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Shira A. Scheindlin served for twenty-two years as a federal judge in the United States District Court for the Southern District of New York. During her tenure on the bench, she presided over many civil and criminal cases, and authored many landmark opinions, including those addressing electronic discovery and the improper use by the police of stop-and-frisk practices.

Before becoming a federal judge, Judge Scheindlin served as an Assistant United States Attorney for the Eastern District of New York, a Magistrate Judge in the Eastern District of New York, and General Counsel for the New York City Department of Investigation. In 2016, Judge Scheindlin retired from the bench, and is currently a member of the litigation practice group of Stroock & Stroock & Lavan LLP and an arbitrator and mediator with the AAA, the International Center for Dispute Resolution, Conflict Prevention and Resolution, and FedArb. Judge Scheindlin has also served as an adjunct professor at NYU Law School, Cardozo Law School, and Brooklyn Law School. She is the author of many influential publications, including the first casebook on electronic discovery. She has received numerous professional honors and awards, has served on several committees of the American Bar Association, the Association of the Bar of the City of New York, and is the former chair of the Commercial and Federal Litigation Section of the New York State Bar Association.

Based on her vast experience on the bench and in practice, Judge Scheindlin offered her reflections on the issues discussed in the annual Institute for Investor Protection symposium in the following dialogue with Loyola University Chicago School of Law Dean Michael J. Kaufman:

Q. There has been substantial press coverage about your determination to have female attorneys take a more active speaking role in the courtroom. Can you tell us more about your experiences on the bench and in practice that have led you to form that perspective?

A. I reflected on my experience with gender bias in the legal profession

in an op-ed in the *New York Times* titled: "Female Lawyers Can Talk, Too."[1] In that piece, I wrote:

> As a Federal District Court judge in New York, I often encountered this courtroom scene: A senior partner in a large law firm would be arguing a motion. I would ask a tough question. He (and it was usually a man) would turn to the young lawyer seated next to him (often a woman). After he conferred with her repeatedly, I would ask myself why she wasn't doing the arguing, since she knew the case cold.
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> In the 22 years I spent on the federal bench before stepping down last year, not much changed when it came to listening to lawyers. The talking was almost always done by white men. Women often sat at counsel table, but were usually junior and silent. It was a rare day when a woman had a lead role—even though women have made up about half of law school graduates since the early 1990s.[2]

Throughout my experience in practice and on the bench, I have seen women subjected to both subtle and overt forms of gender bias and sexual harassment. As I wrote in the *New York Times*:

> The more things change, the more they stay the same. I have practiced law in one role or another for more than 40 years. I was only the second female judge on the Brooklyn federal court when I was appointed as a Magistrate Judge in 1982. I was the first female Chairperson of the New York State Bar Association's Commercial and Federal Litigation section, which issued the recent report. I am now engaged in alternative dispute resolution, in which women obtain only 4 percent of international arbitration cases worth at least $1 billion, according to one survey, and between 15 and 25 percent of all arbitrations.
>
> Progress for women has been elusive. The barriers to real change have been more daunting than I expected.[3]

Q. In order to address gender discrimination in the legal profession, you helped to prepare a Report by the New York State Bar Association's Commercial and Federal Litigation Section.[4] Can you please share your reflections on the conclusions in that Report?

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1. Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. TIMES, at A23 (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html.
2. *Id.*
3. *Id.*
4. HON. SHIRA A. SCHEINDLIN ET AL., IF NOT NOW WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR (N.Y. State Bar Ass'n Nov. 2017).

A. The results demonstrate that women have not made nearly enough progress in the legal profession. The Report found that women were the lead lawyers for private parties barely 20 percent of the time in New York State's federal and state courts at the trial and appellate levels. Women were twice as likely to appear on behalf of public sector clients. But the overall number was dismal: 25 percent in commercial and criminal cases in courtrooms across New York.

