ARTICLES

REASSIGNMENT

Toby J. Heytens*

This Article is about something federal courts of appeals have done for more than fifty years and more than 600 times. That something is reassignment, a practice where a reviewing court returns a case to a lower court for further proceedings while also directing that those proceedings be conducted by a different trial court judge. Drawing on an examination of the local rules and informal reassignment practices of every federal circuit and district in the United States, as well as an original dataset of 668 decisions in which reassignment was ordered, this Article represents the first scholarly examination of when reassignment happens, who orders it, and how it is ordered. More broadly, this Article uses reassignment as a means to explore the various ways that appellate courts might seek to control trial court judges and influence trial court outcomes. It also discusses what reassignment can teach us about notions of judicial impartiality and neutrality. Finally, this Article discusses reassignment's implications for familiar debates about whether legal tests are better expressed through rules or standards and the extent to which it is desirable for judges to give reasons for their decisions.

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* Associate Professor of Law, University of Virginia. Thanks to Kerry Abrams, Barb Armacost, Aaron Bruhl, Jeffrey Dobbins, Judge Frank Easterbrook, Alan Erbsen, Josh Fischman, Brandon Garrett, Charles Geyh, Mike Gilbert, Risa Goluboff, Jill Hasday, Arthur Hellman, Troy Heytens, Rich Hynes, John Jeffries, Rakesh Kilaru, Doug Laycock, Liz Magill, Dave Martin, Greg Mitchell, Trevor Morrison, Caleb Nelson, Megan O'Donnell, Dan Ortiz, Liz Porter, Neomi Rao, Fred Schauer, Greg Siegel, Justice John Paul Stevens, Andrew Terjesen, Debora Threedy, and Ann Woolhandler, as well as workshop participants at the University of Minnesota, the University of Virginia, and the University of Washington, for helpful information, conversations, and suggestions. Thanks also to Leslie Ashbrook and Ben Doherty for help tracking down sources and to Sarah Bosse, Paige Foster, William Marsh, and Victory Whitney for excellent research assistance. Finally, a million thanks to Kristin Glover and Sarah Sawtelle, without whom this project would never have been completed.

INTRODUCTION

In 1996, a remarkable series of events played out between the United States Court of Appeals for the Second Circuit and legendary federal district judge Jack Weinstein in a case called *United States v. Londono*.[1] The

1. 100 F.3d 236 (2d Cir. 1996). The defendant actually at issue was named Diego Lopez-Aguilar. *See id.* at 238-39. I will refer to the case as *Londono*, however, because that is how the Second Circuit decision is captioned.

The same sorts of issues raised by *Londono* recently flared up in a much more high-profile context when the Second Circuit removed Judge Shira Scheindlin from ongoing litigation involving New York City's stop-and-frisk policy, which occurred as this Article was being finalized. *See Ligon v. City of N.Y.*, Nos. 13-3123, 12-3088, 2013 WL 5835441 (2d Cir. Oct. 31, 2013) (removing Judge Scheindlin), *superseded in part sub nom. In re* Reassignment of Cases, 736 F.3d 118 (2d Cir. 2013) (per curiam); Editorial, *Judge Scheindlin's Case*, N.Y. TIMES, Nov. 8, 2013, at A34 (sharply criticizing the Second Circuit's actions). Although the appellate court's second order insisted that Judge Scheindlin's recusal was mandated by 28 U.S.C. § 455, *see In re Reassignment of Cases*, 736 F.3d at 124 ("For this reason, [Judge Scheindlin's] disqualification is required by section 455(a)."); *infra* Part I.A (explaining the differences between recusal and reassignment), later portions of the same opinion blurred the distinction between recusal and reassignment and cited a number of reassignment cases, including *Londono*. *See In re Reassignment of Cases*, 736 F.3d at 128 & n.25; *see also infra* p. 8 (acknowledging that "the line [between recusal and reassignment] can grow fuzzy in individual cases"). This Article supports the Second Circuit's statement that "[r]eassigning a case to a different district judge, while not an

underlying litigation wasn't terribly notable: a criminal defendant pleaded guilty to importing cocaine, and the then-mandatory Federal Sentencing Guidelines called for a term of imprisonment between 108 and 135 months.[2] Judge Weinstein, however, sentenced the defendant to just thirty-seven months of imprisonment.[3] A unanimous Second Circuit panel vacated the sentence and remanded "for resentencing consistent with this opinion."[4]

Six months later, Judge Weinstein issued an opinion stating that he was "not in a position to follow the [Second Circuit's] mandate."[5] The defendant had completed the original thirty-seven-month sentence and been deported to Colombia while the government's appeal was pending, and Judge Weinstein concluded that he lacked the power to resentence without the defendant being physically present.[6] Judge Weinstein further concluded that, as a result of the Second Circuit's vacatur order, the defendant was "unsentenced" and would remain so barring "the unlikely event that custody of the defendant is [again] obtained in the United States."[7]

The Second Circuit didn't take kindly to that. Instead, the panel took the highly unusual step of recalling its mandate and issuing a new opinion.[8] The panel concluded that the defendant's deportation had not rendered the government's appeal moot and that it need not decide whether Judge Weinstein was right about lacking the power to resentence without the defendant being present.[9] Instead, the panel decided to "obviate the issue" by reinstating the original erroneous sentence and remanding with directions to correct that sentence pursuant to Federal Rule of Criminal Procedure 35.[10]

But the Second Circuit did something else, too. Although the case was being returned to the district court, the court of appeals specifically directed that it not go back to Judge Weinstein.[11] The court of appeals identified "several troubling aspects" about Judge Weinstein's "handling of this case."[12]

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everyday occurrence, is not unusual in [the Second Circuit]" or its "sister Circuits." *In re Reassignment of Cases*, 736 F.3d at 128.

2. United States v. Lopez-Aguilar, 886 F. Supp. 305, 305 (E.D.N.Y. 1995), *vacated sub nom.* United States v. Londono, 76 F.3d 33 (2d Cir. 1996), *mandate recalled by* 100 F.3d 236.

3. *Id.* at 306.

4. *Londono*, 76 F.3d at 37.

5. United States v. Lopez-Aguilar, No. CR 93-209, 1996 WL 370160, at *1 (E.D.N.Y. June 28, 1996), *amended and superseded by* 1996 WL 407300 (E.D.N.Y. July 16, 1996), *vacated in part sub nom. Londono*, 100 F.3d 236.

6. *Id.*

7. *Id.* at *4.

8. *Londono*, 100 F.3d at 237.

9. *Id.* at 241-42.

10. *Id.* at 242.

11. *Id.*

12. *Id.*

For one thing, the original sentence had been short enough to make it foreseeable that the custodial portion would be completed before any appeal could be heard, and Judge Weinstein had specifically directed that the defendant "should be deported immediately following his period of incarceration."[13] Second, Judge Weinstein's post-remand order had "implied . . . that [his] hands were tied" because the parties had declined to follow his "suggestion that they seek an amendment of the mandate," but the court of appeals found no such "recommendation in the record."[14] Finally, the court of appeals stated that Judge Weinstein had "impl[ied] without basis that this Court was aware of the deportation when it issued its [initial] opinion," and it emphasized that no one from the district court had contacted the court of appeals to notify it that the defendant had been deported.[15] Declaring that "Judge Weinstein's handling of this case makes an exorbitant claim on appellate resources," the court of appeals "direct[ed] that further proceedings be assigned to a different judge," who would decide, among other things, the very question Judge Weinstein previously decided: "whether or not the sentencing error can be corrected in the defendant's absence."[16]

A case like *Londono* obviously raises all sorts of interesting questions. The questions on which this Article will focus, however, involve the Second Circuit's decision to order reassignment—that is, to return the matter to a lower court for further proceedings while simultaneously directing that those proceedings take place before a judge other than the one who conducted the original proceedings. How often do reviewing courts do this sort of thing, and what do the cases in which they do it look like? What can reassignment tell us about the relationship between trial and appellate courts, as well as how we think (or should think) about judicial impartiality? Should reviewing courts be doing this sort of thing at all and, if so, how should they go about doing it?

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13. *Id.*

14. *Id.* (internal quotation mark omitted).

15. *Id.*

16. *Id.* at 242-43. The saga of *Londono* was not done. Following the court of appeals's second remand, Judge Weinstein issued an opinion that described the Second Circuit's reassignment order as "an unwarranted and illegal interference with the judicial independence of federal district judges." Order at 1, United States v. Londono, No. CR 93-209 (E.D.N.Y. Nov. 18, 1996), ECF No. 101. Judge Weinstein nonetheless stated that he would "acquiesce[] out of respect for fellow Article III judges on the Court of Appeals, without conceding the authority of the Court of Appeals to take such action." *Id.* The case was reassigned to Judge Frederic Block, *see* Calendar Entry, *Londono*, No. CR 93-209 (E.D.N.Y. Nov. 19, 1996), ECF No. 103, who issued a bench warrant for the defendant's arrest and stated that he would resentence if and when the defendant was produced, *see* Calendar Entry, *Londono*, No. CR 93-209 (E.D.N.Y. Feb. 25, 1998), ECF No. 108. The docket entries contain no indication that the defendant ever returned to the United States or that Judge Block ever determined whether he had the power to resentence in the defendant's absence.

Scholars have largely ignored these questions. A leading casebook about the relationship between trial and appellate courts does not mention reassignment at all,[17] and commentators have sometimes described reversal as an appellate court's "*only* means of disciplining district courts."[18] In fact, although federal courts of appeals have been ordering reassignment for more than half a century, there has been no comprehensive attempt to identify the phenomenon's origins, current scope, or broader implications.[19]

This Article does all of those things. No federal statute or Federal Rule of Appellate Procedure addresses to which trial court judge a case should go following an appellate reversal, so I examined the local rules of all thirteen federal courts of appeals and ninety-four federal district courts. Just one circuit and only a handful of district courts address the issue in their local rules,[20] and the remaining district court clerks' offices confirmed that their apparently universal practice following an appellate remand is to return the case to the original trial court judge unless—as in *Londono*—the court of appeals expressly directs otherwise.[21]

I next sought to determine when and how appellate-court-ordered reassignment happens. After attempting to locate every publicly available decision or order in which a federal court of appeals has ordered reassignment,

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17. *See* DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL (2d ed. 2006).

18. Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 370 (2005) (emphasis added); *see also* Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 30 (2006) (describing reversal as "the only commonly used tool possessed by higher courts that imposes any costs on lower court judges").

19. In 1988, Judge Weinstein—who at that point had "never been subject to" a reassignment order—published an article sharply questioning the authority of courts of appeals to enter such orders in the first place. Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267, 267 (1988). I have found only a handful of other works discussing reassignment. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 33.5, at 998-1009 (2d ed. 2007) (briefly discussing reassignment in a treatise principally concerned with recusal); CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 109-13 (2d ed. 2010) (similar), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf; Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 204-05 (2007) (briefly discussing reassignment in the context of a broader discussion of judicial ethics in the federal system); James A. Worth, Note, *Destigmatizing the Reassignment Power*, 17 GEO. J. LEGAL ETHICS 565, 581-88 (2004) (analyzing circuit split over when reassignment is appropriate).

20. *See infra* notes 47-60 and accompanying text.

21. *See infra* note 61 and accompanying text.

I created an original dataset of 668 cases, which I coded by date, circuit, type of case, and trial and appellate judges.[22]

Every federal circuit asserts a power to order reassignment, and they have exercised that power in pretty much every type of case imaginable. At the same time, however, reassignment remains very much the exception rather than the norm—that is, courts of appeals order reassignment in only a tiny fraction of cases in which it is theoretically available.[23] There also are large variations in reassignment numbers both by circuit and by trial court judge, as well as in the types of cases in which reassignment is ordered, the procedures by which various circuits go about ordering it, and the reasons they give for doing so.[24]

This Article does not, however, simply identify the phenomenon of reassignment and describe its current scope. It also asks a more interesting question: what can reassignment teach us? I see three main lessons.[25]

First, reassignment underscores that reversal is not the only tool that appellate courts have for influencing lower court outcomes. Appellate courts can craft the underlying legal tests in ways that make it more likely that a trial court will get it right the first time. Alternatively, they can simply make the final decision themselves instead of remanding for further proceedings, or they can issue detailed marching orders to the trial court that have the effect of doing the same thing. Or appellate courts can reassign a case away from a trial court judge whom they have concluded is too likely to err on remand.

Recognizing these various techniques of appellate control as partial (though imperfect) substitutes for each other yields additional insights. For example, it may help explain why the federal courts of appeals seem particularly likely to order reassignment for sentencing-related errors (because that is a context in which other techniques for appellate control are comparatively less available or useful) and why the modern Supreme Court does not seem to use reassignment at all (because, among other things, the Court has other means for controlling lower court judges). At the same time, reassignment—like other strategies of appellate control—has costs as well. Reassigning cases midstream creates more work for trial court judges, and public case-by-case reassignment orders can strain relationships between trial court and appellate judges. These costs may help explain why reassignment following an appellate reversal is still very much the exception rather than the norm and underscore that appellate judges seem to care about more than simply maximizing the odds that individual cases will be resolved consistent with their policy preferences.

Second, reassignment complicates traditional discussions about judicial impartiality in general and judges' ability to disregard impermissible

22. *See infra* Part II.

23. *See infra* notes 74-78 and accompanying text.

24. *See infra* Part II.B.

25. *See infra* Part III.

information in particular. Although the Supreme Court has told us that a trial court judge's in-court conduct or information that the judge learned during the course of her judicial duties will rarely provide a justification for recusal,[26] courts of appeals frequently identify precisely those sorts of things as support for a decision to order reassignment.[27] This Article thus demonstrates that reassignment can operate as a work-around for narrow recusal rules. More broadly, many aspects of our current litigation processes rest on the premise that trial court judges are able to ignore certain information and disregard their own prior views after being told that they were in error.[28] Yet appellate courts that order reassignment frequently justify their decision to do so by saying that it would be implausible to expect a trial court judge to be able to put her previously expressed views out of her mind. The real-world practice of reassignment thus suggests that framing discussions around *whether* trial judges can ignore inadmissible information or set aside their own previous views is too broad. Perhaps the better questions are *when* it is reasonable (or when it is not reasonable) to expect trial court judges to be able to ignore inadmissible information or set aside their own previous views, as well as whether there may be situations in which other considerations (such as the appearance of fairness) counsel against having a trial judge revisit her own previous rulings.

Third, if appellate courts are going to order reassignment, there are better and worse ways to do so—and the characteristics of the better ways shed interesting light on familiar debates. Both private conversations and public statements suggest that at least certain types of reassignment are deeply unpopular with trial court judges who (understandably) find it fairly insulting to be ordered off a case via a publicly explained application of a fuzzy standard that often focuses on the "appearance of justice." By contrast, I am not aware of any similar complaints being lodged against local rules that make reassignment automatic or presumptive in certain circumstances (for example, in any case remanded for resentencing) or that permit a reviewing court to order reassignment without specifying the reasons. Accordingly, appellate courts should seek to normalize the reassignment process by enacting more formal procedures for when it is appropriate and how it is done. They also should refrain from identifying case- or judge-specific reasons for directing reassignment, at least outside of circumstances where an appellate panel wants to send a particularly harsh signal to the removed trial court judge.

All this, in turn, generates insights of broader applicability. It is well understood, for example, that bright-line rules (to use a standard example, "Speed Limit 55") will often overshoot their underlying justifications and sometimes produce outcomes that do not further the rule's underlying purposes

26. *See* Liteky v. United States, 510 U.S. 540, 555-56 (1994).

27. *See infra* Part III.B.1.

28. *See infra* notes 228-31 and accompanying text.

(for speed limits, promoting traffic safety). What reassignment demonstrates is that this feature of rules can sometimes be an advantage instead of a drawback, because it can blur the signal sent by the rule's application in a particular case.

The remainder of this Article is organized as follows. Part I distinguishes reassignment from the more familiar recusal and describes the various ways in which reassignment can happen. Part II describes an original dataset of 668 decisions in which courts of appeals have ordered the reassignment of trial court judges. Part III discusses some broader implications of reassignment, including what it can teach us about appellate control over trial courts, judicial impartiality, and familiar debates over rules versus standards and whether judges should give reasons for their decisions. It also offers suggestions for improving the real-world practice of reassignment. A brief Conclusion identifies four areas for further research.

I. INTRODUCING REASSIGNMENT

A. *Distinguishing Reassignment from Recusal*

Before going further, it is necessary to distinguish reassignment from its more familiar cousin: recusal. Most discussions of appellate courts ordering lower court judges off pending cases involve recusal. Think, for example, of *Caperton v. A.T. Massey Coal Co.*,[29] where the Supreme Court of the United States held that a member of the West Virginia Supreme Court of Appeals should have disqualified himself in an appeal brought by a company run by one of his biggest financial supporters in a previous election.[30] Although the line can grow fuzzy in individual cases, there are a number of important differences between recusal and reassignment. This Subpart begins by describing the federal recusal statutes and three paradigm cases: one involving recusal and two involving reassignment. It then highlights the most important differences between the recusal and reassignment scenarios.

