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Jack B. Weinstein: Judicial Entrepreneur

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ARTICLES

Jack B. Weinstein: Judicial Entrepreneur

JEFFREY B. MORRIS*

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I. INTRODUCTION

The *University of Miami Law Review's* 2014 Symposium, *Leading from Below*, honored Judge Jack B. Weinstein for his extraordinary career as a private practitioner, government lawyer, advisor to legislators and executive officials, major legal scholar, and federal district judge for over forty-seven years. It also offered the possibility of pausing for several days to consider the significance of the federal district courts more generally.

II. THE FEDERAL DISTRICT COURTS

Too little attention is paid to the work of the federal trial courts. In the two months immediately preceding this Symposium, Robert J. Shelby of the U.S. District Court for the District of Utah made it possible for gay couples in Utah to marry by striking down the state's anti-gay marriage law.¹ Less than one month later, Judge Terrence C. Kern

* Professor of Law, Touro Law School. Professor Morris delivered the Introduction of the Keynote 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).

1. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013). See also Emiley Morgan & Marjorie Cortez, *Gay Couples Wed After Federal Judge Overturns Utah's Same-Sex Marriage Ban*, DESERET NEWS (Dec. 26, 2013, 10:33 AM), <http://www.deseretnews.com/article/865592784/Federal-judge-rules-Utahs-ban-on-same-sex-marriage-unconstitutional.html?pg=all>. Earlier in the same month, a different federal district judge in Utah struck down part of Utah's anti-polygamy law. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013). See also Jack Healy, *Uncertainty in Utah as Appeals Process Plays Out over Gay Marriage*, N.Y. TIMES, Jan. 8, 2014, at A14, available at http://www.nytimes.com/2014/01/08/us/uncertainty-in-utah-as-appeals-process-plays-out-over-gay-marriage.html?_r=0.

for the Northern District of Oklahoma struck down that state's constitutional amendment barring same-sex marriage.² In December 2013, Judge Richard L. Leon of the U.S. District Court for the District of Columbia held unconstitutional the National Security Agency's program of collecting data on every American's telephone records. Within a few days, Judge William Pauley III of the Southern District of New York held the same practice constitutional.³ At the same time, the *New York Review of Books* published a blistering article written by a judge of the Southern District of New York demanding an explanation for why there had not been a single prosecution of any prominent figure in the 2008 financial crisis.⁴ If this was not enough, the U.S. Court of Appeals for the Second Circuit summarily tossed out the findings of the highly regarded Southern District Judge Shira Scheindlin, who held that the New York City Police Department's program of stopping and frisking without reasonable individualized suspicion was unconstitutional.⁵

Federal district courts perform functions central to the modern state—"policy-making, and social control, and regime legitimation."⁶ In the United States, the federal courts are instruments of national power. Ordinarily, they are centralizing agents: enforcing the supremacy of the federal government, helping to achieve national uniformity of government policies, and conferring legitimacy on government activities. Yet, paradoxically, the federal district courts are also decentralized institutions operating under and constituted in some measure by state and local political leaders.

As the major intake point for cases in the federal judiciary, the federal district courts are also an important part of the American political process. They provide a forum in which individuals may seek to advance their goals of directing governmental actions and allocating resources. Judicial decisions resolve disputes, enforce norms, and allocate social

2. *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla.), *cert. denied sub nom. Smith v. Bishop*, 135 S. Ct. 271 (2014). See also Erik Eckholm, *Oklahoma's Ban on Gay Marriage is Unconstitutional, Judge Rules*, N.Y. TIMES, Jan. 15, 2014, at A15, available at <http://www.nytimes.com/2014/01/15/us/federal-judge-rejects-oklahomas-gay-marriage-ban.html>.

3. *Klayman v. Obama*, 957 F. Supp. 2d 1, 41 (D.D.C. 2013); *ACLU v. Clapper*, 959 F. Supp. 2d 724, 757 (S.D.N.Y. 2013). See also Sheryl Gay Stolberg, *Judge Has Record of Wrestling with Thorny Issues, and the U.S. Government*, N.Y. TIMES, Dec. 17, 2013, available at http://www.nytimes.com/2013/12/17/us/politics/judge-has-never-let-presidents-off-easy-on-pornography-terrorism-or-surveillance.html?_r=0; Joel Stashenko, *U.S. Judge Backs Collection of Phone Data*, 250 N.Y. L.J. 1, Dec. 30, 2013, at 1, 1.

4. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?pagination=false&printpage=true>.

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

6. HERBERT JACOB ET AL., *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 3 (1996).

values. They may not be able to command social change, but they are able to speed it up or slow it down. They monitor the institutions of government and attempt to insure equal treatment and governmental “fair play” by keeping the agencies of government within their constitutional and statutory limits. They also are a “safety valve . . . provid[ing] a forum for outraged individuals or groups to vent their disapproval” of the actions of local, state, and national governments and sometimes of the private sector as well.⁷

Although it is rare for an individual district court judge to make law affecting the entire nation, by far the greatest quantity of cases decided in the federal court system begin and end in the district court.⁸ District judges preside over state trials, hear cases involving political corruption, are the first source of interpretation of federal statutes, and implement Supreme Court decisions. District judges play an important role in keeping the powers of the federal and state governments in balance and contribute to the protection of constitutional rights by insuring that American governments operate under the rule of law. The district courts are regulators of the market place, facilitators of interstate commerce, protectors of property, and enforcers of federal law.

Why, then, is the literature on the federal district courts produced by legal scholars, political scientists, historians, and journalists so relatively thin?

First, a disproportionate amount of writing on American courts is devoted to the Supreme Court of the United States. Second, while most of the nearly one thousand district judges in the United States each deal with hundreds of cases every year,⁹ many cases are not of great significance to the legal or the political system. Furthermore, a study of those district court cases that are of great significance demands knowledge of far more areas of law than the Supreme Court—which primarily deals

7. KENNETH M. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS* 113 (1967); *see also* HERBERT JACOB, *DEBTORS IN COURT* 16 (1969) (“The services offered by the courts are a significant element of the output of the political system.”); LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 66 (1997) (discussing policy considerations in the judicial process and their implications for society); CHRISTOPHER E. SMITH, *COURTS, POLITICS AND THE JUDICIAL PROCESS* 7 (1993) (“The judicial process, like other political and governing processes, involves human beings in setting goals and establishing values for society.”); ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 7, 10–15 (1992) (noting that judges, through their decisions, “necessarily make public policy”).

8. *See Judicial Caseload Indicators*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013/judicial-caseload-indicators.aspx> (last visited Dec. 17, 2014).

9. *See* Paul Mark Sandler, *The World of a U.S. Magistrate Judge: An Interview with Paul W. Grimm*, SHAPIRO SHER GUINOT & SANDLER (Jan. 26, 2007), http://www.shapirosher.com/pages/news/136/the-world-of-a-u.s.-magistrate-judge_an-interview (indicating that federal trial judges can hear an “extraordinarily large number of misdemeanor criminal cases” alone each year).

with constitutional cases, criminal cases, and federal statutory interpretation.

Additionally, while the Supreme Court and the courts of appeals may be studied through judicial opinions (or opinion drafts), much of the work of the district courts is not captured by opinions but buried in lengthy records. A great deal of the important work of district judges lacks a paper trail.¹⁰ It involves the judge's role in framing, managing and settling cases, his ability to be dignified, fair and efficient in the courtroom, as well as his talent for creating findings of fact that are useful for the court of appeals and, hopefully, that are reversal-proof.

Yet, much has happened in the past three decades to ease the burdens of observers of the district courts. Electronic legal databases permit almost instant compilation of any judge's complete list of published opinions (as well as unpublished ones that are accessible online). The computer also allows for easy access to newspaper articles discussing trial court proceedings of particular interest to the public. Some circuits even publish weekly compilations of stories from newspapers throughout the circuit, usually including those published at the seats of their district courts.

In addition, circuit and district court historical societies have in recent years stimulated a large number of oral histories of judges, some of which are available online.¹¹ Ordinarily, the oral histories at least illuminate the judge's career before appointment to the bench, the appointment process, the transition to the bench, and the nature of the job.¹² Sometimes they do more. There is already one published volume based on such oral histories comparing the experiences of various judges on various subjects.¹³

Furthermore, the publication of a dozen biographies of district and appellate judges—who were elevated from the district courts—over the last thirty years has illuminated the context in which the district judge works.¹⁴ In addition, there are now more than a dozen good substantive histories of individual district courts, most of which were written in the last thirty years.¹⁵

10. Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 214 (2009).

11. For example, see *The Senior Judge Oral History Program*, PHILA. CTS., <http://www.courts.phila.gov/sjhistory/> (last visited Dec. 17, 2014).

