

# University of Miami Law Review

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Volume 69  
Number 2 *Volume 69 Number 2 (Winter 2015)*  
SYMPOSIUM: Leading from Below

Article 4

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10-1-2015

## Federal Trial Judges: Dealing with the Real World

Jack B. Weinstein

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### Recommended Citation

Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. Miami L. Rev. 355 (2015)  
Available at: <https://repository.law.miami.edu/umlr/vol69/iss2/4>

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# University of Miami Law Review

VOLUME 69

WINTER 2015

NUMBER 2

## KEYNOTE ADDRESS

### Federal Trial Judges: Dealing with the Real World

JACK B. WEINSTEIN\*

I. RULES FOR SURVIVAL .....	355
II. MASS ACTIONS, TEN RULES .....	356
A. <i>Agent Orange</i> .....	358
B. <i>D.E.S</i> .....	360
C. <i>Asbestos and Cigarettes</i> .....	360
D. <i>Pharmaceutical Hazards: Zyprexa</i> .....	362
E. <i>Long Term Trends</i> .....	362
III. CRIMINAL LAW, THREE RULES .....	364
IV. GENERAL RULE .....	365

#### I. RULES FOR SURVIVAL

A realistic description of the federal trial judge’s role might be “Dealing with the Real World.” We are concerned with real people and the impacts of law on those people. We observe real lives through our window to the world. Where the law is inadequate or perverse, we report our observations to those with power to lead: the public, the legislature, and the appellate courts. And, from time to time, we bend the procedural and substantive law to do justice in individual cases.

The perpetually troubled underclasses, the cheated consumers, those injured by pharmaceuticals, and those deprived of constitutional and other rights are grist for our mill. Too often we are reminded of Job’s wail: “Behold, I cry out wrong, but I am not heard: I cry aloud, but

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\* United States District Judge for the Eastern District of New York. Judge Weinstein delivered the keynote address at the *University of Miami Law Review’s* 2014 Symposium, *Leading from Below*. See 2014 Symposium, U. MIAMI L. REV., <http://lawreview.law.miami.edu/2014-symposium/> (last visited Nov. 15, 2014).

there is no judgment.”<sup>1</sup>

Amid massive abuse by the government of prisoners, the mentally disabled, and those otherwise deprived, a class action with decrees and long-term supervision is needed. Providing justice for those who need help on a massive scale requires tough, controlling trial judges.

Allow me to illustrate my views on mass litigation by briefly touching on my own odyssey as a trial judge. Along the way, I have developed some personal “Rules for Survival.”

The first ten of these “Rules for Survival” address class actions, quasi-class actions, multi-district litigations, and the like. In the real world, such mass actions are the only practicable way to impose liability on those causing major harm and to provide adequate remedies to the many injured.<sup>2</sup> In these remarks, I do not address the critical issue facing our profession: the representational problems faced by the vast number of individuals—immigrants, the poor, and the middle class—without adequate counsel and without adequate civil legal protections.<sup>3</sup> A discussion of the work being done to respond to these profound legal problems must be left for another day.

Later, I will also state three of my personal “Rules for Survival” in the criminal law context and then conclude with one “General Rule for Survival.”

## II. MASS ACTIONS, TEN RULES

My first cases in the post-*Brown*<sup>4</sup> 1960’s involved African-Americans and the continued segregation of New York City’s public schools.<sup>5</sup>

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1. *Job* 19:7 (King James 2000). Cf. Timothy Williams, *Study Puts Exonerations at Record Levels in U.S.*, N.Y. TIMES, Feb. 4, 2014, at A12 (“The number of exonerations in the United States of those wrongly convicted of a crime increased to a record 87 during 2013, and of that number, nearly one in five had initially pleaded guilty to charges filed against them . . .”).

2. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 1–2 (1995).