Let's start with recusal. In the federal system, the most important statute governing recusal is 28 U.S.C. § 455.[31] Section 455(a) provides the general rule, and it establishes an objective standard based on the appearance of impartiality. Specifically, § 455(a) states that "[a]ny justice, judge, or

29. 556 U.S. 868 (2009).

30. *Id.* at 872.

31. *See* FLAMM, *supra* note 19, § 23.2, at 678 (citations omitted) ("There is little doubt that §455 affords the broadest and most effective method for seeking the disqualification of federal district judges in the vast majority of cases."). The other principal federal recusal statute is 28 U.S.C. § 144 (2012). *See* FLAMM, *supra* note 19, § 23.1, at 669-78 (describing the history of the federal recusal statutes).

magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[32]

Section 455 is by its terms directed to the covered judge "himself" rather than the litigants or a reviewing court. As a result, it is well settled that § 455 imposes a self-executing obligation: every federal judge is under a continuing obligation to determine whether she must recuse herself in a particular case, and, if she determines that such grounds exist, she must recuse herself regardless of whether any party asks her to do so.[33] If the recusal system were functioning perfectly, therefore, there would be no involvement by the litigants or by reviewing courts.

Of course, things do not always work out that way. Imagine, for example, that a state prisoner is seeking a writ of habeas corpus from a federal district court.[34] The district court judge denies relief without a hearing.[35] In the same order, however, the judge acknowledges that he previously was the chief justice of the supreme court of the state in which the prisoner is incarcerated and that he "probably" participated in the state supreme court's denial of relief during an earlier phase of the litigation.[36] The judge does not recuse himself because he "perceive[s] no personal basis" for doing so, but he invites the prisoner to file a motion requesting his disqualification.[37] The prisoner files such a motion, which the judge then denies while also entering a final order denying the prisoner's underlying claims.[38] The prisoner appeals both the denial of the recusal motion and the decision on the merits.[39] The court of appeals vacates and remands for further proceedings.[40] It reasons that the trial court judge's impartiality could reasonably be questioned under § 455(a) because "he was reviewing the federal constitutional validity of what he previously had approved as a member of the Supreme Court of West Virginia."[41] As a result, the court of appeals concludes that it "need consider none of the questions

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32. 28 U.S.C. § 455(a). Section 455(b) identifies a number of circumstances in which a judge "shall also disqualify himself." For the most part, these involve situations where the judge has a personal connection to the case. For example, § 455(b) requires judges to recuse themselves when they have "a personal bias or prejudice concerning a party," *id.* § 455(b)(1), when they previously "served as [a] lawyer in the matter in controversy," *id.* § 455(b)(2), or when they or certain close family members have a personal stake in the outcome, *id.* § 455(b)(4).

33. *See* FLAMM, *supra* note 19, § 2.2, at 26.

34. The following example is based on *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978).

35. *Rice*, 581 F.2d at 1115.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1118.

going to the merits" and orders that further proceedings be conducted by a different trial court judge.[42]

Now take reassignment. Here, I'll use two examples, both involving federal criminal sentencing. In each case, a defendant asserts that his sentence is unreasonably long and that he should be resentenced by a different trial court judge.[43] Unlike the recusal case described earlier, it does not appear that either defendant objected to the trial court judge's participation when the case was pending below. In each case, the court of appeals begins by examining the merits of the trial court judge's sentencing decision. In one, the court of appeals concludes that the initial sentence was unreasonable and that the "appearance of justice" would be served by having the defendant resentenced before a different trial court judge because the record suggests that the original judge would be unlikely "to disavow his previously expressed views about this case."[44] In the other case, the court of appeals rejects the defendant's challenges to the merits of his sentence, and concludes that, because there is not going to be a resentencing, "there is no reason to consider [the defendant's] argument that the case be assigned to a different district judge for resentencing."[45]

These three cases illustrate the basic distinctions between recusal and reassignment. The most important difference involves the relationship between the merits and the question of whether to remove the original trial court judge. Recusal decisions are made irrespective of the merits: the whole point of the recusal statutes is that certain judges should not be deciding certain cases in the first place. Thus, when an appellate court sets aside a lower court's decision based on a failure to comply with the recusal statutes, the decision is inherently backward looking: the trial court judge is removed to remedy the failure to recuse that occurred in the past.

Reassignment works differently. Here, the error that triggers appellate reversal is not the trial court judge's failure to remove herself from the case. Rather, the court of appeals first concludes that additional proceedings are necessary because of some non-recusal-related error in the lower court phase of the litigation, and then further concludes that it would be best if those proceedings were conducted by someone other than the original trial court judge. In this sense, reassignment is inherently forward looking: the original trial court judge is removed not to remedy some past error, but rather to reduce the risk of undesirable consequences going forward.

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42. *Id.* at 1115.

43. These examples are based on *United States v. Gapinski*, 422 F. App'x 513 (6th Cir. 2011) (granting relief), and *United States v. Harvey*, 181 F.3d 83, No. 98-1623, 1999 WL 357836 (2d Cir. May 20, 1999) (unpublished table decision) (denying relief).

44. *Gapinski*, 422 F. App'x at 521.

45. *Harvey*, 1999 WL 357836, at *2.

B. *The Mechanics of Reassignment*

Having identified what reassignment is, the next step is to describe how it happens. There are two main ways: (1) a case-specific reassignment order of the sort described in the previous Subpart; and (2) reassignment pursuant to a local court rule.

It is striking just how little federal statutes and rules have to say about how trial court judges get assigned to hear cases, much less when or how those cases should be reassigned to other judges. Congress has declared simply that the business of any district having more than one judge "shall be divided among the judges as provided by the rules and orders of the court."[46] Congress has not provided any further details, however, and there is no statute addressing what happens when a court of appeals reverses a trial court decision and remands for further proceedings. The issue is likewise unmentioned in the Federal Rules of Appellate Procedure.

In the absence of any uniform nationwide practice, a handful of federal courts have addressed reassignment via local rule. The only court of appeals to have done so is the Seventh Circuit, whose Circuit Rule 36 divides the universe of cases before it into two categories: one in which the presumption is in favor of reassignment and another in which the presumption is against it. The former category consists of cases that have been "tried in a district court [and are being] remanded . . . for a new trial."[47] In those cases, the rule provides, the case will be reassigned to a different trial court judge "unless the remand order directs or all parties request that the same judge retry the case."[48] In all other cases—that is, those that either have not been "tried in a district court" or are not being "remanded . . . for a new trial"—the case goes back to the same trial court judge unless the court of appeals "direct[s] in its opinion or order that this rule shall apply on remand."[49]

Although the Seventh Circuit's reassignment rule dates back more than forty years,[50] no other circuit has followed its lead. In addition, just seven of

46. 28 U.S.C. § 137 (2012). If the local district court judges are unable to agree, "the judicial council of the circuit shall make the necessary orders." *Id.*

47. 7TH CIR. R. 36.

48. *Id.*

49. *Id.*

50. *See* Singer v. Sterling Drug, Inc., 461 F.2d 288, 292 (7th Cir. 1972) (giving an enactment date of April 4, 1972, for the local rule, then known as Circuit Rule 23); SULLIVAN'S LAW DIRECTORY FOR THE STATE OF ILLINOIS 102b (96th ed. 1972) (quoting text of original 1972 rule). There is, unfortunately, no publicly available legislative history for what motivated the original rule's enactment. E-mail from John Klaus, Reference Librarian, U.S. Court of Appeals for the Seventh Circuit, to author (June 17, 2013) (on file with author). Retired Supreme Court Justice John Paul Stevens, however, has provided one possible explanation. Justice Stevens was a judge on the Seventh Circuit when the rule was enacted more than forty years ago, and he told Douglas Laycock that he believes (but is not certain) that the original rule may have been motivated, in part, by a desire to ensure that the

the eighty-seven federal district courts outside of the Seventh Circuit have adopted local rules governing assignment after remand: all five districts located within the First Circuit and two of the six districts located within the Second Circuit.[51]

There is likewise considerable variation among the district court rules governing assignment after appellate remand. At one end of the spectrum is the District of Puerto Rico, whose local rules address what happens to a case after an appellate remand, but do so only to reaffirm that the case always goes back to the original trial court judge "unless otherwise ordered by the court of appeals."[52] Similarly, the local rules of the District of Connecticut provide that remanded cases "not requiring the trial of an issue of fact" shall be returned to the original judge "unless the Chief Judge or the appellate Court otherwise directs."[53]

By contrast, the other five district court rules make reassignment mandatory or presumptive in at least some circumstances. The most common trigger is a remand for a new trial: two rules mandate reassignment in such circumstances[54] and two others make it presumptive for cases involving nonjury trials.[55] Only one district (the District of Massachusetts) makes reassignment the presumption for all cases remanded for further proceedings, and even then the presumption can be overcome if "the [original trial] judge determines that there will result a substantial saving in the time of the whole court and that there is no reason why, in the interest of justice, further proceedings should be conducted before another judge."[56] Other districts' local rules take a different approach, identifying circumstances in which reassignment generally is not required, including situations in which the

famous "Chicago Seven" case would not be returned to Judge Julius J. Hoffman. *See* E-mail from Douglas Laycock, Robert E. Scott Distinguished Professor of Law, Univ. of Va. Sch. of Law, to author (Nov. 8, 2012) (on file with author) (recounting a conversation with Justice Stevens). For an amazing collection of materials related to that notorious case, see Douglas O. Linder, FAMOUS AM. TRIALS: "THE CHICAGO SEVEN" TRIAL 1969-1970, http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/chicago7.html (last visited Dec. 18, 2013).

51. *See* D. CONN. CIV. R. 40(c); D. ME. R. 83.5; D. MASS. R. 40.1(K); D.N.H. R. 40.2; E.D.N.Y. GUIDELINES FOR DIV. BUS. AMONG DIST. JUDGES 50.2(*l*); D.R.I. R. GEN. 105(b); D.P.R. R. 3A(e)(3). For a discussion of the limited public history of some of these rules, see *infra* notes 58, 84-85 and accompanying text. A number of district courts located within the Seventh Circuit also have local rules addressing the implementation of reassignment as provided in Seventh Circuit Rule 36. *See, e.g.*, N.D. ILL. L.R. 40.5.

52. D.P.R. R. 3A(e)(3).

53. D. CONN. CIV. R. 40(c).

54. D. MASS. R. 40.1(K)(1); D.R.I. R. GEN. 105(b).

55. D. ME. R. 83.5(2); D.N.H. R. 40.2(b).

56. D. MASS. R. 40.1(K)(2).

"remand was predicated solely on errors of law," those involving "vacation of any pretrial order or judgment," and those "remanded for resentencing."[57]

The most unique local rule governing reassignment is that of the Eastern District of New York,[58] which draws a distinction between civil and criminal cases that does not exist in any other federal reassignment rules. In criminal cases, the Eastern District of New York's rule makes reassignment automatic in any case remanded for either a new trial or resentencing.[59] By contrast, the rule provides that all civil cases—including those remanded for a new trial—"shall remain assigned to the judge who was previously assigned, unless the chief judge or his designee orders otherwise."[60]

So what happens in the overwhelming majority of federal judicial districts in which there is neither a circuit- nor district-level rule addressing to whom a case should go following an appellate reversal? The near-universal answer, it seems, is that the case goes back to the original trial court judge unless the court of appeals directs otherwise in its opinion.[61] The next Part addresses how that process of case-by-case reassignment works in practice.

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57. D. ME. R. 83.5(1)-(2), (4); D.N.H. R. 40.2(a)-(b), (d).

58. E.D.N.Y. GUIDELINES FOR DIV. BUS. AMONG DIST. JUDGES 50.2(*l*). The Eastern District of New York is, of course, Judge Weinstein's district, and the connection is no accident. These guidelines were promulgated in 1988, while Judge Weinstein was chief judge and shortly before he published his article criticizing appellate-court-ordered reassignments. *See* Peter Lushing & Lawrence J. Zweifach, Commentary, *Guidelines for the Division of Business Among United States District Court Judges for the Eastern District of New York*, 120 F.R.D. 291, 291 (1988). In addition, the guidelines were drafted by a committee appointed by Judge Weinstein, *see id.*, and the commentary drafted by the committee's chair and reporter echoes many of Judge Weinstein's criticisms of appellate-court-ordered reassignment, *see id.* at 295.

59. E.D.N.Y. GUIDELINES FOR DIV. BUS. AMONG DIST. JUDGES 50.2(*l*)(1). The rules provide, however, that the chief judge may cancel reassignment in a particular case "to avoid placing an excessive burden on another judge." *Id.*

60. E.D.N.Y. GUIDELINES FOR DIV. BUS. AMONG DIST. JUDGES 50.2(*l*)(2).

61. To research this point, a University of Virginia librarian e-mailed the clerk's office of each federal judicial district and followed up with phone calls. We ultimately received responses from 93 of the 94 districts' offices, all but the Southern District of California. Excluding districts with local rules governing reassignment, all of the responding districts advised that their current practice is to return remanded cases to the original district court judge unless the court of appeals directs otherwise. In fact, one district that does have a local rule governing reassignment—the District of Connecticut, *see* D. CONN. CIV. R. 40(c)—nonetheless advised that its practice is to return all cases to the same trial court judge unless directed otherwise by the court of appeals or the chief district court judge. *See* E-mail from Jane Bauer, Operations Manager, U.S. Dist. Court for the Dist. of Conn., to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (Jan. 31, 2013) (on file with author).

One cautionary point: it is possible that current practice may not invariably reflect past practice. For example, a 1968 Second Circuit decision states that "[i]t has long been the practice in the Southern District of New York, with few exceptions, to have the second trial of a criminal case of any length and complexity tried before a judge other than the judge who presided at the first trial." United States v. Bryan, 393 F.2d 90, 90 (2d Cir. 1968) (per

II. WHEN DOES REASSIGNMENT HAPPEN?

Commentators have occasionally recognized that appellate-court-ordered reassignment happens.[62] But no one has attempted to describe exactly when and how it happens. This Part does. Specifically, it describes an original dataset consisting of 668 decisions issued over fifty-five years in which courts of appeals have ordered that cases be reassigned to a different federal trial court judge.

A. *Methodology*

I sought to create as complete a dataset of decisions in which courts of appeals have ordered reassignment as possible. I used multiple overlapping strategies in creating the dataset, including searches for references in previous works, Westlaw and LexisNexis searches,[63] and searches using Bloomberg Law, which allows searches of trial and appellate court dockets, rather than simply of opinions.[64] Whenever I found a qualifying opinion, I also read every opinion cited in that opinion for a reassignment-related proposition. Once the dataset was created, I coded each decision for fifty variables, including information about the type of the case, the courts and judges involved, the stage of the litigation, the nature of the error, who asked for reassignment, and the reasons given for ordering reassignment.[65]

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curiam). By 1991, however, at least one judge on the Southern District of New York believed that no such policy existed. *See* United States v. Smith, No. S 90 CR. 147(CMM), 1991 WL 220973, at *1 (S.D.N.Y. Oct. 15, 1991) (denying defendant's request for a case to be reassigned to a different judge following a reversal and remand for new trial and noting that "[t]his district has formally considered this policy question and has left the decision of reassignment to the discretion of the assigned judge" (citing S.D.N.Y. R. FOR DIV. BUS. AMONG DIST. JUDGES 18, 22)); *see also* Letter from John Gencarello, Chief Deputy of Operations, Office of the Clerk, U.S. Dist. Court for the S. Dist. of N.Y., to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (Feb. 22, 2013) (on file with author) (stating that the current practice of the Southern District of New York is always to return a remanded case to the same judge unless "the district judge is no longer on the bench" or "if the [appellate] mandate directs that a different district judge receive the case").

62. *See supra* note 19.

63. The searches were run in Westlaw's "CTA" and Lexis's "U.S. Court of Appeals Cases, Combined" databases. I searched for instances where: (1) "judge" occurred within four words of "different" or "another" and where that combination occurred within ten words of any variation of "assign" or "reassign"; or (2) the opinion contained any reference to the Seventh Circuit's local rule governing reassignment. The last searches were run on January 8, 2013.

64. The searches were run in Bloomberg's "all federal dockets (non-bankruptcy)" combined database. The search was "(remand! OR mandate OR ((court w/3 appeals) OR circuit)) w/200 (assign! OR reassign! OR (rule w/5 (36 OR 40 OR 50.2 OR 83.5 OR 40.1 OR 40.2 OR 105 OR 40.5)))." The last searches were run on November 24, 2012.

65. A copy of the coding form is available from the author.

Although I have attempted to be comprehensive, there are several reasons to doubt that the dataset includes every decision in which a court of appeals has ordered reassignment. First, it is likely that some decisions ordering reassignment are not available via Westlaw, Lexis, or Bloomberg Law.[66] Second, I may have failed to locate some decisions that are, in fact, available through those sources, either because they were not included in my search parameters or because I simply missed them. Third, I may have inadvertently excluded some decisions that arguably fit my criteria because my aim was to exclude decisions where the court of appeals ordered recusal as opposed to reassignment.[67] Fourth, my dataset does not include cases where reassignment was not mentioned in the court of appeals' opinion but rather occurred automatically by virtue of Seventh Circuit Rule 36, which, as noted earlier, states that any case "remanded . . . for a new trial" shall be reassigned "*unless* the remand order directs or all parties request that the same judge retry the case."[68] Finally, my dataset does not include any cases decided after December 31, 2012.