12. *See id.*

13. *See generally* WILLIAM DOMNARSKI, *FEDERAL JUDGES REVEALED* (2008).

14. *See, e.g.*, GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (2004); FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* (1991); WILLIAM NELSON, *IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE* (2004); POLLY J. PRICE, *RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH* (2009).

15. For a fairly complete list, see JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH* 7

Yet, the fact that the literature on the federal district courts is so skimpy makes it difficult to judge the quality or influence of a particular judge. If they are remembered at all, it is within their own district or because they “escaped” the district bench and went on to a notable career on the court of appeals (such as Learned Hand or Richard Arnold) or because of their association with one particularly notable trial (such as Harold Medina’s trial of the top leaders of the American Communist Party¹⁶). One or two may be known for a particular opinion, such as that of Judge John Woolsey of the Southern District of New York when the federal government attempted to prevent James Joyce’s *Ulysses* from reaching our shores.¹⁷ Finally, there are a very small handful of judges who, because of the extraordinary courage they demonstrated in litigation of enormous political importance, have become icons of judicial independence. The examples that come most rapidly to this observer’s mind are Frank M. Johnson, Jr., and John J. Sirica.¹⁸

This article is intended to look at the career of one very well-regarded judge through spectacles that offer a different vantage point on a judicial career. Those spectacles—the concept of judicial entrepreneurship—seem to be particularly apt when applied to Judge Jack B. Weinstein.

III. JUDICIAL ENTREPRENEURSHIP

Two political scientists, Wayne V. McIntosh and Cynthia L. Cates, have coined the term “judicial entrepreneur” to apply to the impact of particular judges. McIntosh and Cates apply the term to a judge who is “alert to the opportunity for innovation, who is willing to invest the resources and assume the risks necessary to offer and develop a genuinely unique legal concept, and who must strategically employ the writ-

n.25 (2011). In addition, law reviews publish an occasional issue with articles about individual judges, and judges themselves publish articles in law reviews and journals dedicated to judicial administration. Formal court ceremonies—retirements, presentations of portraits, and in memoriam proceedings—continue to be published in *Federal Rules Decisions*.

16. *Harold Medina, U.S. Judge, Dies at 102*, N.Y. TIMES (Mar. 16, 1990), <http://www.nytimes.com/1990/03/16/obituaries/harold-medina-us-judge-dies-at-102.html> (describing the late Medina as having “achieved lasting fame for his handling of the trial of 11 Communist leaders”). It must be noted that, even if Medina is remembered for the Communist trial he presided over as a district judge, he was later elevated to the court of appeals, where he served for more than three decades.

17. *U.S. v. One Book Called “Ulysses,”* 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff’d*, 72 F.2d 705 (2d Cir. 1934).

18. As one living in New York City, I cannot help but also single out Judge Edward Weinfeld of the Southern District, who was legendary for his fairness and commitment to justice. *See NELSON, supra* note 14.

ten word to undertake change.”¹⁹ Whether the concept will prove useful when applied to individual judges generally can be left for another occasion. The concept does seem to be quite useful for Judge Weinstein.

According to McIntosh and Cates, the entrepreneurial judge does not have to be the author of a very important idea or concept, but he must become its chief salesman.²⁰ Four examples of entrepreneurial judges are considered in McIntosh and Cates’ book: Louis Brandeis’ impact on the concept of the right to privacy; Sandra Day O’Connor’s work enhancing the use of the Commerce Clause as a source of states’ rights against the federal government; Hans Linde’s reinvigoration and reanimation of the development of state constitutional law; and Jerome Frank’s doctrinal approach to obscenity and to intangible property.²¹

Historically, judicial entrepreneurs have been few in number because of the desire for steadiness and immutability in the law. The insularity of the judiciary and the norm of collegiality on appellate courts necessitates convincing several other judges and discourages writing alone.²²

According to McIntosh and Cates, to be a judicial entrepreneur a judge must be (1) “alert to the opportunity for innovation,” (2) willing to assume professional risks, and (3) willing to become a salesperson for ideas.²³ There have been and continue to be very few “entrepreneurial judges” because the task requires an important commitment of time and a willingness to endure criticism, reversal, and possibly even professional marginalization.²⁴ The entrepreneurial judge must always prepare for failure, for the law resists innovation.²⁵

If few judges at any level view their role as innovators, or makers and movers, of the law, then trial judges are even less likely to view themselves as such.²⁶

IV. JACK B. WEINSTEIN²⁷

In his forty-seven year career, which is not yet complete, Jack Weinstein has been the recipient of a long list of honors. The fact that

19. WAYNE V. MCINTOSH & CYNTHIA L. CATES, *JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS* 12 (1997).

20. *Id.* at 10.