3. See, e.g., JUDITH S. KAYE & JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., *THE FUTURE OF PRO BONO IN NEW YORK: REPORT ON THE 2002 PRO BONO ACTIVITIES OF THE NEW YORK STATE BAR* iii (2004); Robert A. Katzmann, *Foreword: The Study Group on Immigrant Representation Symposium, Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331 (2011); Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES, Jan. 29, 2014, at A19; Ross Todd, *ABA’s Task Force on Legal Education Issues Report but Won’t Seek Quick Action*, N.Y. L.J., Jan. 29, 2014, at 2 (reporting that the ABA’s Task Force on the Future of Legal Education recommended that state supreme courts and bar associations “look for ways to license legal service providers who lack J.D.s but can handle some legal services” in order to better serve unmet legal needs in their communities).

4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. See, e.g., *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 706 (E.D.N.Y. 1974) (seeking declaratory and injunctive relief regarding continued unconstitutional racial segregation of a junior high school); *Knight v. Bd. of Educ.*, 48 F.R.D. 115, 116 (E.D.N.Y. 1969) (challenging the removal, without notice, of African-American students from their high school’s register for

The paper records left me dissatisfied on the facts. I was confused and daunted by the conflicts among the many groups and individuals likely to be affected by a court decision. It was clear that many kids were getting a raw deal—denied equality of opportunity in fact. So I repeatedly visited the classrooms and ghettos, following Karl Llewellyn’s advice—I needed to get a sense for the situation.<sup>6</sup>

This led to:

**Rule 1:** Be humble. Listen. Try to learn what’s going on. If you need to, get out of the courthouse.

I followed that rule many years later in a case involving a facility on Long Island for the developmentally disabled, where I saw children sitting “half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television.”<sup>7</sup>

During a series of hearings held across the nation as part of the *Agent Orange* litigation, I saw “young widows who ha[d] seen their strapping young husbands die of cancer . . . [and] strong men who ha[d] tears welling up in their eyes as they t[old] of fear that their families [would] be left without support because of their imminent death . . . .”<sup>8</sup>

Today, we are starting to bring litigants into the courthouse directly

alleged truancy). See also Jack B. Weinstein, *Equality, Liberty and the Public Schools*, 48 U. CIN. L. REV. 203, 204 (1979); JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* 143–52, 168–73 (2011).

6. Thomas W. Mayo, *Charles D. Breitel—Judging in the Grand Style*, 47 *FORDHAM L. REV.* 1, 6 (1978) (quoting Chief Judge Breitel who summarized Llewellyn’s central thesis as follows: when a judge derives new rules from existing rules in order to apply them to the case at hand, he must make explicit the socio-economic facts in which he grounds that derivation, and, in order “[t]o accomplish this[,] the judge must have a situation sense”).

7. *Soc’y for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990).

8. *In re “Agent Orange” Product Liab. Litig.*, 597 F. Supp. 740, 764 (E.D.N.Y. 1984).

The quotations do not begin to reflect the moving sights and sounds of the hearings—broken-hearted young widows who have seen their strapping young husbands die of cancer, wives who must live with husbands wracked with pain and in deep depression, mothers whose children suffer from multiple birth defects and require almost saint-like daily care, the strong men who have tears welling up in their eyes as they tell of fear that their families will be left without support because of their imminent death, the man whose mind is so clouded he must be prompted by his wife standing by with his defective child in her arms to go on with his speech, the veterans trying to control the rage that wells up within them, the crippled and diseased with running sores and green fungus growths, and the women who volunteered for field or Red Cross duty and now feel themselves rejected and sick with what they believe are Agent Orange related diseases.

*Id.* See also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 173–78 (1986) (describing further the mindset and testimony of witnesses in the *Agent Orange* litigation).

through videoconferencing and other uses of current technology.<sup>9</sup> I call this democratizing the legal process.<sup>10</sup> Those who are injured need to have the opportunity to be heard and to know that someone in authority is listening.

An early segregated school case, *Hart v. Community School Board*, involved Mark Twain Middle School in Coney Island, New York.<sup>11</sup> Affected communities split on how to resolve the matter. Relying on medieval equity cases,<sup>12</sup> I appointed a Special Master and formulated:

**Rule 2:** A Special Master is often needed to talk to those affected—to act as a bridge and buffer for the judge. Appoint a smart person who you know would never embarrass the court—preferably a friend, one who can deal with people and help make deals. In particularly thorny cases, multiple Special Masters may be needed to approach the political, psychological, and economic aspects of the case and to help execute settlements.