B. *Results*

My dataset contains 668 unique decisions decided between 1958[69] and the end of 2012 in which a federal court of appeals ordered that a case be

66. In an article principally concerned with district court litigation, David A. Hoffman, Alan J. Izenman, and Jeffrey R. Lidicker state that "[t]he use of opinion-only databases to fully capture the work of appellate courts is . . . troubling, because those courts do issue some orders to the parties that are not captured in the electronic databases." David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 728 n.180 (2007). They acknowledge, however, that "such orders are only rarely substantive, with the notable exception of orders related to prisoner litigation," *id.*, and, as noted earlier, the Bloomberg Law searches I conducted included district court dockets. A related challenge is that Westlaw and Lexis did not begin including the full text of unpublished opinions until the mid-1980s and the dates on which they began doing so vary by circuit. *See* Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 205-07 (2007).

67. For an example of a case falling on the margins, and that was not included in my dataset, see *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 157, 167-68 (3d Cir. 1993). I excluded this particular case because the court of appeals held both that recusal was required under 28 U.S.C. § 455 and, in the alternative, that reassignment was warranted as an exercise of the court's supervisory power. *Id.*

68. 7TH CIR. R. 36 (emphasis added). I likewise did not include cases in which a Seventh Circuit opinion mentioned Circuit Rule 36 solely to note that the rule would apply of its own force. When the panel directed that Circuit Rule 36 be applied on remand, however, I did not attempt to assess whether the rule would have been applicable absent such a reference.

69. *See infra* text accompanying notes 204-18 (describing the earliest case).

reassigned to a different trial court judge on remand.[70] That number seems both large enough to be meaningful and small enough to be curious.

By "large enough to be meaningful," I mean that reassignment happens often enough that it is difficult to dismiss as one of those weird things that courts do from time to time but that may not tell us anything more generally applicable than the fact that it occasionally happens.[71] To the contrary, every federal circuit in the United States asserts the power to order reassignment, each has done so at least once during the last decade, and all but one (the D.C. Circuit) have done so during the last five years.[72] Nor is reassignment going away: more than one-third (240) of the decisions in the entire dataset, which covers a period of fifty-five years, were decided during the last ten years and more than 20% (138) were decided since 2008.[73]

At the same time, however, the overall number of reassignments seems fairly small in relative terms. Those 668 decisions ordering reassignment average slightly more than 12 per year for each of the fifty-five years covered by the dataset. The largest single number of decisions in any year was 37 in 2010, followed by 33 in 2008. By contrast, the federal courts of appeals terminated at least 44,000 appeals from district courts in 2010 alone,[74] and

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70. I say "trial court judge" rather than "district court judge" because the dataset includes twelve federal magistrate judges.

71. *Cf.* Bush v. Gore, 531 U.S. 98 (2000).

72. Besides having the second-smallest caseload, *see infra* Table 1, the D.C. Circuit is the only federal circuit in which the trial and appellate judges all have chambers in the same building, *see* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376 (2006). As explained below, reassignment is deeply unpopular among at least some district court judges, *see infra* notes 240-44 and accompanying text, and its risk of straining relationships between trial and appellate judges may help explain why the D.C. Circuit seems to use reassignment less often than other circuits, *see* Roberts, *supra*, at 376 (noting that the physical proximity of D.C. Circuit and District of the District of Columbia judges "allows the circuit judges the unique opportunity of sitting down to lunch right next to a judge who, moments before, they had announced was guilty of abuse of discretion or clear error").

73. There are several possible explanations for why the dataset skews towards later years. First, federal caseloads have risen steadily over time, although the numbers have stabilized. *See History of the Federal Judiciary: U.S. Courts of Appeals Caseload, 1892-2012*, FED. JUDICIAL CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_courts_of_appeals (last visited Dec. 18, 2013). Second, it is possible that my dataset is more comprehensive with respect to recent cases than older ones. *See supra* note 66. Third, it is possible that the frequency with which courts of appeals order reassignment is increasing in a relative sense as well as an absolute one.

74. OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY DEC. 31, 2010, at 13 tbl.B-5 (2010) [hereinafter 2010 STATISTICAL TABLES], *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/B05Dec10.pdf. I say "at least" because, although the relevant table states that 58,319 appeals were terminated in total, that number includes one category of proceedings that were not appealed from district courts, "Administrative Appeals," and two categories of proceedings that include cases that

more than 22,000 of those were terminations on the merits.[75] It is true, of course, that the vast majority (more than 19,500) of those merits terminations were either affirmances or dismissals[76] and that reassignment is not even on the table unless the case is going back to the district court for further proceedings.[77] That said, however, there still were slightly more than 2000 reversals or remands to district courts in 2010—though, unfortunately, the data reveal neither how many of the "reversed" cases were sent back to the district court for further proceedings nor how many of the "remanded" cases were sent back for some sort of purely ministerial action by the trial court.[78] Thus, although it is not possible to calculate a precise ratio, it seems clear that, even in the year in which they ordered the most reassignments in history, the federal courts of appeals ordered reassignment in only a tiny fraction of the cases in which it was theoretically available.

1. *Distribution of cases among circuits*

The Table below shows the number of cases in my dataset by circuit, as well as each circuit's percentage of the total federal appellate docket for the most recent full year for which data are currently available:

come to appellate courts either from district courts or by some other route. The first, "Bankruptcy," includes cases that reach the courts of appeals from district courts, bankruptcy courts, or bankruptcy appellate panels. The second, "Original Proceedings," includes both applications to file a second or successive habeas petition (which do not originate in the district courts) and petitions for a writ of mandamus (which do). *See* E-mail from Catherine Whitaker, Acting Chief, Statistics Div., Admin. Office of the U.S. Courts, to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (Oct. 12, 2012) (on file with author) [hereinafter Whitaker e-mail]. If all cases in the "Bankruptcy," "Original Proceedings," and "Administrative Appeals" categories were excluded, the total would be 44,461. All subsequent numbers given in the text exclude "Bankruptcy," "Original Proceedings," and "Administrative Appeals" cases; the corresponding figures including those categories are given in the accompanying notes.

75. 2010 STATISTICAL TABLES, *supra* note 74, at 13 tbl.B-5 (totaling 30,512 with Bankruptcy, Administrative Appeals, and Original Proceedings).

76. *Id*. (totaling 26,982 with Bankruptcy, Administrative Appeals, and Original Proceedings).

77. *See supra* text accompanying note 45.

78. 2010 STATISTICAL TABLES, *supra* note 74, at 13 tbl.B-5 (totaling 2886 with Bankruptcy, Administrative Appeals, and Original Proceedings); *see* Whitaker e-mail, *supra* note 74 (describing cases included in the "Reversed" and "Remanded" categories).

TABLE 1
Distribution of Reassignments Across Circuits

Circuit	Number of Reassignments	Percentage of Reassignments	Percentage of Total Filings in 2012[79]
1	38	5.69%	2.84%
2	61	9.13%	7.96%
3	18	2.69%	6.43%
4	20	2.99%	9.64%
5	26	3.89%	14.45%
6	16	2.40%	9.13%
7	324	48.50%	5.73%
8	10	1.50%	5.90%
9	108	16.17%	18.15%
10	10	1.50%	4.15%
11	28	4.19%	13.19%
D.C.	5	0.75%	1.29%
Fed.	4	0.60%	1.14%

These percentages must be taken with a large grain of salt,[80] but they nonetheless raise some interesting questions. The most striking feature of the distribution of decisions ordering reassignment is the dominance of the Seventh Circuit, which is, of course, the only court of appeals in the United States that has a local rule governing reassignment.[81] Despite receiving fewer than six percent of all federal appeals taken from federal district courts in 2012,[82] the Seventh Circuit alone accounts for nearly half of the reassigned cases in my dataset.

79. OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY Dec. 31, 2012 tbls.B-7 & B-8 (2013) [hereinafter 2012 STATISTICAL TABLES], *available at* http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/december-2012.aspx. Unfortunately, the first of the cited tables (Table B-7) excludes Federal Circuit filings. The percentages in the fourth column were calculated by adding 503 Federal Circuit filings (taken from Table B-8) to the numbers contained in Table B-7 and then using that sum as the denominator for purposes of calculating circuit-by-circuit filing numbers.

80. The reasons are all of the apples-and-oranges variety. The percentages in the third column are based on the entire dataset, whereas the percentages in the fourth column are based on a single twelve-month period lasting from January 1, 2012, through December 31, 2012. *See id.* In addition, two of the circuits listed above did not even exist for some of the years covered by the dataset. *See* Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25 (creating the Federal Circuit); Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (creating the Eleventh Circuit).

81. *See supra* notes 47-50 and accompanying text.

82. *See supra* Table 1.

The data from the other circuits whose district courts have local rules governing reassignment likewise suggest a connection between the presence of local rules and the prevalence of reassignment orders. As explained earlier, the First and Second Circuits contain the only federal judicial districts outside the Seventh Circuit whose local rules directly address reassignment following an appellate court remand, and the First Circuit is the only circuit in which all of the local district court rules address the issue.[83] As shown by the figures listed above, the First and Second Circuits are also the only courts of appeals other than the Seventh Circuit whose shares of my dataset are higher than their current shares of all federal appeals.

The disparity becomes even more striking, however, when the Seventh Circuit cases (which significantly decrease the reassignment percentages for all other circuits) are removed from consideration. At that point, the First Circuit's share of the non-Seventh Circuit reassignment cases rises to 11.05%, nearly four times greater than its share of current non-Seventh Circuit appeals (3.01%). Something similar happens with the Second Circuit, where the removal of Seventh Circuit cases creates a percentage of reassignments (17.73%) more than twice that of the Second Circuit's current share of total appeals (8.45%).

I lack sufficient information to make any claim about the precise (much less any inevitable) link between district court rules and the use of reassignment by courts of appeals. That said, the limited information we do have suggests at least two possibilities. First, the local rules could be a reaction to the use of remand orders by the regional courts of appeals. For example, an official note that accompanied the promulgation of the District of Maine's local rule governing reassignment in 1989 states that it was "intended to conform to the principles enunciated by the United States Court of Appeals for the First Circuit concerning the assignment of remanded cases."[84] And the official commentary to the Eastern District of New York's local rule—which, as noted earlier, makes reassignment the presumption for all criminal cases remanded for a new trial or resentencing—contains sharp criticism of the Second Circuit's use of case-specific reassignment orders.[85]

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83. *See supra* notes 47-60 and accompanying text.

84. Order of Conrad K. Cyr, Chief Judge, U.S. Dist. Court for the Dist. of Me. (July 17, 1989), *reprinted in* 4 ME. B.J. 269, 269 (1989).

85. *See* Lushing & Zweifach, *supra* note 58, at 295. I was unable to locate any similar legislative history with respect to the other five local district court rules. The District of New Hampshire's local rule is nearly identical to that of the District of Maine, which may indicate some sort of connection. *Compare* D. ME. R. 83.5, *with* D.N.H. R. 40.2. The Rhode Island local rule was proposed in 2005 and took effect in 2006, but the clerk's office advised that the file containing public comments on the rule is sealed and not available for public inspection. *See* E-mail from Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law, to author (Feb. 28, 2013) (on file with author); E-mail from Kristie C. Randall, Deputy Circuit Librarian, U.S. Court of Appeals for the First Circuit, to Kristin Glover, Research Librarian,

There may, however, be circumstances where the causation flows the other way. In other words, the presence of local district court rules addressing reassignment could increase the odds of an appellate court ordering reassignment in cases not covered by those local rules. As explained earlier, the District of Puerto Rico is the only district within the First Circuit whose local rules provide that a case should always go back to the original trial court judge "unless otherwise ordered by the court of appeals."[86] My dataset contains ten decisions in which the First Circuit has ordered reassignment of a case from the District of Puerto Rico but has done so only in the appellate mandate—the little-known one-page document, not generally available on Westlaw or Lexis, that, strictly speaking, represents the court of appeals' judgment in any case in which one is issued.[87] For nine of those cases, I have been unable to locate any explanation from the First Circuit for its decision to order reassignment.[88] The mandate in the tenth case, however, states that the First Circuit was ordering reassignment "because the District Court lacks an appropriate local rule, as other districts [have]."[89] In other words, the promulgation of local rules in one district could increase the odds that appellate judges might order reassignment in cases from other districts, either as a way of encouraging the second district to follow the first district's lead, or simply because the presence of a local rule in one district increases the appellate judges' comfort level with the concept of reassignment.

Univ. of Va. Sch. of Law (Feb. 22, 2013) (on file with author). The District of Puerto Rico's local rule appears to date back to 1984, although the rule's number has changed and its wording has been tweaked since then. *See id.* The District of Connecticut's local rule appears to have been adopted some time between 1965 and 1977, but the clerk's office was unable to say precisely when or direct me to any history of the rule. *See* E-mail from Jane R. Bauer, Operations Manager, U.S. Dist. Court for the Dist. of Conn., to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (June 25, 2013) (on file with author). I was unable to obtain any information about the origins or history of the District of Massachusetts's local rule.

86. D.P.R. R. 3A(e)(3).

87. *See* FED. R. APP. P. 41. The first of these decisions was issued in 1995. *See* Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) (vacating and remanding without mentioning reassignment); Calendar Entry of Apr. 28, 1995, *Libertad*, 53 F.3d 428 (No. 94-01699), ECF No. 31 (referencing unpublished order issued same day as published opinion and stating that "[u]pon remand this case is reassigned to another District Court Judge for the reasons stated in said Order"). I have not, however, been able to obtain a copy of the unpublished order in *Libertad* or to determine for certain when the First Circuit first started this practice.

88. *See, e.g.*, United States v. Flores-Rivera, 601 F.3d 41 (1st Cir. 2010) (per curiam) (vacating and remanding without mentioning reassignment); Mandate, *Flores-Rivera*, 601 F.3d 41 (No. 09-1131) ("The district court is directed to assign this case to a different judge on remand.").

89. Calendar Entry of Dec. 22, 1997, Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97 (1st Cir. 1997) (No. 97-1489), ECF No. 21; *see also infra* Part III.C (discussing possible virtues of this type of less public reassignment).

2. *Who is getting reassigned and by whom?*

a. *The reassigned*

Two things seem especially notable about the distribution of reassignments among federal trial court judges. The first is the (predictable) over-representation of judges whose home districts lie within the circuit that, by itself, ordered almost half of the reassignments in my dataset. In fact, three-quarters of the forty trial court judges in the dataset who have four reassignments or more hail from districts within the Seventh Circuit, as do ten of the twelve most frequently reassigned federal trial court judges.

The most reassigned federal trial court judge in the United States, however, hails from California rather than Chicago. Judge Manuel Real is a member of the United States District Court for the Central District of California, though he has sat by designation on the Districts of Arizona and Hawaii as well. He is also, by far, the most reassigned federal trial court judge in the United States, with forty-three appellate-court-ordered reassignments over the course of twenty-six years,[90] including forty reassignments ordered by the Ninth Circuit and three more ordered by the Federal Circuit.

It is difficult to overstate the extent to which Judge Real is an outlier. For most federal trial court judges, appellate-court-ordered reassignment happens rarely, if ever. There currently are 663 authorized federal district court judgeships,[91] although that number has increased over time and there are always vacancies.[92] My entire dataset—which contains fifty-five years' worth of cases and thus includes judges no longer on the bench—contains 287 unique federal trial court judges.[93] A majority of those judges (173, or 60.28%) have been reassigned only once and another 59 (20.56%) have been reassigned exactly twice. Fewer than 10% of the judges in my dataset (27) have been reassigned five or more times.

Yet, even among that high-reassignment group, Judge Real stands out. Judge Real is not merely number one on this list: he has slightly more than two-and-a-half times as many reassignments as the three trial court judges tied for second at seventeen reassignments each.[94] By himself, Judge Real accounts for

90. *See infra* note 97; *see also, e.g.*, United States v. Pritchard, 485 F. App'x 199 (9th Cir. 2012) (ordering reassignment of Judge Real in a criminal case).

91. 28 U.S.C. § 133(a) (2012).

92. *See How the Federal Courts Are Organized: Federal Judges and How They Get Appointed*, FED. JUD. CTR., http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183 (last visited Dec. 18, 2013) (noting that "[i]n 1950, there were only . . . 212 district court judgeships" and that "[i]t is rare that all judgeships are filled at any one time").

93. *See supra* note 70.

94. Those judges are Samuel Der-Yeghiayan (Northern District of Illinois), Allen Sharp (Northern District of Indiana), and Jack Tanner (Western District of Washington).

6.4% of all of the cases in my dataset and 12.5% of the non-Seventh Circuit reassignments.