Q. Are there any effective solutions to the dramatic gender disparities in the legal profession?

A. *First*, judges can suggest that the lawyer who wrote the brief or prepared the witness should be the one to argue the case. Often it is a woman. Judges are generally more diverse than the lawyers who appear before them. They should bear some responsibility to ensure that the lawyers who speak in court are equally diverse. All judges, regardless of gender, also should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs' management committee unless there is at least one woman on the team. Other judges like Jack Weinstein have issued orders that if a junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. *Second*, clients, particularly corporate clients, can demand that their legal teams be diverse. Clients, after all, select counsel and pay the bills. If they refuse to hire firms that do not provide a diverse relationship partner and a diverse team then change will happen! Finally, law firms that hire large numbers of female lawyers, but who, statistics show, often don't pay them as well as the male lawyers, or promote them at the same rates, must stop paying lip service to diversity and take concrete steps to change.

Q. In this symposium, we explored the relationship between diversity and decision-making. Based on your experience, have you seen evidence of any relationship between the diversity of decisionmakers and the quality and ethics of their decisions?

A. The presence of women in positions of power in law firms and corporate boards results in better, more lawful, and more ethical decisionmaking. Diversity is a tremendous asset. I have seen it as a great strength in the courtroom. Diverse teams reflect the community, and cases are argued to judges and jurors who reflect the community.

And as I have mentioned, legal teams benefit greatly when they empower female attorneys to take on leadership roles on behalf of their clients. Firms can commit to guaranteeing that junior female lawyers participate in the same number of depositions as their male counterparts. They can ensure that every trial team has at least one woman; that women are meeting clients at the same rate as men; and that bright, aggressive women are given leadership positions in the firm as department heads and managing partners. If they do these things, they will more effectively serve their clients.

Q. Spanning more than two decades of sitting on the bench of the Southern District of New York, you have presided over many cases that captured national attention. Can you tell us about your decision to declare unconstitutional the New York City Police Department's stop-and-frisk practices?

A. In 2013, I issued an opinion in *Floyd v. City of New York*,[5] holding that the stop-and-frisk tactics of the New York Police Department violated the constitutional rights of racial minorities in the city. The evidence revealed that the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data.[6] This resulted in the disproportionate and racially discriminatory stopping of African Americans and Hispanics in violation of the Equal Protection Clause. Both statistical and anecdotal evidence showed that minorities are indeed treated differently than whites.[7] For example, once a stop was made, blacks and Hispanics were more likely to be subjected to the use of force than whites, despite the fact that whites were more likely to be found with weapons or contraband. As I wrote in my Opinion, the goal of deterring crime is laudable, but this method of doing so is unconstitutional. The Police Department employed a "policy of indirect racial profiling" which led to officers routinely stopping "blacks and Hispanics who would not have been stopped if they were white."[8] I concluded that this police practice violated the Fourth Amendment, which protects against unreasonable searches and seizures by the government, as well as the Fourteenth Amendment's Equal Protection Clause, and I ordered the appointment of a federal monitor to oversee broad reforms, including

5. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
6. *Id.* at 561–63.
7. *Id.* at 562.
8. *Id.*

the use of body-worn cameras for some patrol officers.[9]

Q. What has been the impact of the *Floyd* decision on policing and violent crime in New York City?

A. While still in use, the number of stops-and-frisks has declined by 98 percent from more than 600,000 a year to about 20,000. That is a dramatic change. This has had a positive impact on both police work and community relations. During the pendency of the *Floyd* case, the City of New York and the Police Department insisted that the practice of stop-and-frisk was indispensable to their successful efforts to reduce violent crime. But in my Opinion I emphasized that this decision was "not about the effectiveness of stop-and-frisk in deterring or combating crime."[10] This Court's mandate was "solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool."[11]