21. *Id.* at 23, 47, 67, 91.

22. *Id.* at 8.

23. *Id.* at 12–13.

24. *Id.*

25. *Id.* at 13.

26. WILLIAM I. KITCHEN, *FEDERAL DISTRICT JUDGES: AN ANALYSIS OF JUDICIAL PERCEPTIONS* 77 (1978).

27. I used some of the following biographical material in my introduction of Judge Weinstein at the *University of Miami Law Review* Symposium.

this Symposium honors him and seeks lessons from his career from the past and for the future certainly suggests that he has had a very wide impact. And the *University of Miami Law Review* has not been alone in its decision to focus its Symposium on Jack Weinstein's work. By the middle of 2014, there will have been four conferences at law schools focusing upon Judge Weinstein's work, which will have yielded four published symposia.²⁸ There were also celebratory programs at the New York City Bar and Touro Law School at the time of Judge Weinstein's ninetieth birthday.²⁹

As one of a handful of judges to receive the Edward J. Devitt Award³⁰—the highest accolade that federal judges award annually to one of their number—Weinstein has, for more than a half-century, been a central figure in the law of evidence, civil procedure, and New York practice. He has produced a practice code, major treatises, and casebooks. He has written hundreds of articles not only in these areas, but also dealing with mass torts, legal ethics, institutional litigation, and sentencing. As a judge and scholar, Weinstein has greatly influenced developments in many fields of law, but perhaps nowhere more than in the area of mass torts, where his management of the most complex cases has been extraordinarily influential. He has been one of the nation's most innovative judges during the past half-century, introducing countless improvements into New York State and federal law.³¹

Born in 1921 into a warm Jewish family living temporarily in Wichita, Kansas, Jack Weinstein grew up in Brooklyn.³² After graduating from Brooklyn College, he served during the Second World War as a junior officer on a submarine in the Pacific.³³ After the war, Weinstein, who previously had never even met an attorney, entered Columbia Law

28. See Stephen Breyer, *Tribute to the Honorable Jack Weinstein*, 97 COLUM. L. REV. 1947 (1997); *Judge Jack B. Weinstein, Tort Litigation, and the Public Good: A Roundtable Discussion to Honor One of America's Greatest Trial Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL'Y 149 (2003) [hereinafter *80th Birthday Roundtable*]. In 2014, symposia were held at both the University of Miami School of Law and DePaul Law School.

29. See *The Jurisprudence of Jack Weinstein*, N.Y.C. BAR, http://www2.nycbar.org/Events/Calendar/show_event_new.php?eventid=1719 (last visited Sept. 15, 2014).

30. See also *Judicial Conference, Second Judicial Circuit of the United States*, 160 F.R.D. 287, 355 (1994) (comments of Judge Gasch) (presenting Judge Jack Weinstein with the Edward J. Devitt award).

31. John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2035 (1997) ("As a lawyer, scholar, and jurist, Judge Weinstein has introduced countless improvements, small and large, into nearly every aspect of New York and federal law.")

32. See *The Lawrence A. Wien Prize for Social Responsibility 2011 Honoree: Hon. Jack B. Weinstein '48*, COLUM. L. SCH., http://www.law.columbia.edu/media_inquiries/news_events/2011/november2011/2011-wien-prize-bio-weinstein (last visited Dec. 17, 2014).

33. *WWII Profile: Jack B. Weinstein*, U.S. CTS. (Jun. 16, 2014), <http://news.uscourts.gov/wwii-profile-jack-b-weinstein>.