Although I will not attempt a full exploration of Judge Real's unique status here, three things stand out. First, he has been a federal judge for a very long time. Appointed to the bench by President Lyndon Johnson in 1966, Judge Real is currently the most senior active-status federal judge in the United States,[95] and he was on the district court bench for forty-seven of the fifty-five years covered by my dataset. Length of service, however, seems unlikely to be a full explanation; the second-most senior active-status district court judge has only one reassignment in his entire judicial career and the third- and fourth-most senior district judges have no reassignments.[96] That said, one area for future research would be to examine the degree to which reassignment correlates with length of service, both in terms of absolute numbers and whether the odds of reassignment in any given case tend to increase or decrease with the length of judicial service.[97]

Second, Judge Real appears to have an unusually high reversal rate. Although precise data are hard to come by, a relatively standard estimate seems to be that 90% of federal appeals result in affirmances.[98] According to a Westlaw "Judicial Reversal Report" produced on September 21, 2013, Judge Real was the subject of at least 727 appeals between 2000 and 2012. Of those cases, 297 were categorized as "Reversed," "Affirmed in Part/Reversed in Part," "Vacated," or "Remanded," with only 416 categorized as "Affirmed," "Dismissed," or "Affirmed and Remanded."[99] Because some sort of reversal is a necessary precondition to reassignment, it is unsurprising that the judge with the largest number of reassignments also seems to have an atypically high reversal rate. What I cannot say at this point, however, is whether a higher

95. *See History of the Federal Judiciary: Biographical Directory of Federal Judges, 1789-Present*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/judges.html (click "Select research categories" hyperlink; click "Commission Date," "Limit Query to Sitting Judges," and "Continue"; search for Commission Date Before January 1, 1970; and select "Active Judges") (last visited Dec. 18, 2013).

96. Those judges are Joseph Tauro (District of Massachusetts), Harold Murphy (Northern District of Georgia), and John Copenhaver, Jr. (Southern District of West Virginia), respectively.

97. Judge Real, for example, did not have a case reassigned until 1986, at which point he already had been on the bench for twenty years. Judge Real's next reassignment did not occur until 1995. Since 2005, however, Judge Real has had at least one case reassigned per year, and he had at least three cases reassigned per year from 2008 through 2012. Although I cannot say what may have caused the sharp spike in Judge Real's reassignment numbers, it seems noteworthy that the circuit judge who has sat on the highest number of panels ordering reassignment of Judge Real's cases received her appellate commission in 1998.

98. *See* Guthrie & George, *supra* note 18, at 358.

99. *See also* Carol J. Williams, *Critics Want This Judge Benched*, L.A. TIMES, Aug. 16, 2009, at A33 ("Judiciary analysts have calculated that Real's reversal rate in some years has been as high as 10 times the average for federal district judges.").

reversal rate is correlated with an even higher relative rate of reassignment—that is, whether a judge with a high reversal rate might be more likely to be reassigned in any given reversed case than one with a lower reversal rate.

Third, Judge Real seems to have an unusually contentious relationship with his local court of appeals. In 2008, Judge Real was publicly reprimanded by the Judicial Council of the Ninth Circuit for "making inaccurate and misleading responses to the Judicial Council and special committee" and "by withdrawing [a] bankruptcy reference and staying a judgment in [a] matter based on personal knowledge and information received *ex parte*."[100] That same year, the Judicial Council of the Ninth Circuit dismissed a different misconduct complaint against Judge Real but stated that it was "troubled by the failure of the District Judge . . . in many cases to give reasons for his rulings when the law requires that reasons be given, and by Judge Real's obduracy in implementing many directives from the appellate court."[101] Although obviously just one example, the case of Judge Real suggests that appellate judges may be more likely to order reassignment when they have concerns about a particular trial court judge's general disposition or willingness to carry out their directives on remand.

b. *The people ordering reassignment*

There are no similarly dramatic outliers when we turn from the judges being reassigned to those ordering reassignment. My dataset includes 452 unique judges who have been members of appellate panels that ordered reassignment.[102] Of these, 355 were court of appeals judges at the time they sat on those appellate panels and 101 were other judges sitting by designation, including 93 federal district court judges, 4 members of the United States Court of International Trade, 2 members of the United States Court of Claims, 1 member of the now-defunct United States Court of Customs and Patent Appeals, and 1 retired Supreme Court Justice (Tom Clark).[103] Well over 95%

100. *In re* Comm. on Judicial Conduct & Disability, 517 F.3d 563, 569 (U.S. Jud. Conf. 2008). This incident also gave rise to an impeachment hearing in the House of Representatives. *See Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. Res. 916 Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 2-4 (2006).

101. *In re* Complaint of Judicial Misconduct, Nos. 07-89000, 07-89020, slip op. at 3 (9th Cir. Dec. 12, 2008), *available at* http://www.ca9.uscourts.gov/datastore/misconduct/07_89000_and_07_89020.pdf. For additional information about Judge Real, including a discussion of his involvement in an incident featured in THE PEOPLE VS. LARRY FLYNT (Columbia Pictures 1996), see Terry Carter, *Real Trouble*, A.B.A. J., Sept. 2008, at 45, 48.

102. There currently are 179 authorized court of appeals judgeships in the United States. *See* 28 U.S.C. § 44 (2012).

103. The reason why the numbers in the preceding sentence do not add up to 452 is because my dataset includes judges who sat on appellate panels that ordered reassignment

of the cases in my dataset involved three-judge panels, though there were thirteen cases in which reassignment was ordered by an en banc court.

Not surprisingly, the Seventh Circuit dominates this category too. In fact, the nineteen highest ranked judges—that is, the judges who have sat on the largest number of appellate panels that ordered reassignment—are all current or former Seventh Circuit judges,[104] and each of the ten highest-ranked Seventh Circuit judges has at least twice as many reassignments as the highest-ranked non-Seventh Circuit judge.[105] Each of the twenty-eight permanent Seventh Circuit judges in my dataset has at least three reassignments, twenty-two of them have at least twelve reassignments, and a majority of them have at least thirty-six reassignments. There is a four-judge cluster at the top, whose members all are within eight reassignments of each other and at least twenty reassignments ahead of the next highest-ranked judge.[106] But there is no single outlier like Judge Real.

The pattern holds when we look at which non-court-of-appeals judges have sat on the largest number of appellate panels ordering reassignment. My dataset includes two federal district court judges who have sat on eleven such panels and one federal district court judge who has sat on ten such panels.[107] No other non-court-of-appeals judge has sat on more than four such panels. Two of these three judges are from districts located within the Seventh Circuit. More importantly for my purposes, these three judges were sitting by designation on the Seventh Circuit for thirty of thirty-one cases in which they participated in a decision to order reassignment.[108]

Another obvious question is whether there is any particular relationship between the trial court judges being reassigned and the appellate panel

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both while serving as a trial court judge sitting by designation and later after being elevated to a court of appeals.

104. The judge-by-judge numbers discussed in the next seven paragraphs include cases in which reassignment was ordered by a court of appeals sitting en banc (as opposed to in a three-judge panel). A majority of the en banc reassignments (seven of thirteen) were by the Seventh Circuit. As a result, the Seventh Circuit share of the dataset includes a disproportionately large number of cases in which a single reassignment is attributed to more than three appellate judges.

105. The top twenty are William Bauer (76 reassignments), Walter Cummings (74), Richard Posner (73), Richard Cudahy (68), Ilana Rovner (47), Kenneth Ripple (46), Luther Swygert (45), Frank Easterbrook (44), Harlington Wood, Jr. (44), Joel Flaum (42), John Coffey (39), Wilbur Pell, Jr. (39), Ann Williams (38), Diane Wood (37), Daniel Manion (36), Michael Kanne (30), Terence Evans (25), Thomas Fairchild (25), Robert Sprecher (23), and Kim Wardlaw (Ninth Circuit) (21).

106. See *supra* note 105.

107. Those judges are William Campbell of the Northern District of Illinois (11 reassignments), Robert Grant of the Northern District of Indiana (11), and Edward Dumbauld of the Western District of Pennsylvania (10).

108. The one exception is *United States v. White*, 846 F.2d 678 (11th Cir. 1988), in which Judge Dumbauld was sitting by designation on the Eleventh Circuit.

members ordering the reassignment. I performed a very preliminary examination of two things: the connection between specific judges and the role of ideological compatibility between the trial court judge and the appellate panel.

One correlation practically leaps off the page: the link between the trial court judge with the largest number of cases reassigned and the non-Seventh Circuit judge with the highest number of reassignments ordered. As described earlier, the trial court judge with the largest number of reassignments is Judge Manuel Real (43 reassignments) of the Central District of California. The non-Seventh Circuit judge who has participated in the largest number of reassignment orders is Judge Kim Wardlaw (21 reassignment orders), who sits on the circuit that reviews decisions from Judge Real's district. In 16 of those 21 cases, Judge Wardlaw was a member of a panel that ordered that a case be reassigned from Judge Real, though not one of those 16 cases resulted in a signed majority opinion.[109] In other words, Judge Wardlaw was a member of more than one-third of the panels that have ordered that cases be reassigned from Judge Real, and Judge Real was the judge in question for more than three-quarters of the reassignments in which Judge Wardlaw participated.

As with Judge Real himself, it is difficult to overstate the unusual nature of the correlation between these two judges. No other appellate judge—including the four members of the Seventh Circuit with sixty or more total reassignments ordered each—has participated in more than eight reassignments of a single federal trial court judge.

Part of this is simply a function of Judge Real's extreme outlier status. There are a number of Ninth Circuit judges for whom Judge Real makes up a high percentage of their reassignment orders. For example, Judge Real also was the trial court judge for more than half of the cases in which three other Ninth Circuit judges ordered reassignment: Betty Fletcher (8 of 15), Alex Kozinski (6 of 11), and Harry Pregerson (6 of 11). There also are five other court of appeals judges who have ordered reassignment of Judge Real at least twice, each without once ever ordering the reassignment of any other trial court judge.[110]

There are also likely other federal trial court judges for whom a disproportionately large number of orders directing reassignment come from panels including a particular appellate judge. Take Judge Samuel Der-Yeghiayan of the Northern District of Illinois, for example. Judge Der-Yeghiayan has had seventeen cases reassigned by the Seventh Circuit. Seven of those panels (41.17%) had Judge Diane Sykes as a member, seven had Judge Diane Wood as a member, and two of those panels had both Judges

109. *See, e.g.*, United States v. Morales, 465 F. App'x 734, 740 (9th Cir. 2012).

110. They are William Fletcher (6), Pamela Rymer (3), Daniel Friedman (2), Susan Graber (2), and N. Randy Smith (2).

Sykes and Wood as members.[111] Such links also may well exist with respect to certain trial court judges with lower total numbers of reassignments. Yet even with these caveats, the connection between Judge Wardlaw and Judge Real is unique in my dataset.[112]

The numbers are less striking when we turn from specific personalities to more general politics. As a first cut at assessing ideology, I used the admittedly imperfect but relatively standard measure of party of the appointing President.[113] I excluded decisions from courts sitting en banc, decisions in which the trial court judge was not a federal district court judge, cases where I was unable to identify the trial court judge or the court of appeals judges, and two cases where there were two different district court judges. That left 630 cases. Here are the results, with appellate panels arranged from panels consisting of all Democratic appointees to all Republican appointees[114]:

111. *See, e.g.*, H.K. Electro-Chem. Works, Ltd. v. Less, 539 F.3d 795 (7th Cir. 2008) (involving a panel with both Judge Diane Wood and Judge Sykes).

112. I lack sufficient information to offer a reason for this connection. The number of times an appellate judge has sat on a panel that ordered reassignment of a particular trial court judge is a product of at least three variables: (a) the total number of appeals heard from that judge; (b) the percentage of such appeals that resulted in a remand to the trial court for further proceedings; and (c) the percentage of such remands that are accompanied by an order of reassignment. It is possible that Judge Wardlaw has heard an unusually large number of appeals from Judge Real or that an unusually large percentage of those appeals resulted in a remand for further proceedings, both which could result in Judge Wardlaw having sat on an unusually large number of panels that ordered reassignment of Judge Real. Here, as in other places, any more detailed explanations must await future research.

113. *See* Smith, *supra* note 18, at 42 ("Although certainly not perfect, the majority party on the circuit-court panel is a reasonable indicator of the circuit panel's ideological preferences."); *see also* Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 539 & n.9 (2002) (using "party of the appointing president" as a measure of ideology and noting that "[t]wo recent analyses found the use of this proxy to be defensible"); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 J.L. & POL'Y 133, 167 (2009) (describing "the party of the official who appointed the judge" as "[t]he most popular proxy for a judge's ideology"); *id.* at 166-90 (describing and assessing various other measures); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 679-80 (1994) (describing other methods of estimating judicial ideology).

114. Information on the party of the appointing President was obtained via a database maintained by the Federal Judicial Center. *See Export of All Data in the Biographical Directory of Federal Judges, 1789-Present*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/export.html (last visited Dec. 18, 2013). On the rare occasions where the database did not contain information about the President who had appointed a particular judge, I conducted various Internet searches to obtain that information. A spreadsheet showing the party assignments of all judges included in Table 2 is available from the author.

TABLE 2
Number of Reassignments by Party of the Appointing President

Appellate Panel	District Judge: *D*	District Judge: *R*
DDD	30 (59%)	21 (41%)
DDR	89 (45%)	109 (55%)
RRD	106 (40%)	162 (60%)
RRR	52 (46%)	61 (54%)

Although these are obviously raw numbers, nothing immediately jumps out. Both majority-Democratic and majority-Republican panels have ordered reassignment of somewhat more Republican-appointed district court judges than Democrat-appointed district court judges, which is not entirely surprising given that Republican-appointed district court judges made up 56.31% of the dataset. Nor is the presence of an all-Democratic or all-Republican appellate panel associated with a sharp spike in cross-party reassignment relative to same-party reassignment.

Several clarifications are important here. These are raw numbers with judges categorized solely by the party of the appointing President. I made no effort to control for the percentage of federal trial or appellate judges appointed by Presidents of a given party at a particular time or the proportion of cases involving each combination. I also ran no regressions and made no effort to more finely measure judicial ideology or to control for the nature of the underlying case. It is entirely possible that a more fine-grained analysis would detect patterns not apparent on this first rough cut, as well as help explain why, if anything, Republican-majority appellate panels seem on first glance to be more likely than Democratic-majority panels to order reassignment of Republican-appointed district court judges.

3. *What do the cases in which reassignment is ordered look like?*

When reading individual cases, it can start to feel like there is no pattern to when or how the courts of appeals order reassignment. Appellate courts seem to order reassignment in almost every type of case imaginable. Some cases are

high profile, politically sensitive, or involve huge sums of money.[115] Others are run-of-the-mill cases unlikely to be of interest beyond the litigants.[116] Sometimes, an order of reassignment is contained in a lengthy opinion that provides a detailed rationale for directing reassignment.[117] Other times, the court of appeals provides no explanation at all.[118]

That said, some definite patterns emerge when one takes a step back. The key is realizing that the Seventh Circuit uses reassignment in a way that is quite different from its sister circuits.

Consider, for example, the ratio of civil to criminal cases. The total dataset contains 53.29% civil cases and 45.21% criminal cases, with the remaining 1.5% of cases classified as "contempt."[119] What those figures obscure, however, is that more than three-quarters of the Seventh Circuit's reassignment orders are in civil cases, whereas in every other circuit with criminal jurisdiction there are at least as many criminal cases as civil.

The Seventh Circuit is different in other ways as well. It is much less likely than other circuits to give reasons for a decision to order reassignment (10.19% in the Seventh Circuit versus 84.01% in the other circuits). On the other hand, a much higher percentage of Seventh Circuit opinions ordering reassignment are signed by one of the panel members than in other circuits (88.27% in the Seventh Circuit versus 56.98% in other circuits).

Because the percentage of Seventh Circuit decisions in the overall dataset is so high (48.50%), any systematic differences between its reassignment practices and those of the other circuits threaten to swamp the ability to spot interesting patterns.[120] Accordingly, the remainder of this Part will discuss the non-Seventh Circuit and Seventh Circuit cases separately.

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115. *See, e.g.*, Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006) (involving a long-running class action in which Native Americans accused the federal government of decades of mismanagement of tribal lands); United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) (involving the prosecution of a prominent televangelist); Bradley v. Milliken, 620 F.2d 1143 (6th Cir. 1980) (involving long-running desegregation cases involving the City of Detroit).

116. *See, e.g.*, Brown v. Potter, 457 F. App'x 668 (9th Cir. 2011) (ordering reassignment of an employment discrimination action against the United States Postal Service after the district court erroneously granted summary judgment in favor of the employer).

117. *See, e.g.*, United States v. Gupta, 572 F.3d 878, 891-92 (11th Cir. 2009).

118. *See, e.g.*, United States v. Lane, 473 F. App'x 229, 230 (4th Cir. 2012) (per curiam).

119. For an example of a case in the "contempt" category, see *United States v. Neal*, 101 F.3d 993 (4th Cir. 1996).

120. To a lesser extent, this risk also exists with respect to aggregating data from other circuits. For example, the Ninth Circuit (108 reassignments) is the only circuit that has more reassignments ordered in unpublished opinions than in published opinions (55 unpublished versus 53 published). In every other circuit except for the Sixth Circuit (50%) and the Eleventh Circuit (61%), the percentage is at least 70% published. These figures stand in sharp contrast to the overall rate of published versus unpublished opinions among the courts

a. *Non-Seventh Circuit cases*

My dataset contains 344 cases where a court of appeals other than the Seventh Circuit ordered a case reassigned to a different trial court judge on remand. More than two-thirds are criminal cases (230), with cases involving criminal sentencing errors alone making up 42.15% of the non-Seventh Circuit cases in the dataset (145). The other error stages that generated large numbers of reassignment orders are the guilty plea (25 decisions) and trial (20 decisions) stages in criminal cases and the summary judgment (22 decisions), trial or merits hearing (29 decisions), and final remedies, which includes attorneys' fees, (13 decisions) stages of civil cases.