A Columbia University professor, Curtis Berger, was appointed Special Master in *Hart*.<sup>13</sup> Together and with the community, we developed a magnet school that still operates today. Special Masters put the judge into the real world where he or she can seek a practical, results-oriented solution.

#### A. *Agent Orange*

The 1980s *Agent Orange* case presented large legal-factual-political problems.<sup>14</sup> The case was based on herbicidal spraying of the jungles—and consequently, United States troops—in Vietnam.<sup>15</sup> Kenneth Feinberg, who helped develop some of my “Rules,” served as one of four Special Masters in the case.<sup>16</sup> He and I toured the nation speaking

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9. See *Boykin v. 1 Prospect Park ALF, LLC*, 292 F.R.D. 161, 161 (E.D.N.Y. 2013) (ordering live-streaming of summary judgment and class-certification hearing in putative class action involving residents of assisted living facility).

10. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451, 455 (2012); see also Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 COLUM. J. L. & SOC. PROBS. 481, 490–91 (2012).

11. 383 F. Supp. 699, 706.

12. See generally Linda J. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1075–79 (1975).

13. Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

14. See generally SCHUCK, *supra* note 8, at 3–15 (explaining the technological advances and historical events that led to a never before seen mass toxic tort); see also *id.* at 92–93.

15. *In re “Agent Orange” Product Liab. Litig.*, 597 F. Supp. 740, 775–77 (E.D.N.Y. 1984).

16. *Id.* at 752–53 (“With the approval of the parties, in April 1984, Kenneth R. Feinberg, David I. Shapiro, and Leonard Garment, Esqs., all of Washington, D.C., were appointed as Special

and listening to Vietnam veterans who had been affected by the sprayings.

The paperwork involved in this case was huge. Federal Judge Shira Scheindlin, then a magistrate, and a panelist at this Symposium, gathered the facts so that this huge case was trial-ready and ripe for settlement.<sup>17</sup>

Judges need all the help they can get in large complex cases. We are fortunate that judges receive extensive assistance from able and talented colleagues. This leads us to:

**Rule 3:** Expand the role of magistrate judges and Special Masters to supervise discovery and to assist the trial judge in other ways.

The next Rule is central to all litigation. It is:

**Rule 4:** Get the money out fast to those who should get it.

This principal requires the trial judge to strictly control lawyers, to move the cases, to ensure that clients receive some of the benefits of wholesale cost efficiencies, to control against fake claims and unwarranted fees, and to provide relief as quickly as practicable to those who deserve it. Plaintiffs' Attorneys Committee members and leaders must be trustworthy. The court must know what's going on. In *Agent Orange*, fees were kept under ten percent, and criteria for membership in the class and for compensation were set by the court.<sup>18</sup>

Getting the money out fast and properly may also require an *ad hoc* administrative institution to conserve and disperse funds. Insurance companies, social work agencies in every state, and investment advisers should be included, as they were in *Agent Orange*, when needed to get the maximum benefit from the settlement funds.<sup>19</sup>

These first four rules are, in sum: Big cases require judges to exercise their powers to the fullest extent reasonable and necessary, to utilize responsible assistance, and to get the money and other relief out as quickly as possible and to the right people.

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Masters to assist the parties in settling the case. Special Master Kenneth R. Feinberg had already commenced preliminary work on the issues with the knowledge of the parties that such work would be going forward.”)

17. SCHUCK, *supra* note 8, at 122–24; *see also* Shira A. Scheindlin, *Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multi-District Class Action Litigation*, 52 BROOK. L. REV. 397 (1986).

18. SCHUCK, *supra* note 8, at 192–93 (discussing attorney's fee awards).

19. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019–21 (1997).