School where he made a distinguished record.³⁴ In the first few years after his graduation, Weinstein practiced law, served as a law clerk to New York Court of Appeals Judge Stanley H. Fuld—then one of the outstanding state jurists in the nation—and worked for a Republican State Senator, Seymour Halpern.³⁵

In 1952, Weinstein became Columbia Law School's first faculty hire after the war.³⁶ He would continue to teach a full load at Columbia for decades after his appointment to the bench. Early in his teaching career, Weinstein was a member of the legendary team of attorneys who worked on the NAACP Supreme Court brief in *Brown v. Board of Education*.³⁷

As special counsel to the New York Joint Committee on Motor Vehicle Problems, Weinstein drafted the revision of the New York State Motor Vehicle and Traffic Law. Then, he served as consultant to and reporter for the New York Temporary Commission on the Courts ("Tweed Commission"), which was the driving force behind what still remains the last significant revision of the Judiciary article of the New York State Constitution.³⁸ Then, he was the primary draftsman of the completely revised New York Civil Practice Law and Rules ("CPLR"), which still remains in effect.³⁹ "While working on the CPLR, Weinstein gathered materials for what became an eight-volume treatise on New York civil procedure, which he edited with [Harold] Korn and [Arthur] Miller."⁴⁰

Weinstein was appointed by Chief Justice Earl Warren to the Advisory Committee to the Judicial Conference Committee on Evidence in 1966.⁴¹ As a professor and then as a judge, "Weinstein took an active role in the creation of the Federal Rules of Evidence."⁴² "After the Rules were promulgated, Weinstein repeated what he had done with the CPLR, sharing authorship of a treatise and manual on evidence with Margaret Berger, a former law clerk and a professor of law at Brooklyn Law School."⁴³ Weinstein was thus able to influence the interpretation by

34. *Id.*

35. MORRIS, *supra* note 15, at 44–45.

36. *Id.* at 45.

37. *Id.*; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

38. MORRIS, *supra* note 15, at 48.

39. *Id.*

40. *Id.*; *see generally* JACK B. WEINSTEIN ET AL., *NEW YORK CIVIL PRACTICE* (1963). The three men also produced JACK B. WEINSTEIN ET AL., *MANUAL: NEW YORK CIVIL PRACTICE LAW AND RULES* (1967). Weinstein also produced a casebook on civil procedure with his Columbia colleague, Maurice Rosenberg. *See* MAURICE ROSENBERG ET AL., *ELEMENTS OF CIVIL PROCEDURE* (1976).

41. MORRIS, *supra* note 15, at 49.

42. *Id.*

43. *Id.*

attorneys and judges of New York civil practice and of the federal evidence rules in their formative years, while at the same time creating important reference works that are very much in use today.⁴⁴

In the fifteen years before his appointment to the federal bench, Weinstein used his professional expertise to assist a number of men engaged in political life including State Senator Seymour Halpern, Nassau County Executive Eugene Nickerson (for whom Weinstein served as County Attorney), and Senator Robert F. Kennedy.⁴⁵ At one point, Kennedy had intended that Weinstein run for State Attorney General.⁴⁶ Later, Kennedy offered to appoint Weinstein judge of the U.S. District Court for the Southern District of New York.⁴⁷ But Weinstein, heavily involved in work as advisor to the State Constitutional Convention, turned him down.⁴⁸ However, when, several months later, Kennedy offered to appoint him judge of the Eastern District of New York, Weinstein, fed up with the Convention, accepted with alacrity.⁴⁹ Confirmation was no problem.⁵⁰

When Weinstein took the oath as federal judge in May 1967, he was by ability and background well-qualified for the bench.⁵¹ Although his experience in private practice had been limited, Weinstein had lawyering experience from his work as a government lawyer and from the handling of *pro bono* cases.⁵² As a full professor at one of the nation's leading law schools, Weinstein had taught not only civil procedure and evidence—two subjects essential for a federal judge—but had also either taught or written in a wide variety of fields, including conflict of laws, searches and seizures, pretrial discovery, and reapportionment.⁵³ Ironically, Weinstein probably knew more about New York practice than anyone else alive, but this would be of relatively minor assistance to him as a federal judge.⁵⁴

Weinstein brought to the bench “an outstanding legal mind, intellectual curiosity, [inhuman] energy, decisiveness, . . . [striking] indepen-

44. See generally JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE (1975). See also JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL STUDENT EDITION (7th ed. 2005); JOHN M. MAGUIRE ET AL., CASES AND MATERIALS ON EVIDENCE (6th ed. 1973). He also revised EDWARD R. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE (Jack B. Weinstein ed., 5th ed. 1976).

45. MORRIS, *supra* note 15, at 50–54, 68.

46. *Id.* at 68.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 69.

52. *Id.* at 70.

53. *Id.* at 70.