Courts of appeals outside the Seventh Circuit generally give reasons for ordering reassignment (84.01%), but the reasons they give vary widely. For one thing, there are a fairly large number of cases (72, or slightly less than 25% of cases in which reasons are given) in which the reviewing court suggests that the type of underlying error in question generally mandates reassignment. The largest number of cases in this category (38) involves violations of the rule associated with *Santobello v. New York*,[121] which states, broadly speaking, that prosecutors must keep their promises to make—or to refrain from making—particular recommendations with respect to criminal sentencing.[122] The other major category (15 cases) involves violations of Federal Rule of Criminal Procedure 11(c)(1), which bars judicial participation in plea negotiations.[123]

The bulk of decisions, however, provide more case-specific reasons for ordering reassignment. Perhaps unsurprisingly, the three most common reasons simply repeat the three "principal factors" from the most frequently recited test for ordering reassignment. That test is drawn from the Second Circuit's

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of appeals in recent years. *See* OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 38 tbl.S-3 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (listing 85% of opinions in 2011 as unpublished); OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 tbl.S-3 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (listing 84% of opinions in 2010 as unpublished).

121. 404 U.S. 257 (1971).

122. *Id.* at 262-63; *see also, e.g.*, United States v. Mosley, 505 F.3d 804, 809-10, 812 (8th Cir. 2007) (ordering reassignment based on *Santobello* violation). Although *Santobello*-style errors are the single largest category of sentencing errors in the dataset, they are not the only reason that sentencing cases predominate; on the contrary, nearly three-quarters of non-Seventh Circuit sentencing cases involved some other type of error.

123. *See generally* United States v. Davila, 133 S. Ct. 2139 (2013) (discussing Federal Rule of Criminal Procedure 11(c)(1)). For a decision ordering reassignment on this ground, see *United States v. Cano-Varela*, 497 F.3d 1122, 1134 (10th Cir. 2007).

decision in *United States v. Robin*.[124] The first factor asks "whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected" (53 references).[125] The second, and most often cited, factor asks "whether reassignment is advisable to preserve the appearance of justice" (88 references).[126] The third factor asks whether reassignment would consume limited judicial resources "out of proportion to any gain in preserving the appearance of fairness" (39 references).[127]

Perhaps the most striking recurring variation among the reasons for reassignment offered by different appellate panels involves how they treat the trial court judge. On one hand, a fairly large number of decisions go out of their way to express confidence in the about-to-be-reassigned trial court judge's actual impartiality (31 decisions) or willingness to faithfully follow any instructions on remand (7 decisions).[128]

Other appellate panels, however, are less charitable. Numerous decisions expressly justify the decision to order reassignment based at least in part on the removed judge's prior conduct. These include references to the fact or number of previous reversals in this particular case (25 decisions),[129] the number (10 decisions) or flagrancy (13 decisions) of the trial court's errors,[130] the trial court's failure to explain or justify its decisions (11 decisions),[131] or the reversal (8 decisions) or even reassignment (2 decisions) of this same trial court judge in other cases.[132] Other decisions note that the trial court judge reached

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124. 553 F.2d 8 (2d Cir. 1977) (en banc) (per curiam), *superseded by* 28 U.S.C. § 2255 Rule 4(a).

125. *Id.* at 10.

126. *Id.*

127. *Id.* For a decision citing all three *Robin* factors, without citing to *Robin* itself, see *United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (per curiam).

128. *See, e.g.*, United States v. Johnson, 387 F. App'x 105, 107 (2d Cir. 2010) ("[W]e do not doubt that Judge Johnson would comply faithfully with our instructions following remand."); Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 833 (1st Cir. 1987) ("[T]he actual fairness of the trial judge is not in question . . . .").

129. *See, e.g.*, TriMed, Inc. v. Stryker Corp., 608 F.3d 1333, 1344 (Fed. Cir. 2010) ("The district court has now been reversed twice after entering summary judgment against TriMed . . . .").

130. *See, e.g.*, Simon v. City of Clute, 825 F.2d 940, 944 (5th Cir. 1987) (observing that the trial court judge "had refused to enter a judgment in this case when it was its plain duty to do so until the plaintiffs sought a writ of mandamus from this court").

131. *See, e.g.*, Stewart Title of Cal., Inc. v. Fidelity Nat'l Title Co., 279 F. App'x 473, 476 n.5 (9th Cir. 2008) (stating that reassignment was warranted "particularly in light of the district judge's failure to articulate any reasoning behind his decisions").

132. *See, e.g.*, United States v. Steppello, 664 F.3d 359, 366 (2d Cir. 2011) (per curiam) ("We note that we are reversing the suppression order of this district judge on substantially the same grounds as we reversed the same judge's suppression order in [a previous case]."); United States v. Hirliman, 503 F.3d 212, 217 (2d Cir. 2007) (noting that court had twice

the same result following an earlier appellate reversal (14 decisions) or go further to accuse the trial court judge of failing to address the reasons for the prior reversal (11 decisions) or even of violating the previous appellate mandate (15 decisions).[133] Other decisions fault the trial court judge for failing to act in an appropriate judicial manner toward the parties, citing abusive or critical comments (22 decisions), excessive interventions (10 decisions), or the general tenor of the litigation (7 decisions).[134]

Appellate judges also make predictions about the future when ordering reassignment. Some panels supplement the general factor asking whether the trial court judge might have difficulty putting previous conclusions out of her mind by noting that the trial court judge has already expressed strong views about the facts (14 decisions), law (11 decision), or proper outcome (17 decisions) of a particular case.[135] Others express concerns about putting the trial court judge in a sort of damned-if-you-do, damned-if-you-don't situation (6 decisions), where reaching the same conclusion on remand would invite accusations that the trial court judge was stubbornly adhering to her original position but reaching a different conclusion would invite counteraccusations that she simply caved to appellate pressure.[136] Still other panels openly express doubts about whether the original trial court judge would actually follow any directions given on remand (9 decisions).[137]

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previously ordered reassignment of the same trial court judge based on the same error committed in the current case).

133. *See, e.g.*, Reserve Mining Co. v. Lord, 529 F.2d 181, 188 (8th Cir. 1976) (characterizing the trial court judge as having committed "an intentional violation of the mandate of this court"). Three decisions also cite the trial court judge's failure to do as directed by an appellate court in previous cases. *See, e.g.*, *Hirliman*, 503 F.3d at 217 ("This is, therefore, the third case in two years in which Judge Elfvin failed in the initial sentencing proceeding to comply with the requirements of notice and explanation for the imposition of a non-Guidelines sentence and then, on remand, failed to follow a direction of this court to comply with those requirements.").

134. *See, e.g.*, United States v. Hall, 271 F. App'x 559, 560 (9th Cir. 2008) (citing the trial court judge's "disparaging remarks" and "lengthy interrogations of witnesses").

135. *See, e.g.*, United States v. Doe, 655 F.2d 920, 929 (9th Cir. 1981) ("The [district] court was adamant in questioning and rejecting all claims of cooperation which might mitigate punishment.").

136. *See, e.g.*, Conley v. United States, 323 F.3d 7, 15 (1st Cir. 2003) (en banc) ("A third remand would put the district judge in a very awkward position. If he ordered a new trial yet again, it might be thought that he was wedded to an outcome; if he altered his result, Conley might suppose that the judge had yielded to exhaustion or to a supposed message from this court.").

137. *See, e.g.*, United States v. Brunson, 416 F. App'x 212, 223 (3d Cir. 2011) ("All indicators suggest that the District Court will refuse to alter its course, as it has been forced to confront its errors repeatedly, and in each instance, has run headlong into error again.").

b. *Seventh Circuit cases*

The dataset also includes 324 cases from the Seventh Circuit. More than 75% of them are civil cases (248),[138] with the greatest number of errors triggering reversal coming at the trial or merits hearing (69 cases), summary judgment (65), or motion to dismiss (50) stages. In civil cases, the errors triggering reversal favor the defendant just over 80% of the time.

Because there are so many of them, I also grouped the Seventh Circuit's civil cases into categories by type of case. Some cases involve more than one type of claim, which means that there are more entries than cases. The single largest category involves civil rights cases, by which I mean any constitutional claim as well as statutory discrimination claims that arose outside the employment environment. Just under one-third of the Seventh Circuit civil cases fit that description (82). Another 16% (40) are employment discrimination cases, with the remainder involving a wide variety of federal- and state-law claims.

The Seventh Circuit's criminal cases also seem to vary in interesting ways from those of the other circuits. As with the other circuits, sentencing errors make up the biggest category of Seventh Circuit criminal cases (26 cases or 36.11% of all criminal cases). Unlike the other circuits, however, the Seventh Circuit ordered reassignment on very few guilty-plea-related claims (2.78% of Seventh Circuit criminal cases), while a much higher percentage of the circuit's criminal reassignments involve erroneous pretrial rulings (20.83% of Seventh Circuit criminal cases versus 2.61% of non-Seventh Circuit criminal cases) or habeas litigation (19.44% of Seventh Circuit criminal cases versus 3.91% of non-Seventh Circuit criminal cases).

The Seventh Circuit rarely gives reasons for its decisions to order reassignment, and, when it does so, those reasons tend to be highly case-specific and minimal. The vast majority of the Seventh Circuit decisions in my dataset (89.81%) provide no explanation for the decision to order reassignment; rather, the panel simply announces that "Circuit Rule 36 shall apply on remand"[139] or something to that effect. And on those rare occasions when a Seventh Circuit panel provides reasons, the explanation is rarely more than a sentence (or even a clause) long. There are cases that note that the Seventh

138. One possible explanation for the higher civil-to-criminal case ratio in the Seventh Circuit would be that the Seventh Circuit is behaving similarly to its sister circuits when it comes to criminal cases, but then simply adding a much larger number of civil reassignments on top. The data do not support that hypothesis, however. Even if all 248 Seventh Circuit civil cases were removed from the dataset, the Seventh Circuit's 72 criminal cases would by themselves give that circuit the second-highest number of reassignments of any circuit (trailing only the Ninth Circuit's 108 reassignments) and a percentage of total reassignments ordered (17.31%) that would still be more than triple its current percentage of total federal appeals (5.43%).

139. *See, e.g.*, United States v. Trujillo-Castillon, 692 F.3d 575, 580 (7th Cir. 2012).

Circuit has already reversed the same judge in the same case at least once before.[140] Other Seventh Circuit panels have stated that a trial court judge already "has made up his mind on" a particular subject,[141] that reassignment was desirable to help bring the case to a speedy close,[142] or that everyone involved would benefit from a fresh start.[143] Still other times, Seventh Circuit panels have spoken vaguely of "the interests of justice,"[144] "the circumstances of this case,"[145] or "the policy underlying" Circuit Rule 36.[146] What the Seventh Circuit has never done, however, is announce any sort of formal test for exercising its case-specific discretion to order that a case be reassigned on remand.

III. WHAT CAN REASSIGNMENT TEACH US?

Reassignment is interesting in its own right. But reassignment also exists within a larger framework and recognizing its existence both sheds light on familiar debates and raises questions for further inquiry. This Part discusses three particular areas. First, it explains how reassignment is a tool that appellate judges can use to influence trial court outcomes and examines the relationship between reassignment and other such tools for doing so. Second, this Part explores the connection between reassignment and notions of judicial impartiality. More particularly, it shows how reassignment can function as a limited work-around for the restrictions on recusal doctrine and also how the reasons that reviewing courts give for ordering reassignment sometimes reflect discomfort with the general presumption that trial court judges can ignore legally impermissible information or put aside their own previous views. Finally, this Part argues that courts of appeals should adopt local rules governing reassignment and generally refrain from giving case-specific reasons for ordering it. It also explores this argument's implications for broader

140. *See, e.g.*, BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 761 (7th Cir. 2011).

141. Kusay v. United States, 62 F.3d 192, 196 (7th Cir. 1995).

142. *See, e.g.*, Senese v. Chi. Area I.B. of T. Pension Fund, 237 F.3d 819, 827 (7th Cir. 2001).

143. *See, e.g.*, West v. West, 694 F.3d 904, 907 (7th Cir. 2012) (citing "the judge's evident exasperation with the parties").

144. Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 595 (7th Cir. 1977), *vacated*, 435 U.S. 992 (1978).

145. *Id.*

146. Lavin v. Ill. High Sch. Ass'n, 527 F.2d 58, 61 (7th Cir. 1975) (per curiam). What is now Seventh Circuit Rule 36 was first promulgated in 1972 as Circuit Rule 23, which is the version cited in *Lavin*. *See supra* note 50. The rule later was renumbered Circuit Rule 18, *see Kurek*, 557 F.2d at 595 (citing Circuit Rule 18), before arriving at its current designation as Circuit Rule 36 by the mid-1980s, *see* Shidaker v. Tisch, 833 F.2d 627, 633 (7th Cir. 1986) (stating that "Circuit Rule 36 will not apply").

conversations about rules versus standards and the desirability of having judges give reasons for their decisions.

A. *Reassignment as a Means of Appellate Control*

Appellate courts face formidable barriers when attempting to control trial court decisionmaking.[147] Most obviously, there has to be an appeal. That sounds simple enough. But, in fact, there are a number of review-limiting doctrines—most notably the final judgment rule and the adversity requirement—that conspire to create a world in which "some demonstrably incorrect lower court rulings are not reviewable even in theory."[148] Even if an issue reaches a reviewing court, moreover, trial court judges retain "one inestimable advantage in any struggle with their judicial superiors: the ability to find (and thus characterize) the underlying facts—findings that for reasons of both necessity and sound practice will almost always be accorded great deference on appeal."[149]

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147. For discussions of the relationship between trial and intermediate appellate courts in particular, see, for example, Lawrence Baum, *Responses of Federal District Judges to Court of Appeals Policies: An Exploration*, 33 W. POL. Q. 217, 223-24 (1980) (concluding "that the courts of appeals fall far short of determining the policies of subordinate courts in any absolute sense"); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 685 (2008) (arguing that "[d]istrict court judges are significantly constrained by anticipated responses from courts of appeals, generally speaking"); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 225-26 (2008) (finding no "evidence that district court judges learn from appellate review of their rulings [in patent cases]" and suggesting "either that district court judges are incapable of or not interested in learning, or that Federal Circuit decisions do a poor job of teaching"); and Smith, *supra* note 18, at 29 (finding that "the district judges in this study respond to reversals by changing their decision patterns").

148. Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2068 (2008).

149. *Id.* at 2072; *see also* FED. R. CIV. P. 52(a)(6); Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985) (discussing the application and rationale of the "clearly erroneous" standard). This assumes, of course, that deferential standards of review actually constrain appellate judges. *Cf.* John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 362 n.130 (1986) (describing standards of review as "notorious for being open to judicial manipulation"). A number of scholars have discussed this issue. *See* Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 5 (describing a study showing that "deferential standards of review appear to considerably decrease the probability of outright [appellate] reversal" and concluding "that standards of review matter, but not in the way that either the conventional legal model of deference or the positive political theory would predict"); Timothy J. Storm, *The Standard of Review* Does *Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 103 (2009) (reporting results of a study finding "that application of standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates").

In a previous article, I discussed two types of techniques that reviewing courts can use to control lower court behavior.[150] Strategies in the first group seek to influence lower court decisions at the front end, thus "reduc[ing] the initial number of trial court errors and . . . eas[ing] their detection by appellate courts."[151] Strategies in the second group, by contrast, seek to reduce the barriers to effective appellate monitoring after the fact, such as by making exceptions to the final judgment rule or lowering the applicable standard of review.[152]

Reassignment represents a third category for appellate control—one that is invariably more targeted than the others and one that may under the right circumstances be more effective as well. Imagine an appellate court panel that has reversed a trial court decision and concluded that further trial-level proceedings will be necessary, but nevertheless has concerns about whether the current trial court judge will reach the correct result on remand.[153] One option would be to seek to influence the underlying merits determination directly, such as by expressing the relevant legal test as a rule rather than as a standard, requiring the trial court to explain its decision, or adjusting the baseline presumption or burden of proof.[154] Another option would be to increase the availability of after-the-fact appellate monitoring, such as by creating an exception to the final judgment rule or announcing that a less deferential standard of review will govern any future appeal.[155]

But what if neither of those approaches seems particularly promising? What if a higher court (say, the Supreme Court) has specifically forbidden the reviewing court from altering the legal standard or adopting a more searching form of appellate review?[156] What if the reviewing court is worried that changing the underlying legal test for this case risks creating "new bad outcomes" for other cases by pushing trial court judges who would get things right under the current test too far in the other direction?[157] What if the reviewing court suspects that the real problem isn't the underlying legal test;

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150. Heytens, *supra* note 148, at 2056.