### B. *D.E.S.*

Another illustrative stop on my journey were the D.E.S. (diethylstilbestrol) cases.<sup>20</sup> New York courts had made justice possible by changing substantive law to allow for a daughter to recover damages pro rata from all D.E.S. producers in existence in the year her mother used the drug even though the precise manufacturer of the drug the mother ingested was unknown.<sup>21</sup> My view in disposing of large numbers of individual cases was based in part on my conversations with the daughters, many of whom had been devastated by an inability to conceive the children they and their spouses yearned for. Placing all the cases before one judge was efficient. I was lucky. I had a plaintiff's advocate, Sybil Shainwald,<sup>22</sup> who was devoted to her clients, and defendants' counsel who were reasonable. From my experience with the D.E.S. Cases, Rules 5 and 6 followed:

**Rule 5:** Sometimes the judge needs to let empathy flow.

**Rule 6:** Choice of law, personal jurisdiction, and procedural rules can be applied to permit individual cases from all over the country to be placed before one judge in a substantively welcoming state.<sup>23</sup> Mass cases need mass treatment—one court, one judge, one law.

### C. *Asbestos and Cigarettes*

In the asbestos cases, some seventy Brooklyn Navy Yard complaints tried in two batches. They were the basis for many subsequent settlements.<sup>24</sup> Rules 7 and 8 resulted:

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20. See *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992); *Braune v. Abbott Labs.*, 895 F. Supp. 530 (E.D.N.Y. 1995).

21. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y. 1989) (“[E]xant common-law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturer of the drug that injured her. . . . [However], it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that . . . because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. . . . [I]t is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action.”).

22. *Id.* at 1071.

23. See Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World: Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001) (“My thesis is that fair venue controls in personam jurisdiction and choice of law. In mass torts, reduction of transactional costs, full protection of the largest number of those injured, the interest of defendants in stability, and the prompt ending of litigations usually mandate application of one law in one court.”).

24. See Kenneth P. Nolan, *Weinstein on the Courts*, 18 LITIG., Spring 1992, at 24–25 (explaining that trying as many as fifty of the Brooklyn Navy Yard cases at a time provided a baseline model of what similar cases would be worth, enabling parties to conduct more informed

**Rule 7:** Bellwether trials provide matrices for settling large numbers of individual cases. Do not fear statistical analyses that can solve substantive and procedural problems.<sup>25</sup>

I soon discovered that a few lawyers were grabbing huge fees and awards. The enormous Manville Trust Fund designed for years of payments to asbestos victims was being swiftly depleted.<sup>26</sup> This required:

**Rule 8:** To protect future claimants, the judge must step in fast and sometimes stay all payments, appoint new trustees, and enforce strict directions to protect now and in the future *all* those injured. Firm judicial hands can prevent unfair allocations of available funds.

The imperative of “getting the money out fast” does not trump the basic duty of the trial judge: to ensure that all parties before the court, present and future, receive an equal measure of justice.<sup>27</sup>

The large cigarette cases illustrate a failure of imaginative use of class actions and statistical analysis to remedy a national tragedy based on a fraud that shortened the lives of millions of people.<sup>28</sup> Efforts at large-scale disposition were frustrated. Decades later, social pressures and regulations have reduced the toll, but the law’s deterrence came too late and too little. Trial judges’ power to try or settle these cases en masse was largely frustrated by extremely narrow class action appellate rulings.

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settlement negotiations). A similar, more general attempt by another judge of the Eastern District of New York to try 48 test cases in a consolidated group of 600 asbestos cases was struck down by the court of appeals. *See Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993).

25. *See United States v. DiCristina*, 726 F.3d 92, 94 (2d Cir. 2013); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010); *In re Simon II Litig.*, 407 F.3d 125, 127–28 (2d Cir. 2005), *rev’g* 211 F.R.D. 86 (E.D.N.Y. 2005).

26. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 915 (E. & S.D.N.Y. 1991).

27. A somewhat different problem related to “getting the money out fast” arose in *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1428 (E.D.N.Y. 1989). There, an atomic reactor was scrapped, and the public utility was ordered to pay back some \$6 billion ratepayers who had been charged for its construction. *See id.* at 1433–34. Immediate payment would have bankrupted the utility. *See id.* at 1438. The utility was ordered to pay back the sums owed in reductions from electric bills over a period of years. *See id.* at 1433, 1456–57. The result was not entirely satisfactory because some rate payers who moved out received no reductions while some who had moved in received rebates. *See id.* at 1469. Unfair, yes. But some rough and ready solutions to avoid excess costs and achieve a generally fair solution are sometimes necessary in mass cases. *See also MORRIS, supra* note 5, at 230–39.

28. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (refusing to certify a class despite the existence of common issues because, “given the number of questions that would remain for individual adjudication, issue certification would not ‘reduce the range of issues in dispute and promote judicial economy.’”), *rev’g* 449 F. Supp. 2d 992 (E.D.N.Y. 2006); *In re Simon II*, 407 F.3d at 127–28 (holding that the class must be vacated because there was no evidence to ascertain the limits of the fund or the aggregate value of the punitive claims).



#### D. *Pharmaceutical Hazards: Zyprexa*

Individual cases can be handled effectively with multidistrict litigations or their equivalents.

**Rule 9:** Benefits of class actions can be obtained by, in effect, consolidating individual actions into a quasi-class action.

The recently completed *Zyprexa* multi-district pharmaceutical litigation—in which about 30,000 individual cases were settled and disposed of for some \$6 billion<sup>29</sup>—with sharp limits on fees and expenses—suggested why a quasi-class action concept<sup>30</sup> is needed when class action status is not available.<sup>31</sup>

In some respects, a quasi-class action of consolidated individual suits is more effective than a class action. It avoids interlocutory appeals.<sup>32</sup> Those appeals slow down the case for years and reduce the ability of judges and litigants to resolve the matters fairly and relatively quickly.

#### E. *Long Term Trends*

Current trends in mass actions are disturbing. My view is embodied in:

**Rule 10:** Denying the little guy effective access to the courts is unjust.

Increasingly, suits for workers and consumers are being blocked by mass forced consent to arbitration clauses, thereby preventing class actions and other appropriate forms of litigation.<sup>33</sup> But did the signers of these clauses understand what they signed, and did they act voluntarily? In a recent case before me where non-English-speaking workers in a supermarket complained of being cheated out of statutory minimum

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29. See *In re Zyprexa Prods. Liab. Litig.*, 260 F.R.D. 13, 16, 25 (E.D.N.Y. 2009).

30. See *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006) (“The court, magistrate judge and special masters will continue to administer this litigation as a quasi-class action.”).

31. See *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131–37 (2d Cir. 2010) (reversing the district court’s class certification order because the class could not establish “substantial elements of its claim against Lilly” using “generalized, rather than individualized, proof”).

32. See FED. R. CIV. P. 23.

33. See *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, slip op. at 3 (U.S. June 20, 2013) (“[A]rbitration is a matter of contract . . . [and] courts must ‘rigorously enforce’ arbitration agreements according to their terms.”); *AT&T Mobility LLC v. Concepcion*, No. 09-893, slip op. at 18 (U.S. Apr. 27, 2011) (finding California case law—which held class arbitration agreements to be unconscionable and therefore unenforceable—to be preempted by the Federal Arbitration Act, which favors arbitration). *But see Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1764 (2010) (finding the imposition of “class arbitration on parties whose arbitration clauses are ‘silent’ on that issue” improper and inconsistent with the Federal Arbitration Act).

wages, some workers were neither knowledgeable nor free to reject an arbitration clause without being fired.<sup>34</sup> Arbitration clauses that block litigation must sometimes be analyzed by asking one of the first questions posed in our first-year contracts course: Was there a voluntary meeting of the minds?

The 1938 Federal Rules of Civil Procedure opened the doors to our courthouses for the poor, the oppressed, and the legally deprived. Easy pleading, full discovery, and subsequent class action amendments were critical.<sup>35</sup> That door is now being closed by reducing the availability of class actions through legislation and judicial decisions, by tightening the pleading rules, by limiting discovery, by encouraging summary judgment, by increasing standing requirements, by favoring arbitrations over litigation,<sup>36</sup> and by a generally negative attitude toward joint action through unions, other voluntary associations, or individuals being denied standing.<sup>37</sup>

The view from below is not all negative. Gender and disability discrimination suits, pro-civil rights decisions, and other substantive rulings have strengthened the litigation power of many individual litigants. Particularly important have been mandatory fee-shifting provisions encouraging lawyers to take such cases.<sup>38</sup> In the federal Fair Labor Standards Act,<sup>39</sup> provisions for opt-in class actions—which act as barriers to the continued erosion of class actions—appear to be standing firm.

