias came after a full evidentiary hearing. The importance of findings such as this one may be undercut when critics of judicial decisions make bias accusations that are entirely speculative and cannot be substantiated.

CONCLUSION

As we learn more from social scientists about how unconscious biases influence everyone's decision making, the temptation increases to blame individual judicial decisions on implicit prejudices against social groups or on other implicit biases when the judges' own explanations seem unpersuasive. As discussed, the recent stop-and-frisk cases serve as a good example.

Accusations of "bias," with various different meanings, were thrown around everywhere in the stop-and-frisk cases, and there was room for more. Based on a lengthy adversarial hearing, Judge Scheindlin found that implicit racial bias led the New York City police to implement stop-and-frisk policy disproportionately harshly against minorities. The conservative press, critical of her decisions, accused Judge Scheindlin of anti-government bias and liberal political or philosophical biases that distorted her perception of the evidence. While the cases were pending, the City joined in questioning the judge's partiality, producing an arguably misleading report purporting to show that her track record of published decisions in criminal cases demonstrated her bias against law enforcement. Judge Scheindlin defended herself, suggesting that she was even-handed and independent while some other judges were biased in favor of law enforcement. The Second Circuit found that the judge's remarks contributed to the appearance that she was biased against the City.

Critics of the Second Circuit decisions entered the fray, suggesting that it was the Second Circuit judges who were displaying partiality, although the critics did not necessarily specify what sort of implicit biases were supposedly at work. Drawing on contemporary teachings about implicit biases, and knowing that judges, like others, are susceptible to implicit biases of various sorts, critics might have elaborated by suggesting that the appellate judges had themselves fallen under the sway of racial or gender biases, pro-government or anti-academic biases, cognitive biases, or others.

On balance, however, it is better to resist the temptation to import "implicit bias" rhetoric into critiques of individual judicial decisions. A charge of bias will tend to be confusing precisely because of the many senses in which the term may

158. See *supra* notes 19 & 20.

be used, and a single judicial decision will be too small a sample to justify the conclusion that the judge was biased in one way or another. The charge of judicial bias is likely to serve as a substitute for, rather than as the culmination of, a persuasive critique of a judge's opinion, and where unprovable, the charge of judicial bias may detract from more serious bias charges made in other contexts. In the end, unproven accusations of unconscious bias detract from fair and informative discourse about judicial decision-making.