151. *Id.* at 2066. The classic example here involves formulating the underlying legal test as a rule (for example, "Speed Limit 55") rather than as a standard (for example, "no one shall drive faster than is safe under the circumstances"). *See id.* at 2057; *see also id.* at 2061-66 (identifying four other techniques).

152. *Id.* at 2067-72.

153. By "correct," I mean only the decision that would be preferred by a majority of judges on the initial appellate panel.

154. Heytens, *supra* note 148, at 2056-67.

155. *Id.* at 2067-73. Several circuits follow the same-panel rule under which a subsequent appeal goes back to the panel that decided the original appeal. *See, e.g.*, 6TH CIR. I.O.P. 34(b)(2); 7TH CIR. O.P. 6(b).

156. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 275 (2002) (rejecting the Ninth Circuit's attempts "to 'clearly delimit' an officer's consideration of certain factors" for purposes of conducting reasonable suspicion analysis under the Fourth Amendment).

157. Heytens, *supra* note 148, at 2059-60.

rather, the problem is that, for whatever reason, the appellate court cannot trust this particular trial court judge's ability to find the facts fairly or otherwise appropriately exercise her discretion with respect to this particular case.[158]

Enter reassignment. An appellate judge who does not have the option—or does not like the idea—of changing the governing legal test or altering the standards governing a future appeal can direct that the case be reassigned to a different trial court judge in the hope that the new judge is less likely to make a decision with which the appellate judge would disagree in the first place. As a strategy for exercising appellate control, reassignment's chief virtue is that it is targeted, both in the sense that it creates fewer spillover effects for other cases and in the sense that it gives appellate courts a more direct way to address concerns they have with a particular trial court judge in a particular case.

At the same time, some of the same features that make reassignment a more targeted strategy for increasing appellate control over trial court outcomes also make it a more limited strategy. Most obviously, reassignment is not even potentially in play until after there has been a successful appeal under the then-existing substantive legal standards and generally applicable standard of review. Nor does reassignment change anything for future cases beyond whatever intangible signaling effect it may have on the affected trial court judge and other trial court judges going forward. For those reasons, we might expect to see reassignment used most regularly in contexts where, for one reason or another, more broad-based methods of increased appellate control have been ruled out.

Take, for example, the single biggest category of cases in my dataset: criminal sentencing appeals.[159] Perhaps as much as any other area of law, sentencing is a realm where we simultaneously resist drawing bright-line rules to govern the conduct of trial courts, while nonetheless worrying deeply about trial court judges exercising their discretion in inappropriate ways that sometimes can be very difficult to detect.[160] What is more, criminal sentencing is also an area in which we have seen a three-way power struggle between district courts, courts of appeals, and the Supreme Court, with courts of appeals repeatedly attempting to adopt less deferential standards of appellate review

158. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 424-25 (2007) (noting that both the process of factfinding and the need to make various "managerial decisions" can "afford[] the trial judge significant discretionary power over the outcome of the case before it"); *see also* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1270 (2005).

159. *See supra* Part II.B.3.a.

160. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (quoting testimony suggesting that female bank robbers had been sentenced less harshly than male bank robbers and that African American bank robbers in the South had been sentenced more harshly than similarly situated bank robbers convicted elsewhere).

and the Supreme Court repeatedly mandating more deferential ones.[161] In other words, at least part of the reason why courts of appeals seem particularly likely to use reassignment in the sentencing context may be because they have been prevented from using other techniques of controlling district court decisions in that area.[162]

At the same time, there is a bit of a mystery here. Why don't appellate courts use reassignment more often? Why is reassignment still very much the exception rather than the rule?[163]

Political scientists who study judicial behavior often posit that intermediate appellate judges are rational actors who seek to maximize their policy preferences within the constraints imposed by existing doctrine and the risk of getting reversed by the Supreme Court.[164] Return to the situation of an appellate judge in the position to order reassignment. The appellate judge knows that she has already disagreed with the trial court judge on at least one issue in the case, that the disagreement is not harmless, and that further proceedings in the trial court will be necessary. In addition, the appellate judge may have other reasons to believe that this particular trial court judge is less likely than the average one to resolve the matters on remand in a way with which the appellate judge would agree.[165] The appellate judge also knows there are a variety of review-limiting doctrines—including, most notably, the final

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161. *See, e.g.*, Gall v. United States, 552 U.S. 38, 49, 51 (2007) (holding that courts of appeals may not apply "a heightened standard of review to sentences outside the [by-then advisory] Guidelines range"); Koon v. United States, 518 U.S. 81, 91 (1996) (holding that a district court judge's decision to depart from the sentencing ranges under the then-mandatory Federal Sentencing Guidelines should be reviewed for abuse of discretion rather than de novo, as the Ninth Circuit had held).

162. *See infra* note 232 (explaining that the percentage of non-Seventh Circuit reassignment cases involving sentencing-related errors has remained above 40% before, during, and since the death of mandatory Federal Sentencing Guidelines).

163. *See supra* notes 74-78 and accompanying text.

164. *See, e.g.*, McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 (1995) ("The core assumption of the argument in this Article is that all of the relevant actors—elected politicians and judges—act rationally to bring policy as close as possible to their own preferred outcome."); *see also* LAURENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 115 (1997) (describing previous studies "posit[ing] that lower court judges want judicial doctrine to match their policy preferences as closely as possible"); Benesh & Reddick, *supra* note 113, at 538-39 ("[W]e expect that the ideological views of appeals court judges affect their behavior."); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation for Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 601 (2003) (taking as "an incontrovertible finding of the empirical literature . . . that policy preferences exert a powerful influence on circuit judges' decisions").

165. *See, e.g.*, Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 76, 78 (David M. O'Brien ed., 2d ed. 2004) ("There are, from time to time, district judges whose decisions come to the court of appeals with a presumption of reversibility.").

judgment rule and deferential standards of review—that may make it difficult for her to review those future decisions.[166] Finally, the appellate judge is aware that the chance of a reassignment decision getting overturned by the Supreme Court is vanishingly small: in fact, the Court did not overturn a single one of the decisions included in my dataset.[167] If appellate judges really had a single-minded focus on ensuring that what they view as the "correct" outcome of each individual case comes to fruition, it seems strange that we do not see them ordering reassignment far more often than they actually do so.

The answer I would posit is straightforward: in the real world, appellate judges care about more than simply maximizing the chances that their policy preferences will be followed in particular cases, and reassignment can be costly in terms of other goals that appellate judges are likely to care about.[168] For one thing, reassignment is costly from an administrative standpoint. It takes time and effort for a new trial court judge to get up to speed on a case, and the time spent doing so has to come from somewhere—most likely at the expense of the new judge's existing caseload.[169] Just these sorts of considerations are reflected in the most common formulation of the test for ordering reassignment on remand, which directs the reviewing court to consider "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."[170]

But appellate-court-ordered reassignment is costly in other ways too: it threatens to strain relationships between appellate and trial court judges. Most of us find it unpleasant to be told that we messed up, and there is no reason to believe that judges are any different when it comes to having their decisions reversed.[171] But reassignment is even worse. At least some reversals can be

166. *See supra* text accompanying notes 147-49.

167. The only reference to reassignment of federal trial court judges by the courts of appeals that I have found in a Supreme Court opinion was in a 1994 case about recusal. *See* Liteky v. United States, 510 U.S. 540, 554 (1994). In that brief discussion, the Court noted only that "[f]ederal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances,'" and acknowledged that this power "may permit a different standard" for reassignment than for recusal. *Id.* (quoting 28 U.S.C. § 2106).

168. Klein & Hume, *supra* note 164, at 602 ("[S]omething other than ideology is at play in [circuit] judges' decisions.").

169. *Cf.* F. Andrew Hessick, *The Cost of Remands*, 44 ARIZ. ST. L.J. 1025, 1025-26 (2012) (observing that "[r]emands impose costs" and that "the brunt of the responsibility falls on the court to which the case is remanded since it must newly decide the case").

170. United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam), *superseded by* 28 U.S.C. § 2255 Rule 4(a).

171. *See, e.g.*, Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 7 (1958) ("I don't enjoy getting reversed any more than any other judge . . . ."); Smith, *supra* note 18, at 30 (noting that "[s]tudents of judicial

chalked up to a good faith disagreement about the law or the facts, and an appellate court's decision to send the case back to the original trial court judge can reasonably be seen as an expression of its faith that the trial court judge will handle the matter appropriately going forward.[172] By contrast, it is difficult to ask trial court judges not to take it personally when they are told that one of their cases must be reassigned because the appellate court is skeptical of their ability to reconsider their "previously-expressed views or findings" or to "preserve the appearance of justice."[173] Reassignment's public nature only exacerbates the problem. It is bad enough to be called out on the carpet by one's judicial superiors; it is even worse to have it happen on Westlaw and Lexis and in the pages of the *Federal Reporter*.

Now, one obvious response is to ask why appellate judges should care that trial court judges might take offense at being removed from a pending case. For one thing, whether or not they should care, we have evidence that appellate judges do in fact care, as shown both by their public statements and the frequency with which even decisions ordering reassignment go out of their way to avoid casting aspersions on the trial court judge.[174]

More broadly, an intermediate appellate judge who cares about maximizing her ability to impact legal policy should care about her need to rely on trial court judges to implement those policies on a day-to-day basis.[175] As noted earlier, trial court judges make all sorts of decisions that have tremendous potential to affect the ultimate outcome of discrete cases but that either are not subject to appellate review at all (because the underlying case settles before reaching a final judgment) or are difficult to review effectively because of deferential standards of review.[176] Appellate judges know they need the cooperation of trial court judges. As a result, there may be circumstances where an appellate judge who does not particularly trust a trial court judge to reach the "correct" result in one case might nonetheless decide against removing the trial court judge for fear of generating additional "wrong" results in future cases.

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behavior commonly argue that judges do not like to have their decisions reversed" and citing sources).

172. Pauline Kim, for example, notes that, at least in areas involving "novel issue[s] of law," appellate reversals "do not necessarily entail criticism of the lower court judge" and contrasts such reversals with "[a]n explicit rebuke for failure to conform to legal norms." Kim, *supra* note 158, at 432-33.

173. *Robin*, 553 F.2d at 10.

174. *See* Magruder, *supra* note 171, at 3 ("[T]he maintenance of this institutional prestige of the courts imposes upon us a certain judicial etiquette in our dealing with judges lower in the federal system, whose acts we are called upon to review on appeal."); *see also supra* text accompanying note 128.

175. *See* BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 1 (2d ed. 1999) ("[J]udicial policies do not implement themselves.").

176. *See supra* notes 147-49 and accompanying text; *see also* Kim, *supra* note 158, at 424-25.

For example, the appellate judge might fear that removal will antagonize either the removed trial court judge or other trial court judges and make them feel less obligated to do as the appellate judge would prefer in future cases. Alternatively, she might fear that a widespread practice of reassignment in certain categories of proceedings could lead some trial court judges to take even less care in those cases on the theory that the costs of any remand will be borne by someone else.[177]

The fact that reassignment is just one mechanism for appellate control and that it has real costs may also help explain another apparent mystery: why we do not see the Supreme Court using it. In fact, although the Justices have (very) occasionally asserted a general supervisory power to order that further proceedings be conducted before a different federal district court judge, I am not aware of a single case in which they have ordered that proceedings be conducted by a different panel of the court of appeals.[178] The explanation cannot be a perceived lack of authority: the very statute that the Supreme Court has identified as the source of the courts of appeals' power to order that a case be reassigned to a different trial court judge on remand is, by its terms, equally applicable to remands from the Supreme Court to the courts of appeals.[179] And lack of interest in case-specific outcomes, though undoubtedly a large part of the explanation, seems unlikely to be a complete one. Although the Court's own rules and statements by Justices indicate that the Court is generally unconcerned with case-specific outcomes,[180] there have been instances—most notably in the death penalty and habeas contexts—where the Court has expended enormous effort to ensure the "correct" outcome in a single case.[181]

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177. I thank Aaron Bruhl for this suggestion.

178. *See infra* notes 195-203 and accompanying text (describing a 1955 decision in which the Supreme Court ordered that a case be reassigned to a different district court judge and a 2008 decision in which two Justices unsuccessfully urged the Court to do so).

179. *See* Liteky v. United States, 510 U.S. 540, 554 (1994) (citing 28 U.S.C. § 2106); *see also* 28 U.S.C. § 2106 (2012) ("*The Supreme Court or any other court of appellate jurisdiction* may . . . require such further proceedings to be had as may be just under the circumstances." (emphasis added)).

180. *See, e.g.*, SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) ("The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest . . . .").

181. *See, e.g.*, Wilson v. Corcoran, 131 S. Ct. 13, 16-17 (2010) (per curiam) (reversing the Seventh Circuit for the second time in the same death penalty case); Miller-El v. Dretke, 545 U.S. 231, 237 (2005) (reversing the Fifth Circuit for the second time in the same death penalty case); Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (vacating, for the third time, a stay of execution entered by the Ninth Circuit in a single death penalty case and directing that "[n]o further stays of Robert Alton Harris's execution shall be entered by the federal courts except upon order of this Court"); Gomez v. U.S. Dist. Court, 503 U.S. 653 (1992)

So why don't we see the Supreme Court debating reassignment even in those cases? One possible explanation involves the standard of review. Courts of appeals frequently review trial court decisions under a deferential standard of review—either because they are reviewing findings of fact that are reviewable only for clear error or a trial court judge's resolution of a mixed question of fact and law that is reviewable only for an abuse of discretion[182]—and a great many of the cases in which courts of appeals have ordered reassignment seem to be those in which future appeals would be governed by such a standard. By contrast, courts of appeals don't make factual findings and the Supreme Court rarely defers to them about anything,[183] which means that the Justices have less cause than appellate judges to worry about an inability to correct a future mistaken decision. In addition, the Justices have other means of disciplining appellate judges—including high-profile tongue-lashings via summary reversal[184]—that may in some circumstances perform a function similar to reassignment by the courts of appeals.[185]

(per curiam) (first decision in the trilogy that culminated in *Vasquez*). For a recent example, see *Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013) (per curiam), which concluded that the Ninth Circuit had abused its discretion in failing to issue a mandate following the Supreme Court's denial of certiorari and remanding the case "with instructions to issue the mandate immediately and without any further proceedings."

182. *See, e.g.*, FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous . . . ."); Gall v. United States, 552 U.S. 38, 51 (2007) (noting that a trial court's criminal sentence is reviewed "under an abuse-of-discretion standard" on appeal).

183. The only real exceptions of which I am aware are the Court's (general) practice of deferring to federal courts of appeals about the meaning of state statutes, *see* Frisby v. Schultz, 487 U.S. 474, 482 (1988), its (occasional) reluctance to overturn factual findings agreed to by two lower courts, *see* Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949), and its (possible) deference to courts of appeals about the application of certain Federal Rules of Appellate Procedure, *see Ryan*, 133 S. Ct. at 2550-51 (assuming without deciding that Federal Rule of Appellate Procedure 41(d)(2)(D) permits a court of appeals to stay the issuance of its mandate following the Supreme Court's denial of a petition for a writ of certiorari, but concluding that the Ninth Circuit abused its discretion by doing so in this particular case).

184. *See* Spears v. United States, 555 U.S. 261, 268 (2009) (per curiam) (Roberts, C.J., dissenting) (referring to "the bitter medicine of summary reversal"); *see also*, Parker v. Matthews, 132 S. Ct. 2148, 2149 (2012) (per curiam) (introductory sentence describing the Sixth Circuit as having "set aside two 29-year-old murder convictions based on the flimsiest of rationales").

185. What this does not explain, of course, is why we do not see the modern Supreme Court directing reassignment of trial court judges—something that has not happened since 1955. *See infra* notes 195-203 and accompanying text. The main reason, undoubtedly, is the Court's general lack of concern with case-specific outcomes. *See supra* note 180. But, as with the courts of appeals, that does not explain why the Court almost never discusses reassignment of the trial court judge, even in cases where the evidence suggests that it does care about getting the case-specific outcome right. *See supra* note 181. *But see infra* note 203 (discussing the urgings of both Justices Stevens and Souter that Judge Real be reassigned in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008)). It is plausible that

B. *Reassignment, Recusal, and Judicial Impartiality*

Reassignment is not the same thing as recusal. Yet many (perhaps most) of the decisions where courts of appeals order reassignment suggest that they are rooted in the same considerations underlying recusal doctrine: ensuring that trial court judges are and appear to be impartial and open minded. Reassignment has implications, thus, both for recusal doctrine and for discussions of judging more generally.