54. *Id.*

dence, and felicity of literary style.⁵⁵ His work would be unusually thorough.⁵⁶ As a judge, he became a master of the craft of opinion writing and would be unusually productive in dealing with his docket.⁵⁷ He proved innovative in the use of new technology in the courtroom, remarkably flexible in employing procedural rules, and strikingly creative with substantive law.⁵⁸ He also demonstrated a “capacity to gain attention for his ideas, decisions, and [other] activities.”⁵⁹

Weinstein’s judicial career began in 1967.⁶⁰ Perhaps the most important case of Weinstein’s first decade on the bench involved the desegregation of a junior high school on Coney Island.⁶¹ In that case, Weinstein, who appointed a special master to assist him, flirted with issuing an order attacking the totality of the problem of desegregation on Coney Island—involving remedies dealing with education, housing, police, parks, and transportation—but ultimately ended up with a modest resolution: the creation of a magnet school.⁶² In the long run, this remedy proved quite successful. The U.S. Court of Appeals for the Second Circuit affirmed, but not without some sharp criticism.⁶³

Not the least of Judge Weinstein’s activities during his first decade on the bench was his electoral candidacy for the Democratic nomination for Chief Judge of the New York Court of Appeals in 1973.⁶⁴ He was the first federal judge to run for that office since Learned Hand attempted it sixty years before. Weinstein was barely defeated.⁶⁵

During Weinstein’s second decade on the bench (1977–87), his First Amendment decisions “marked him as a votary of free speech.”⁶⁶ “His criminal docket yielded prominent mob defendants and several [important] prosecutions for political corruption.”⁶⁷ Once again, there

55. *Id.* at 72.

56. *Id.*

57. *Id.* at 91.

58. *Id.* at 89.

59. *Id.*

60. *Judge Jack B. Weinstein*, U.S. Dist. Ct. E. Dist. N.Y., <https://www.nyed.uscourts.gov/content/judge-jack-b-weinstein> (last visited Dec. 17, 2014).

61. *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 756 (E.D.N.Y.), *aff’d*, 487 F.2d 223 (2d Cir. 1974).

62. *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 769 (E.D.N.Y. 1974). *See also* MORRIS, *supra* note 15, at 150–51.

63. *Hart v. Cmty. Sch. Bd.*, 512 F.2d 37, 41, 56 (2d Cir. 1975) (“[The community school board] succeeded initially in getting the District Judge to convert a narrow issue involving a single junior high school with a capacity of about 1,000 students into what could only become an issue so broad as to defy judicial competence, a matter which would require . . . action by three governments, federal, state and city, for a solution.”).

64. MORRIS, *supra* note 15, at 155–60.

65. *Id.* at 155.

66. *Id.* at 161.

67. *Id.*

were important cases affecting the New York City public schools. His most important litigation by far in these years was the Agent Orange class action discussed later in this article.⁶⁸

During this period, Weinstein, bypassed for appointment to the U.S. Court of Appeals for the Second Circuit, served as Chief Judge of the Eastern District from 1980 to 1988.⁶⁹ He employed that position to assist poor litigants, help prevent a split of the Eastern District, and was a gadfly, opposing changes in judicial administration proposed by Chief Justice Warren Burger and Second Circuit Chief Judge Irving R. Kaufman.⁷⁰

Probably the most notable case of Weinstein's third decade on the bench (1987–97) involved the controversy over the Shoreham Nuclear Reactor on Long Island. Presiding over what had become a bitter public dispute over the safety of a nuclear reactor, Weinstein was able to settle the case (and close the reactor) with the assistance of Kenneth Feinberg as mediator and the cooperation of New York State Governor Mario Cuomo.⁷¹ During this period, Weinstein also handled a number of high-profile criminal cases including those involving the Gambino and Colombo crime families and the Colombian drug cartel.⁷²

From the early 1990s to the present, Weinstein has been an energetic and visible critic of the Federal Sentencing Guidelines. Though far from alone, he “marshaled his craft, reputation, energy, and stubbornness” in an attempt to thwart a system he passionately believed was “lacking in humanity.”⁷³

During his fourth decade on the bench (1997–2007), Weinstein handled several important mass tort cases also discussed later in this article. Perhaps the most remarkable of the rest of his judicial efforts during this period was his involvement in clearing the backlog of *habeas corpus* petitions from the dockets of most of his colleagues.⁷⁴ While continuing to handle his own docket, Weinstein volunteered at the age of eighty-two to dispose of five hundred petitions.⁷⁵ He did it, he explained, because he thought it “unfair to make prisoners wait for years.”⁷⁶ Disposing of the cases in about nine months, Weinstein granted the petition in nine cases, dismissed it in four hundred and forty-one,

68. See *infra* Part III.B. See also MORRIS, *supra* note 15, at 87.

69. MORRIS, *supra* note 15, at 87, 161.

70. *Id.* at 204–05.