Massive litigation will probably become more acute as we experience more natural disasters—and no fewer man-made ones—in the coming years.<sup>40</sup> Our legal system must be prepared to meet these challenges to ensure that prompt justice is available to those who seek it.

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34. See *Limon v. Saleh*, No. 1:13-cv-03421 (E.D.N.Y. Jun. 14, 2013).

35. See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

36. See *Am. Express Co.*, No. 12-133; *AT&T Mobility LLC*, No. 09-893.

37. See Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014); Vaughn R. Walker, *Class Actions Along the Path of Federal Rule Making*, 44 LOY. U. CHI. L.J. 445, 445 (2012) (noting that “courts have ‘tightened the requirements for almost every element of class certification’”); Archis Parasharami et al., *Litigation: Challenging Class Certification for Lack of Article III Standing*, INSIDE COUNS. (Jan. 3, 2013), <http://www.insidecounsel.com/2013/01/03/litigation-challenging-class-certification-for-lac>.

38. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 233 (1984) (noting more than 150 federal statutes authorizing attorney fee shifting).

39. Fair Labor Standards Act of 1938 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

40. See THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS 4–8 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012) (discussing an anticipated increase in the frequency of droughts, intense precipitation and flooding, heat waves, wildfires, and other extreme climatic conditions throughout the globe); VIVIEN GORNITZ, RISING SEAS: PAST, PRESENT, FUTURE (2013).

## III. CRIMINAL LAW, THREE RULES

**Rule 1:** Unnecessary cruelty, destruction of people and communities, and huge costs to taxpayers should be avoided.

Trial court decisions insistently and consistently demonstrated the unnecessary cruelty of original guideline sentencing.<sup>41</sup> Ultimately, the Supreme Court heard the cries of injustice and granted sentencing judges discretion to sentence reasonably.<sup>42</sup>

Like dogs howling at the gate,<sup>43</sup> trial judges have warned of the rank injustice of many mandatory statutory minimums. Congress has not yet yielded to our entreaties (except in a partial amelioration of crack cocaine penalties).<sup>44</sup> But public pressure to eliminate prison-filling and cruel mandatory minimums is building.<sup>45</sup>

Representation of defendants in federal criminal cases is generally good. This is apparently not true in some states.

Collateral attacks on state and federal convictions do not require attorneys for petitioners; but despite budgetary problems, federal judges are appointing counsel and lawyers under the Criminal Justice Act.<sup>46</sup> And pro bono lawyers and students are exposing unjust convictions and laying the groundwork for more careful investigations, trials, and appropriate criminal judgments.<sup>47</sup>

**Rule 2:** The main protection for defendants is good lawyering.

As we observe the fiftieth anniversary of *Gideon v. Wainwright*,<sup>48</sup> a decision that brought our criminal justice system closer to that noble promise of “equal justice under law,” we must take measure of the major work yet to be done. As the Supreme Court has declared, “when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair

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41. A. G. Sulzberger, *Defiant Judge Takes on Old Child Pornography Law*, N.Y. TIMES, May 22, 2010, at A1.

42. See *United States v. Booker*, 543 U.S. 220, 305 (2005) (Scalia, J., dissenting) (noting the “notorious unpopularity of the Guidelines with many district judges”).

43. See William Blake, *Auguries of Innocence*, reprinted in THE POETRY AND PROSE OF WILLIAM BLAKE 481 (David V. Erdman ed., 1965); ENGLISH POETRY II: FROM COLLINS TO FITZGERALD, THE HARVARD CLASSICS (1909–14) (“A dog starvd at his Master’s Gate / Predicts the ruin of the State”).

44. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 1–3, 124 Stat. 2372, 2372–74 (2010).

45. See, e.g., Editorial, *Unjust Mandatory Minimums*, N.Y. TIMES, Feb. 18, 2013, at A22. But see Douglas A. Berman, *A Cynic’s Guide to All the Federal Sentencing Reform Buzz*, 26 FED. SENT’G REP. 73, 74 (2013).

46. Criminal Justice Act of 1964, Pub. L. No. 88-455, § 3006A, 78 Stat. 552 (1964).

47. *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Sept. 23, 2014).

48. 372 U.S. 335, 344 (1963).

opportunity to present his defense.”<sup>49</sup> Those advocating on behalf of the criminally accused must possess the tools required for their formidable task, including ready access to expert investigative and forensic assistance.<sup>50</sup>

In the sentencing and post-sentencing areas, we are making advances through trial judges reducing unnecessary incarcerations. Increasing reliance on probation and closely supervised release by courts more effectively helps the drug addicted, the mentally afflicted, and the educationally and job deprived to enter a lawful, productive life.<sup>51</sup> Cooperation among judges, probation officers, social workers, and private helping agencies is also increasing.<sup>52</sup>

**Rule 3:** Judges should use their discretion to minimize injustice and to encourage prosecutors (through charging and plea decisions) to do the same. We are here to save where possible, not to destroy unnecessarily.<sup>53</sup>

The Attorney General, as well as local prosecutors, can reduce injustice by appropriate charging and plea decisions. Judges can speak out. In the Eastern District of New York, under the leadership of Judge John Gleeson, “[f]ederal judges . . . [have] team[ed] up with prosecutors to create special treatment programs [(“drug courts”)] for drug-addicted defendants who would otherwise face significant prison time, an effort intended to sidestep drug laws widely seen as inflexible and overly punitive.”<sup>54</sup> Cases based on excessive stops, frisks, false arrests, and a whole panoply of prosecutorial abuses can be effectively addressed.

#### IV. GENERAL RULE

**General Rule:** If you see something is wrong, say something is wrong—and try to correct it.<sup>55</sup>

49. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

50. See John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 *YALE L.J.* 2126, 2137–47 (2013). “Until the Supreme Court both significantly raises the bar as to the quality of representation . . . and requires states to provide more than paltry investigative and expert services to indigent defendants, *Gideon* will remain an unfulfilled dream of what could and should have been.” *Id.* at 2147.

51. See Peter Raynor & Gwen Robinson, *Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy*, 1 *EUR. J. PROBATION*, no. 1, 2009.

52. *Mission Statement*, AM. PROBATION & PAROLE ASS’N, [http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=IA\\_Introduction](http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=IA_Introduction) (last visited Sept. 25, 2014).

53. *United States v. C.R.*, 972 F. Supp. 2d 457, 457–58 (E.D.N.Y. 2013) (“The effect of harsh minimum sentences in cases such as C.R.’s is, effectively, to destroy young lives unnecessarily.”).

54. Mosi Secret, *Outside Box*, *U.S. Judges Offer Addicts New Path*, *N.Y. TIMES*, Mar. 2, 2013, at A1.

55. See Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 *FORDHAM URB. L.J.* 131 (2004).

In sum, the image of Justice that adorns so many courthouses in this country—blindfolded and dressed in majestic robes—too often departs from what we deal with in the real world. Trial judges must have the courage to inform Empress Justice when her garments have grown tattered or outmoded. It is appropriate to publicize legal deficiencies in extra-judicial writings and teachings, and to act to dispense justice where possible.

Future disasters and resulting mass litigations are likely to be even more challenging than mass tort actions of the past and present.<sup>56</sup> This is a subject worth discussing for a future symposium under the possible heading of: “Mass Litigations and Disasters Require the Integration and Coordination of Our Legal Systems.”

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56. See, e.g., Jeff Goodell, *Why the City of Miami is Doomed to Drown*, ROLLING STONE, June 20, 2013, available at <http://www.rollingstone.com/politics/news/why-the-city-of-miami-is-doomed-to-drown-20130620>.