1. *Reassignment as a substitute for recusal*

Most obviously, reassignment can function as a limited substitute for recusal. Scholars who study recusal have identified a host of reasons why even modern recusal statutes will be ineffective at reaching many types of troubling judicial behavior.[186] A standard that asks whether a judge's "impartiality might reasonably be questioned"[187] is hardly self-applying, and judges have tended to give the recusal statutes narrow constructions.[188] For example, the Supreme Court has endorsed the "extrajudicial source" doctrine, under which a judge's rulings, in-court conduct, or opinions formed based on materials received during judicial proceedings will almost never form a proper basis for recusal.[189] The procedural rules governing recusal motions also conspire to prevent their frequent use. It is black-letter law in federal court that a request for recusal must first be made to the very judge whose impartiality is being questioned and that a trial court judge's denial of a recusal motion is reviewable on appeal only for an abuse of discretion.[190] Under those circumstances, a sensible litigant may well refrain from filing a plausible recusal motion for fear of antagonizing her trial court judge.[191]

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the extra layer of appellate review and the Justices' general lack of familiarity with particular district court judges could make them more reluctant to intervene in such a manner. The Justices also are aware, of course, that the courts of appeals have the power to order reassignment of district court judges. *See* Liteky v. United States, 510 U.S. 540, 554 (1994) (referencing the practice).

186. *See, e.g.*, Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 461-62 (2004) (explaining that "recusal and disqualification do not exclude judges in many situations in which a party might legitimately want a case tried before a different judge" and noting various procedural obstacles to obtaining recusal).

187. 28 U.S.C. § 455(a) (2012).

188. *See* FLAMM, *supra* note 19, § 23.7, at 695 (noting that federal "courts have generally construed [28 U.S.C.] § 144's procedural requirements quite strictly").

189. *See Liteky*, 510 U.S. at 554-56.

190. *See* FLAMM, *supra* note 19, § 33.1, at 986; *id.* § 33.5, at 998-99.

191. *See, e.g.*, Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 795 (2011) ("Lawyers think long and hard before bringing disqualification

The same limitations do not apply to reassignment. As explained earlier, courts of appeals frequently cite a judge's prior rulings, opinions, and in-court comments as justifications for ordering reassignment.[192] In addition, there is no need to ask the trial court judge first; rather, a request for reassignment may be made for the first time on appeal or ordered by the court of appeals on its own motion.[193] Finally, there may be situations where reassignment would be seen as comparatively less stigmatizing for the trial court judge, such as those where the only plausible basis for recusal would be that the trial court judge's "impartiality might reasonably be questioned."[194] In other words, a reviewing court that is troubled by a trial court judge's conduct but unable or unwilling to order recusal will sometimes be able to reach the same result via reassignment.

The earliest reassignment decisions I have been able to locate seem to stem from just that sort of calculation. In early 1955, the Supreme Court was faced with a troubling case from the District of Colorado. Four defendants had been convicted of jury tampering, their convictions had been upheld on appeal, and they sought a writ of certiorari. The defendants' guilt does not appear to have been in question.[195] But surviving memos drafted by three different law clerks all identify several troubling features about the district court judge's handling of the case: setting extremely high bail, ordering one defendant's bond forfeited when he was taken from the courtroom to a hospital for surgery, refusing to permit the defendants to speak on their own behalf at sentencing, and imposing extremely severe sentences on each of the defendants.[196] At the same time, however, the memos expressed doubts about whether the district court had committed any errors that warranted Supreme Court review,[197] and they all

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motions and may well be too reluctant to make meritorious (or at least colorable) motions out of fear of alienating a judge who will preside over the matter if the motion is denied.").

192. *See supra* text accompanying notes 129-35.

193. *See* FLAMM, *supra* note 19, § 33.5, at 999-1000. It is not possible to know exactly how often reassignment orders are requested by a party versus initiated by a court, because the vast majority of the decisions in my dataset do not indicate whether one of the parties requested reassignment.

194. 28 U.S.C. § 455(a) (2012).

195. *See* Memorandum from Earl E. Pollock, Law Clerk, to Chief Justice Earl Warren 1-2 (1955) (on file with author) [hereinafter Warren memo] (recounting the procedural history and stating that "[t]here is extensive evidence to the effect that all four petitioners tried to 'fix' the jury which was to hear the case, either by offering bribes or otherwise attempting to influence the jurors' decision").

196. Memorandum from Harvey M. Grossman, Law Clerk, to Justice William O. Douglas 1 (1955) (on file with author) [hereinafter Douglas memo]; Memorandum from Thomas N. O'Neill, Jr., Law Clerk, to Justice Harold H. Burton 9 (1955) (on file with author) [hereinafter Burton memo]; Warren memo, *supra* note 195, at 7.

197. Then, as now, the Federal Rules of Criminal Procedure required trial court judges to give the defendant an opportunity to speak before pronouncing a sentence. *See* FED. R. CRIM. P. 32(i)(4)(A)(ii). Yet two of the memos noted that the defendants had not asked to make a statement, and one of those two further suggested that any error might have been harmless and would have warranted at most resentencing in any event. *See* Burton memo,

concluded that the then-existing standards for recusal were not satisfied.[198] Accordingly, two of the three memos reluctantly recommended that the Court deny certiorari and permit the trial court's judgment to stand.[199]

The memo by Justice Burton's law clerk—and future federal district court judge[200]—Thomas N. O'Neill, Jr. recommended a different course. Although O'Neill's memo acknowledged that "most . . . matters of fairness and impartiality should be left to" the courts of appeals, he recommended that the Justices grant certiorari, summarily reverse the lower court's judgment in a per curiam opinion, and remand for a new trial before a different trial court judge.[201] And, on March 14, 1955, that is exactly what the Supreme Court did. The Court's per curiam opinion in *Calvaresi v. United States* reads, in its entirety: "In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge."[202]

The Supreme Court has never cited its decision in *Calvaresi*, and I am not aware of any subsequent case in which it has exercised the power to reassign a trial court judge.[203] At the same time, however, the earliest decision that I have been able to locate in which a court of appeals asserted the power to order reassignment has a similar reassignment-being-used-as-a-substitute-for-recusal feel. In 1958, the Tenth Circuit sitting en banc—the same circuit from which *Calvaresi* had arisen—issued its second decision in *United States v.*

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supra note 196, at 8 ("If [petitioners] had any mitigating evidence, it is reasonable to assume that they would seek to present it."); Warren memo, *supra* note 195, at 9-10 (noting that "petitioners did not ask for an opportunity to make a statement," and that if the district court erred, it "would not appear to have been prejudicial," so, if the district court erred, it "would merely entitle petitioners to resentencing, not to a new trial"). In addition, the memos all acknowledged that the defendants' sentences were within the statutory maximum and that the Supreme Court had never at that point authorized appellate review of sentences for reasonableness. *See* Douglas memo, *supra* note 196, at 1; Burton memo, *supra* note 196, at 2, 8; Warren memo, *supra* note 195, at 12.

198. Douglas memo, *supra* note 196, at 1 ("[I]t does not seem that any clear showing has been made of actual bias . . . ."); Burton memo, *supra* note 196, at 5-6 (describing the recusal question as "a messy type of question, one that ordinarily should be left to the lower c[our]ts"); Warren memo, *supra* note 195, at 7 ("While these actions may be indicative of some bias, I doubt that they would be sufficient to justify a reversal on this ground alone.").

199. Douglas memo, *supra* note 196, at 1 (concluding with a recommendation of "Deny?"); Warren memo, *supra* note 195, at 12 (concluding with a recommendation of "DENY (?)").

200. *See* 1 ALMANAC OF THE FEDERAL JUDICIARY, at 3d Cir. 70 (2013).

201. Burton memo, *supra* note 196, at 9.

202. 348 U.S. 961 (1955) (per curiam).

203. In 2008, two Justices urged that the Court order that Judge Manuel Real be removed from a long-running human rights case involving Ferdinand Marcos, the former President of the Philippines. *See* Republic of Phil. v. Pimentel, 553 U.S. 851, 875-77 (2008) (Stevens, J., concurring in part and dissenting in part) (urging that case be reassigned from Judge Real); *id.* at 879 (Souter, J., concurring in part and dissenting in part) (same).

Hatahley,[204] a contentious case between Native Americans and the federal government over the seizure of horses and burros.[205] The court of appeals concluded that the district court judge had made several serious errors in calculating the amount of the plaintiffs' damages and remanded for a new trial as to damages.[206] But the court of appeals went further. Although it acknowledged that the Supreme Court previously had concluded that the initial trial was "not so improperly conducted as to vitiate [all of] the [district court's] findings,"[207] the Tenth Circuit nonetheless "suggest[ed] that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge."[208] The court of appeals explained that, based on the trial court judge's "obvious interest in the case, illustrated by conduct and statements throughout the trial," it was "certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside."[209]

The district court judge, however, did not take the hint. Instead, Judge Ritter informed the parties that he "did not intend to follow [the court of appeals'] suggestion."[210] At that point, the government filed an application with the court of appeals under the All Writs Act,[211] asking it to order Judge Ritter off the case.[212] The court of appeals granted the government's application and "ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit" and that Judge Ritter "take no further action herein."[213]

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204. 257 F.2d 920 (10th Cir. 1958) (en banc).

205. *Id.* at 921. *Hatahley* is also an important case for the law of remedies and the relationship between the federal government and Native Americans. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 11-18 (4th ed. 2010); Debora L. Threedy, United States v. Hatahley*: A Legal Archaeology Case Study in Law and Racial Conflict*, 34 AM. INDIAN L. REV. 1 (2010).

206. *Hatahley*, 257 F.2d at 923-25.

207. *Id.* at 925.

208. *Id.* at 926. The Tenth Circuit did not cite the Supreme Court's then-recent decision in *Calvaresi*, although it cited earlier decisions that it found "somewhat in analogy" to reassignment, in which a district court judge was barred from presiding over contempt proceedings "where the contempt charged has in it the element of personal criticism or attack upon the judge," *id.* (citing Cooke v. United States, 267 U.S. 517, 539 (1925)), or where "the trial judge [has] permitted himself to become personally embroiled with the [party charged with contempt]," *id.* (citing Offutt v. United States, 348 U.S. 11, 17 (1954)).

209. *Id.*

210. United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959) (en banc) (per curiam) (quoting oral statement by Judge Ritter) (internal quotation mark omitted).

211. All Writs Act, 28 U.S.C. § 1651 (2012).

212. *See Ritter*, 273 F.2d at 31-32.

213. *Id.* at 32.

Although *Hatahley* may at first glance look like a straightforward case of appellate-court-ordered recusal rather than reassignment, a closer inspection refutes such an interpretation. First, the Tenth Circuit did not cite the then-existing recusal statutes in any of its decisions, including after Judge Ritter directly challenged its authority to remove him from the case.[214] Second, it is doubtful that the Tenth Circuit would have had the authority to direct recusal because there is no indication that the government ever sought recusal in the district court.[215] Third, and perhaps most tellingly, the only authority that the Tenth Circuit did cite in support of its authority to order Judge Ritter off the case—the Supreme Court's 1957 decision in *La Buy v. Howes Leather Co.*[216]—appears to have been referenced for its statement that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."[217] In short, *Hatahley* seems like *Calvaresi*: a case in which reassignment is used to remove a troublesome trial court judge without resorting to appellate-court-ordered recusal.[218]

This pattern has continued to the present day. In fact, my dataset includes fifteen decisions in which courts of appeals expressly state that the standard for recusal has not been satisfied but nonetheless order reassignment.[219] There are even more decisions in which courts of appeals order reassignment without citing the recusal statutes and offer reasons that seem to reflect case-specific concerns about the appearance of justice or the trial court judge's impartiality or neutrality.[220] Finally, although the Supreme Court has stated that "[i]t has long been regarded as normal and proper for a judge . . . to sit in successive trials involving the same defendant,"[221] a number of federal courts have

214. *See Hatahley*, 257 F.2d at 921-26; *see also Ritter*, 273 F.2d at 31-32.

215. *See* FLAMM, *supra* note 19, § 32.9, at 978 ("[A]n appellate court will generally not undertake to review a judicial bias claim unless it has been properly presented to the trial court by means of a motion for disqualification[] or a motion for mistrial." (footnote omitted)).

216. 352 U.S. 249 (1957).

217. *Id.* at 259-60; *see Ritter*, 273 F.2d at 32 (explaining that *Hatahley*'s citation to *La Buy* was used to support the *Hatahley* court's suggestion that, on remand, the case be placed before another judge—a suggestion that "was made in the exercise of appellate supervisory control and in the interest of proper judicial administration"); *Hatahley*, 257 F.2d at 926 (citing *La Buy*, 352 U.S. at 259).

218. *See* O'Rourke v. City of Norman, 875 F.2d 1465, 1475 (10th Cir. 1989) ("The appellate court's authority to reassign exists apart from the judicial disqualification statutes." (citing *Hatahley*, 257 F.2d at 926)).

219. *See, e.g.*, United States v. Jacobs, 855 F.2d 652, 656 & n.2, 657 (9th Cir. 1988) (per curiam).

220. *See, e.g.*, *In re* Ellis, 356 F.3d 1198, 1211 (9th Cir. 2004) (en banc) ("The district judge has read the presentence report and has expressed strong views on its contents.").

221. Liteky v. United States, 510 U.S. 540, 551 (1994).

enacted local rules that make reassignment at least presumptive following some or all decisions by appellate courts that reverse and remand for a new trial.[222]

To the extent one believes there is a serious problem with recusal doctrine, however, reassignment is no panacea. The reason is because reassignment shares some of the limitations of recusal while adding a few more of its own. Like recusal, reassignment still requires a party who is before a problematic trial court judge to figure out some way to get her case in front of a reviewing court before the economics of the situation require her to settle and eliminate her ability to seek further review from any court. And, unlike recusal, reassignment—at least as typically practiced—requires that a party seeking a different judge identify some other error warranting appellate reversal as a predicate to obtaining it.[223] Finally, at least outside the Seventh Circuit, a litigant seeking reassignment will most often need to satisfy another demanding standard: the one governing whether reassignment is warranted in a particular case.[224]

In short, reassignment will permit courts of appeals to get around the limits in recusal doctrine in certain cases. But there will be many cases in which reassignment also will be unavailable. Thus, to the extent that there is a more general problem with the scope or operation of recusal doctrine, reassignment is not a complete solution.

2. *Reassignment and judicial impartiality*

Reassignment also has implications for broader discussions of judicial impartiality and what can and cannot reasonably be expected of people who wear judicial robes. A significant number of decisions ordering reassignment explain the decision to do so on the grounds that it would be unreasonable or unrealistic to expect a trial court judge to disregard certain evidence or arguments that she already heard or to reconsider views that she has already expressed.[225] The three-factor test most frequently used by federal courts of appeals for determining whether to order reassignment expressly directs the reviewing court to make such judgments, asking "whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected."[226]

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222. *See supra* text accompanying notes 48-57.

223. *See supra* text accompanying notes 43-45.

224. *See In re* DaimlerChrysler Corp., 294 F.3d 697, 700-01 (5th Cir. 2002) (en banc) (per curiam) (describing tests adopted by various circuits).

225. *See, e.g.*, *In re* Vasquez-Ramirez, 443 F.3d 692, 701 (9th Cir. 2006) ("The district judge who denied Vasquez's guilty plea has already viewed Vasquez's criminal history report and has expressed strong views about its contents.").

226. United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam).

Something strange is going on here. The degree to which people are actually capable of disregarding information or reconsidering an opinion is ultimately a psychological and empirical question that lies well beyond the scope of this Article.[227] But what is clear is that all sorts of features of our legal system are premised on the assumption that judges are capable of doing these things. Most dramatically, we let the trial court judge who rules on a motion to suppress incriminating evidence or a damning confession preside at the subsequent trial.[228] But that is just a specific example of a more general phenomenon. We let the judge who is conducting a bench trial rule on the admissibility of evidence at that trial[229] and permit the judge who is charged with sentencing a defendant to rule on objections to the material in the presentence report.[230] And although we sometimes order reassignment following an appellate reversal, the much more common course is to return the case to the very judge whose decisions were just found to be erroneous in at least some respect.[231] None of this makes sense unless we act on a presumption that, in all but the unusual case, judges can ignore impermissible information and force themselves to reconsider their own previously expressed views.

So how do we explain the limited but still significant number of cases in which reviewing courts cite skepticism of a trial court judge's ability to do just that as a basis for ordering reassignment? One possibility, of course, is that these decisions are simply mistaken and that reassignments of this sort should be abandoned. Another possibility is that we should abandon the general presumption that judges can disregard impermissible information or freshly reconsider their own previously expressed view—a step that would require fairly dramatic changes to the ways in which our courts currently operate.

But there is another possibility, too. Maybe the various local rules governing reassignment and the courts of appeals decisions ordering it suggest

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227. On people's ability to prevent impermissible information from tainting their decisionmaking, see Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 110 (2008); and Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258-59 (2005). On the effects of already formed beliefs on subsequent decisionmaking, see Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1037 (1980); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1996); and Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

228. *See* FED. R. EVID. 104(a), (c).

229. *See id.* 104(a).

230. *See* FED. R. CRIM. P. 32(i)(3)(B).

231. *See supra* notes 74-78 and accompanying text (explaining that I have located only 668 decisions over fifty-five years in which federal courts of appeals have ordered reassignment, a number that represents only a tiny fraction of cases returned to a lower court for further proceedings during that same period).

that our traditional notions of what judges are and are not capable of doing—or what we should or should not ask of them—are too coarse. It is possible that these rules and decisions suggest that the better question is what kinds of materials should we expect judges to be able to ignore and what kinds of previous conclusions or findings should we expect judges to be able to set aside.