71. See, e.g., *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1428 (1989).

72. MORRIS, *supra* note 15, at 212.

73. See *id.* at 243, 244–79.

74. *Id.* at 281.

75. *Id.*

76. See William Glaberson, *Unbelievable Stories (Just Ask the Judge): A Last Hearing for 495 Lost Causes, Each One 'a Movie of the Week'*, N.Y. TIMES, July 30, 2003, at B1, available at

closed forty-four administratively, reassigned three, and consolidated three with earlier petitions.⁷⁷

Perhaps the most important case of this period that did not involve a mass tort or a petition for *habeas* involved New York City's Administration for Children's Services' policy of automatically taking children away from mothers battered by their husbands and boyfriends immediately after notice of the battering.⁷⁸ In *Nicholson v. Williams*,⁷⁹ Weinstein "made use of experts from all over the country, . . . insisted that persons involved [with the] administration of the policy come to court, and . . . [wrote an] extensive opinion laying out the problems."⁸⁰ As a result of the litigation, the City completely reorganized the way it handled such matters.⁸¹

With his fifth decade on the bench more than half over, the 93-year-old judge continues to carry a full load of cases, to consistently write opinions more than one hundred pages long, and to make the front pages of *The New York Law Journal* and *The New York Times*. He continues to be absorbed by the cases before him with a particular concern for class actions and otherwise aggregated cases, as well as cases in which mandatory minimum sentences are required. In one child pornography case in which the jury brought in a guilty verdict, Weinstein held that because he had not informed the jury of the five-year minimum sentence required on conviction for receiving child pornography, *he* had committed a constitutional error.⁸² The court of appeals vacated Weinstein's reversal of himself and remanded, but the battle had only just been joined.⁸³ That case produced a front-page story in *The New York Times*.⁸⁴ After reversal in another case in which the defendant was initially sentenced to thirty months (half the mandatory minimum) plus five years of supervised release for the crime of distributing child pornography, Weinstein replied with a memorandum and order the very

<http://www.nytimes.com/2003/07/30/nyregion/unbelievable-stories-just-ask-judge-last-hearing-for-495-lost-causes-each-one.html>.

77. See *In re Habeas Corpus Cases*, 216 F.R.D. 45 (E.D.N.Y. 2003); *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303 (E.D.N.Y. 2003).

78. MORRIS, *supra* note 15, at 281–82.

79. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

80. MORRIS, *supra* note 15, at 299.

81. *Nicholson*, 203 F. Supp. at 257. See also *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004), *aff'd*, 344 F.3d 154 (2d Cir. 2003); *Nicholson v. Williams*, No. 00-cv-5155, 2004 WL 1304055 (E.D.N.Y. June 14, 2004), *modifying* 181 F. Supp. 2d 182 (E.D.N.Y. 2002).

82. MORRIS, *supra* note 15, at 279.

83. *Id.*

84. See, e.g., *United States v. Polizzi*, 549 F. Supp. 2d 308, 448 (E.D.N.Y. 2008), *rev'd*, *United States v. Polouizzi* [sic], 564 F.3d 142 (2d Cir. 2009). See also A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 22, 2010, at A1.

same day that he was reversed by the Second Circuit.⁸⁵

While Jack Weinstein's brilliance is virtually universally acknowledged, he has been criticized for departing from the detachment required of a judge, for making too much law, and for employing too many innovations.⁸⁶ If that be so, it should be understood that Weinstein is no knee-jerk activist. The breadth of his knowledge, the eloquence of his prose, the thoroughness of his work, and his capacity to shape—and sometimes transform—cases by putting ingenious strategies into the minds of the attorneys before him sets him apart from other judges. Thurgood Marshall, not known for flowery tributes, wrote to Weinstein, “You have, more than anyone I know of, contributed your share to the work of the federal judiciary.”⁸⁷ Professor Alan Dershowitz called Weinstein, “the most important Federal judge in the last quarter century.”⁸⁸