As I made clear throughout the proceedings, even if the stop-and-frisk practice was effective in reducing crime, that would not be a defense to its unconstitutionality. But, in any event, the evidence since *Floyd* was decided has made clear that ending stop-and-frisk has not had a negative impact on crime. As research compiled by the Brennan Center for Justice has shown, there is no correlation between stop-and-frisk and crime reduction. To the contrary, the rate of violent crime in New York City actually has declined since the practice of stop-and-frisk was dramatically reduced.[12]

Q. Your judicial decisions also have had a tremendous impact on the procedures governing civil litigation. In the case of *Zubulake v. UBS Warburg*,[13] you authored a series of path-breaking opinions on many aspects of the process of discovering electronically stored information ("ESI"). Do you believe that there has been any improvement in the process of discovering ESI since those decisions were issued?

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9. *Id.* at 563.

10. *Id.* at 556.

11. *Id.* (emphasis added).

12. *See, e.g.*, James Cullen, *Ending New York's Stop-and-Frisk Did Not Increase Crime*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW (April 11, 2016), https://www.brennancenter.org/blog/ending-new-yorks-stop-and-frisk-did-not-increase-crime.

13. *See, e.g.*, *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

A. In those opinions, I addressed a wide range of issues regarding the process of electronic discovery in civil litigation, including the scope of a party's duty to preserve electronic evidence during litigation, the lawyer's duty to supervise the client's preservation and production of ESI, the burden of absorbing the cost of producing ESI in accessible form, and the appropriate sanction for the spoliation of electronic evidence.

Many of the principles that I developed in those opinions have now been codified into the Federal Rules of Civil Procedure. For example, Federal Rule of Civil Procedure 26(b)(1)[14] now directs a federal judge to conduct a proportionality analysis with respect to discovery requests to determine whether that request seeks material that is both relevant to the case and proportional to the needs of the case. That Rule requires the judge to consider some of the same proportionality factors that I discussed in *Zubulake,* including the cost of discovery, the parties' resources and relative access to information, the importance of discovery to the issues in the litigation, the amount in controversy, and whether the burden of discovery outweighs its likely benefit.[15]

Similarly, the Federal Rules now create a burden-shifting process for the discovery of ESI that is similar to the process that I ordered in my *Zubulake* opinions. Federal Rule 26(b)(2)(B) states that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.[16] On a motion to compel discovery or for a protective order, however, the party from whom discovery is sought has the burden of showing that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the federal judge may nonetheless order discovery from such sources if the requesting party shows good cause.

Finally, in *Zubulake*,[17] I addressed the proper sanction to be imposed on a party who fails to comply with a request for discovery of ESI. Finding that the defendant in that case had willfully deleted relevant emails despite court orders requiring preservation of such emails, I granted the plaintiff's motion to sanction this misconduct by ordering an adverse inference jury instruction and by ordering the defendant to pay costs. I also noted that the defendant's lawyers had failed to meet their obligation to ensure that all relevant documents were discovered, retained, and produced. Federal Rule 37(e) now explicitly authorizes

14. FED. R. CIV. P. 26(b)(1).
15. *See, e.g.*, *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003).
16. FED. R. CIV. P. 26(b)(2)(B).
17. 229 F.R.D. 422 (S.D.N.Y. 2004).

federal judges to impose similar sanctions for failures to preserve or produce electronically stored information, including an adverse inference instruction to the jury that the unproduced information is unfavorable to the offending party.[18]

Q. In this symposium, we have grappled with the question of whether, in an era of relaxed regulation, individuals can be incentivized to engage in ethical behavior and corporations can be incentivized to engage in social value creation. Based on your experience as a judge and a litigator, do you believe that people generally need regulation to make them engage in ethical and lawful behavior, or are they naturally disposed to do the right thing?

A. It is hard to generalize about human motivation and human behavior. We are all products of our upbringing to some extent. But I believe that most people need to have a clear sense that there will be negative consequences if they behave unethically or unlawfully. If we want to discourage wrongful behavior, therefore, we need to maintain rules and regulations that clearly define and strongly deter and punish that behavior.

18. FED. R. CIV. P. 37(e).