Without attempting to perform a complete analysis here, it does seem that there are several broad patterns that can be discerned. The first is a special concern with criminal sentencing. I found that courts of appeals ordered reassignment in substantially more resentencing cases than in any other category of cases, and this pattern predated, continued during, and survived the death of the mandatory Federal Sentencing Guidelines.[232] The Eastern District of New York has a local rule that makes reassignment the norm in all cases remanded for resentencing, and there are several court of appeals decisions from the period before the Federal Sentencing Guidelines suggesting a similar approach.[233] Perhaps there is something about the act of criminal sentencing—which, after all, involves a complex interplay of factfinding, prediction, and moral judgment culminating in the awesome responsibility of deciding exactly how long another human being will be deprived of his liberty—that makes it an area where we might reasonably fear that it tends to be particularly difficult to ignore things that one knows or to reconsider one's own previous decisions.[234]

A second broad pattern involves the reassignment of cases being remanded for a new trial. The rules of the only circuit in the United States to have a local rule addressing reassignment single out those cases, as do a majority of district court rules that address reassignment.[235] Perhaps here the intuition involves the

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232. The Federal Sentencing Guidelines went into effect on November 1, 1987, and were rendered advisory on January 12, 2005. *See* United States v. Booker, 543 U.S. 220, 245 (2005); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993). The percentage of non-Seventh Circuit reassignment decisions that involve sentencing-related errors has remained remarkably consistent: 41.5% in the period through the end of 1986 (the last full year prior the Federal Sentencing Guidelines), 42.0% in the period from 1988 through 2004 (the full years in which they were mandatory), and 43.1% in the period from 2006 through 2012 (the full years covered by the dataset in which they have been advisory).

233. *See, e.g.*, Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972) (per curiam) ("It is difficult for a judge, having once made up his mind, to resentence a defendant . . . .").

234. This is not the only possible explanation for the preponderance of sentencing-related reassignments. Another would be that criminal sentencing is an area in which some appellate judges believe in bending over backwards to avoid any appearance of impropriety. *See, e.g.*, United States v. Figueroa, 622 F.3d 739, 745 (7th Cir. 2010) (Evans, J., concurring) (expressing doubt "that what the judge actually did, as opposed to what he said, demonstrated an intent to lay the wood to Figueroa or otherwise treat him unfairly" but agreeing with vacatur and reassignment because "Figueroa is entitled, procedurally, to a cleaner hearing than the one he got").

235. *See supra* notes 47-60 and accompanying text.

scope and depth of what the trial court is being asked to do on remand. It is one thing to ask a person to disregard information or her own previous views when performing a single discrete task. But trials take time and involve a litany of decisions, which one might think would tax the capacities of even the most conscientious trial court judges.[236]

Third, there are a great many cases in which courts of appeals do not order reassignment until after multiple appellate reversals. More than 19% of the decisions in my dataset involve a situation in which the appellate court's opinion discloses that it had already reversed or remanded to the same trial court judge at least once during the same case.[237] In addition, many of these decisions note that the trial court judge reached the same result following a previous appellate reversal or failed to address the reasons for the previous reversal.[238] A handful of decisions go even further, suggesting that reassignment might almost be the norm following repeated reversals, particularly in the sentencing context.[239] These decisions suggest that although it may make sense to employ a general presumption that judges can disregard impermissible information or reconsider their own previously expressed views, one need not necessarily persist in that presumption in the face of case-specific evidence suggesting the contrary. There is, in short, a difference between a presumption and an inflexible rule.

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236. This explanation, of course, does not explain why the vast majority of federal courts have not seen fit to take such an approach.

237. I am not aware of any statistics about how often there are multiple reversals in a single federal case, but it appears that it must be quite rare. Fewer than one federal district court decision in nine even generates an appeal. *Compare* OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2011, at 43 tbl.C-1 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C01Mar11.pdf [hereinafter 2011 U.S. COURT STATISTICS] (listing 324,190 district court terminations in civil cases for the twelve-month period ending on March 31, 2011), *and id.* at 62 tbl.D (listing 78,487 district court terminations in criminal cases during the same period), *with id.* at 25 tbl.B-5 (listing 44,545 court of appeals terminations, excluding "administrative appeals," "bankruptcy," and "original proceedings"). *See generally supra* note 74 (discussing the "administrative appeals," "bankruptcy," and "original proceeding" categories). Of those appeals, approximately half are not even terminated on the merits, and of those that are, only 10% result in a reversal or a remand. *See* 2011 U.S. COURT STATISTICS, *supra*, at 25 tbl.B-5. Put another way, it seems that fewer than 1% of all federal district court terminations result in even a single appellate reversal, much less multiple reversals. (It is, of course, possible that the existence of a first reversal increases the odds of a second reversal because it suggests that the stakes are high enough to make resort to the appellate processes warranted, the issues are complicated, or both. I thank Rich Hynes for suggesting this point.)

238. *See supra* text accompanying note 133.

239. *See, e.g.*, United States v. DeMott, 513 F.3d 55, 59 (2d Cir. 2008) (per curiam) ("[I]t is not unprecedented for a case to be remanded to a different judge after a district court has twice used an improper sentencing procedure." (alteration in original) (quoting United States v. Hirliman, 503 F.3d 212, 216 (2d Cir. 2007)) (internal quotation marks omitted)).

C. *Rules, Reasons, and Reassignment*

Reassignment seems to trigger strong reactions from trial court judges. Some have ignored "suggestions" that they remove themselves from cases.[240] Others have filed (unsuccessful) petitions for a writ of mandamus with the Supreme Court seeking to overturn reassignment orders,[241] vocally dissented when sitting by designation on appellate court panels that have ordered reassignment of other judges,[242] or pointedly cited Judge Weinstein's article decrying the practice in their opinions.[243]

There are a number of strands running through trial court judges' criticisms of reassignment, but one seems especially notable. Again and again, one hears trial court judges describing appellate-court-ordered reassignment as disrespectful and unavoidably personal to the judge who is ordered off a case.[244] Having read these cases, it is easy to see why trial court judges feel that way. Some of the appellate decisions are extraordinarily critical of the trial court judge and use the sort of language that one rarely sees Article III judges use when speaking about their colleagues in a public forum.[245]

This realization—that reassignment can trigger quite different reactions by federal trial court judges depending on how it is utilized—sheds new light on broader debates. Two familiar conversations in law are whether legal tests are better expressed as bright-line rules or context-sensitive standards[246] and

240. *See supra* text accompanying note 210 (discussing a trial court judge's refusal to heed the Tenth Circuit's "suggestion" that he remove himself from a case).

241. *See, e.g.*, Petition for Writ of Certiorari, Real v. Yagman, 484 U.S. 963 (1987) (No. 87-250), 1987 WL 955561.

242. *See, e.g.*, United States v. Jacobs, 855 F.2d 652, 657-58 (9th Cir. 1988) (per curiam) (Stephens, D.J., concurring in part and dissenting in part) (asserting "that the way Ninth Circuit panels order cases reassigned is unfair," "punitive," and amounts to "censuring" and "disciplin[ing]" trial court judges (quoting 28 U.S.C. § 372(c)(6)(B)(vi))).

243. *See, e.g.*, LeBlanc-Sternberg v. Fletcher, 9 F. Supp. 2d 397, 405 n.19 (S.D.N.Y. 1998) (citing Weinstein, *supra* note 19); *In re* Acker, 696 F. Supp. 591, 593-94 (N.D. Ala. 1988) (same).

244. *See, e.g.*, *Jacobs*, 855 F.2d at 657-58 (Stephens, D.J., concurring in part and dissenting in part). I have heard similar statements in private conversations with federal trial court judges.

245. *See, e.g.*, United States v. Remillong, 55 F.3d 572, 577 (11th Cir. 1995) (per curiam) ("We are greatly troubled that Judge Sharp continues to ignore or to circumvent specific directives and mandates from this court in his adjudication of cases before him. His deliberate defiance of our mandate in *Remillong II*, however, not only shows a disregard for our explicit instruction, complete with our quoting the governing statute to him, but also disregard for Remillong, who is before Judge Sharp for a just resolution of his case.").

246. *See, e.g.*, WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 163 (2007) (discussing the classic "rules versus standards" debate).

whether judges are obligated to give (the real) reasons for their decisions.[247] Reassignment adds an important new dimension to both discussions.

First, reassignment illustrates that the choice between bright-line rules and case-specific standards has implications not only when crafting the underlying legal principles that will bind private actors and guide trial courts (a point that is familiar and well understood) but also when deciding how appellate courts should go about exercising their own unique reviewing functions.[248] By their very nature, rules tend to overshoot their underlying justifications and create situations in which the application of the rule does not necessarily further the purposes that motivated the rule's creation in the first place.[249] To use a familiar example: We want to prevent people from driving at an unsafe speed. We generally implement that purpose through a rule (for example, "Speed Limit 55"), even though we know there will be situations (for example, a long straightaway on a divided highway on a clear day) where the rule will be more restrictive than its underlying purposes would necessarily warrant.

The inevitable lack of a perfect fit between rules and their underlying purposes is commonly cited as one of the chief downsides of decisionmaking via rule.[250] Reassignment, however, illustrates that there can be times when this is a feature, not a bug. Say that an appellate judge believes remanded cases should be returned to the original trial court judge unless the trial court judge would have a difficult time fairly reconsidering her own previous decision. One option is for the appellate judge simply to apply that test directly, which would be a standard. Another option, however, would be for the appellate judge to announce a rule—that is, to identify categories of cases in which trial court judges as a class will generally (but not inevitably) be unable to fairly reconsider their own prior decisions and say that reassignment is mandatory in all such cases. A virtue of this latter approach is that it blurs the message sent by reassignment in a particular case; it permits the appellate judges to assert that there is nothing personal about the decision to order reassignment and perhaps even to state that this may be one of the cases in which the rule's scope has exceeded its purpose.

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247. *See, e.g.*, Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988-90 (2008) (discussing opposing viewpoints whether judges should "adhere to a principle of sincerity" in their opinions).

248. To the extent that the "rules versus standards" literature has discussed the relationship between trial and appellate courts, the analysis generally has focused on the appellate courts' formulation of the test that the trial court should apply in adjudicating the underlying dispute. As I and others have explained, one reason an appellate court may choose to create a rule is because it does not trust at least some lower court judges to apply a standard correctly. *See* Heytens, *supra* note 148, at 2057-59; *see also* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 150-51 (1991); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 78 (2006).

249. *See, e.g.*, Heytens, *supra* note 148, at 2059-60.

250. *See, e.g.*, *id.* at 2059, 2060 & n.60 (citing sources for this proposition).

The same thing is true of the manner and extent to which an appellate court explains its decision to order reassignment. As the previous Part explained, the Seventh Circuit rarely provides reasons for its decision to order reassignment and the First Circuit sometimes orders reassignment in the appellate mandate rather than in its opinion.[251] On one hand, this seems problematic because it violates the intuition that public explanation is an important part of justifying the exercise of coercive judicial power.

On the other hand, reassignment underscores that there can be virtues in circumspection as well. Appellate court decisions have many audiences: not just the trial court judges and the parties, but also other judges, future litigants, and other interested readers.[252] Both the Seventh Circuit's approach of ordering reassignment via an unexplained reference to a circuit rule that is unlikely to mean anything to most readers and the First Circuit's approach of separating the reassignment order from the underlying opinion can be seen as ways of reducing the salience of the decision to order reassignment, thus making the decision feel less like a public scolding.[253]

All of this is to say that, for most courts of appeals, there are better ways of going about reassignment. If appellate judges are committed to maintaining the power to order reassignment in particular cases (as they seem to be), the first step should be to consider promulgating a local rule, as the Seventh Circuit has done. That decision alone should help reduce the stigma associated with reassignment by presenting it as something that is a normal and expected part of the appellate process for certain cases, rather than a sanction reserved for exceptional ones. Next, the courts of appeals should identify categories of cases in which reassignment will be automatic or presumptive.[254] The categories could be based on particular types of legal errors, the nature of the proceedings for which the case is being remanded, the previous appellate history of the case (for example, the existence of at least one previous reversal), or something else. The aim would be to reduce the judge-specific stigma associated with any particular reassignment decision. Finally, unless an appellate panel wishes to send a strong message to a particular trial court judge, they should consider

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251. *See supra* notes 47-49, 88-89 and accompanying text.

252. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) ("It is an old but neglected idea that a distinction can be drawn in the law between rules addressed to the general public and rules addressed to officials.").

253. For another example, see *United States v. Edwards*, 152 F.3d 930, No. 97-30192, 1998 WL 385413 (9th Cir. June 23, 1998) (unpublished table decision) (ordering reassignment via an unpublished order while noting that the court of appeals had reversed the defendant's criminal conviction via a published opinion filed the same day).

254. Of course, the courts that currently have local rules governing reassignment do not seem to agree about what those categories should be, though a supermajority of them seem to agree that there is something special about the grant of a new trial. *See supra* notes 47-60 and accompanying text.

some sage advice when pondering whether to give case-specific reasons for ordering reassignment: "If you can't say something nice, don't say nothin' at all."[255]

CONCLUSION

Although it has existed largely below the radar, reassignment is neither a new nor an isolated phenomenon. Federal courts across the country have been ordering reassignment for more than fifty years, a number of federal courts have addressed it in their local rules, and the practice of case-by-case reassignment shows no signs of going away. At the same time, reassignment following appellate reversal remains very much the exception rather than the norm, and there are large variations by circuit, by judge (both trial court and appellate), and by the types of cases in which reassignment is ordered.

This Article has discussed some broader implications of this practice, including what reassignment can teach us about the ways in which appellate courts attempt to control trial courts, discussions of judicial impartiality, and familiar debates over rules versus standards and whether judges should give reasons for their decisions. It has also offered suggestions for improving the real-world practice of reassignment by urging courts to adopt local rules governing the practice and suggesting that they generally refrain from offering case-specific reasons for ordering reassignment.

Beyond identifying reassignment's existence and sketching some of its implications, this Article also has identified at least four areas for future research. First, there is a great deal more to be learned about when and how reassignment actually happens. This Article has introduced the phenomenon and provided a broad view of the dataset. In future work, I hope to address more targeted questions, such as whether the use of reassignment has changed over time, whether reassignment is more common in certain types of cases, and whether more fine-grained methods of measuring judicial ideology reveal any interesting patterns about how appellate judges use reassignment.

Second, although this Article has focused almost exclusively on reassignment by federal courts of appeals of federal trial court judges, that is not the only context in which it occurs. To the contrary, we see state appellate courts ordering reassignment of state trial courts,[256] state rules governing reassignment after remand,[257] and even instances of federal courts ordering

255. BAMBI (Walt Disney Pictures 1942). The line is spoken by Thumper the rabbit, repeating advice from his father.

256. *See, e.g.*, FLAMM, *supra* note 19, § 33.5, at 1000-01 (citing state court decisions in which reassignment was ordered).

257. *See, e.g.*, ARIZ. R. CIV. P. 42(f)(1)(D)-(E) (authorizing parties to have a different trial court judge as a matter of right following an appellate remand for "a new trial on one or more issues").

reassignment of state court judges.[258] There also are decisions in which federal courts of appeals and trial court judges have ordered that various administrative adjudications—including immigration cases and Social Security disability benefits cases—be reassigned to a different adjudicator on remand.[259] When and why do those sorts of reassignments tend to happen? Is the pattern similar to or distinct from the circumstances in which federal courts of appeals order reassignment? Are or should courts be more or less willing to reassign in situations involving agency adjudicators?

Third, many of the decisions ordering reassignment seem to reflect a hunch that certain kinds of information are particularly hard to ignore or that certain kinds of conclusions are particularly hard for judges to set aside. This suggests the value of further research investigating whether those intuitions are based in truth and, if they are, whether there are other kinds of judgments that can pose similar difficulties. More broadly, it suggests the value of further investigation of the tension between the ideal of impartial judging and the reality of a sometimes all-too-human judiciary.

Fourth, reassignment adds another dimension to the still-developing literature about how courts at different levels of a judicial hierarchy interact with one another and the norms governing those communications.[260] The particular example of Judge Real suggests that there may be a close connection between reversal, reassignment, and other non-case-specific methods of judicial control and discipline. One interesting topic for further research is the ways in which these various strategies interact and whether the norms governing intrajudicial communication vary from setting to setting.

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258. *See* Bercheny v. Johnson, 633 F.2d 473, 476-77 (6th Cir. 1980).

259. *See, e.g.*, Huang v. Gonzales, 453 F.3d 142, 151 (2d Cir. 2006) (ordering that the case be reassigned to a different immigration judge); Pretto v. Astrue, No. 3:08cv397/LAC/EMT, 2009 WL 2424577, at *1 (N.D. Fla. Aug. 5, 2009) (ordering that a Social Security case be reassigned to a different administrative law judge).

260. *See, e.g.*, Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 247 (1993) ("This Article explores the circumstances in which [various informal methods of judicial discipline] are used, assesses how well they work, and discusses a number of proposals to improve of modify their operation."); Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 426 (2007) ("This article examines the procedures by which the judiciary handles complaints of misconduct by judges and surveys the results in part by focusing on the findings of a committee chaired by Supreme Court [J]ustice Stephen Breyer." (italics omitted)).