A. *Weinstein the Judicial Entrepreneur*

Two major characteristics of Judge Weinstein push him in the entrepreneurial direction. First, he has *never* been *just* a judge. For most of his time on the bench, he has also been a full-time professor.⁸⁹ He is, by nature, an inveterate and incorrigible educator. Throughout his career, he has had something to say to a number of different audiences—fellow judges at all levels, law professors, U.S. prosecutors, defense attorneys, the class action bar, public interest lawyers, and, of course, law students. In his oral history, Weinstein commented, “I’ve never ignored an opportunity of a public forum to make a little substantive statement.”⁹⁰ The treatise, the casebooks, the books on rule-making and mass torts, the super-abundant number of law review articles, the hundreds of speeches (many going through a number of drafts), law school teaching, and, of course, the opinions themselves bear witness to someone who simply must educate, teach, illuminate, and advocate.

One of Weinstein's most illustrative educational efforts has been the treatise-like opinions he issues that illuminate areas of law for his

85. *United States v. C.R.*, 296 F.R.D. 131, 132 (E.D.N.Y. 2013).

86. MORRIS, *supra* note 15, at 2.

87. Joseph Goldstein, *New View of Brown v. Board Unlikely to Sway One Judge*, N.Y. SUN (July 9, 2007), <http://www.nysun.com/new-york/new-view-of-brown-v-board-unlikely-to-sway-one/58071>.

88. William Glaberson, *A Judge Shows Who's Boss*, N.Y. TIMES, July 20, 1997, at 21.

89. Professor Stephen B. Burbank has argued that Judge Weinstein's conception of the judicial role has been greatly influenced by his career as a law professor, pointing to Weinstein's desire for intellectual autonomy and lack of desire for intellectual accountability. Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997).

90. MORRIS, *supra* note 15, at 108.

fellow-judges, magistrate judges, and practitioners. Among the examples are opinions on calculating damages for pain and suffering,⁹¹ admitting government reports on police misconduct in civil rights cases,⁹² admitting evidence on radioimmunoassay of hair analysis,⁹³ and recommending procedures to employ in dealing with *habeas corpus* petitions.⁹⁴

Second, Weinstein's judicial career has been marked by innovation in methods of managing cases, techniques employed in the courtroom, application of procedural rules, and development of the substantive law.⁹⁵ He has made heavy use of magistrates and special masters, audacious use of equity powers, and flexible use of procedure.⁹⁶ He has made considerable use of advisory juries,⁹⁷ tried civil rights actions by prisoners in jails,⁹⁸ employed the use of restitution as part of a criminal sentence,⁹⁹ videotaped sentencing hearings to permit court of appeals judges to actually see the prisoner and his family,¹⁰⁰ and was one of the first American judges to employ international human rights norms in deportation cases.¹⁰¹

Weinstein, thus, has all of the qualifications for judicial entrepreneurship mentioned by McIntosh and Cates save one—sitting on an appellate court.¹⁰² Throughout his career he has been alert to the opportunity for innovation. His grand vision of the law came from his teaching and scholarship. His self-confidence and willingness to take risks, including reversal, seem to have been generated by his personality. Certainly, since the beginning of his judicial career, he has been fiercely independent. When describing how he felt at the beginning of his career, Weinstein said: "I was the Article III judge. . . . An independent branch of the government. . . . I didn't care what anybody else was doing or what the Court of Appeals was doing. I'd listen to them, but I had an

91. *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640, 662–64 (E.D.N.Y. 1997).

92. *King v. Conde*, 121 F.R.D. 180, 186–98 (E.D.N.Y. 1988).

93. *United States v. Medina*, 749 F. Supp. 59, 60–62 (E.D.N.Y. 1990).

94. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303, 313–17 (reporting on 500 *habeas* cases and proposing procedures for the handling of future *habeas* cases).

95. MORRIS, *supra* note 15, at 105.

96. *Id.*

97. *Id.* at 106; *see also* Jack B. Weinstein & Jeffrey B. Morris, Oral History of Jack B. Weinstein 442 (1993-) (unpublished manuscript) (on file with author) [hereinafter Weinstein Oral History].

98. *Id.* (manuscript at 12–13).

99. *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 961–62 (2001) [hereinafter *Compensation for Mass Private Delicts*].

100. MORRIS, *supra* note 15, at 277 (citing *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004)).

101. *Id.* at 302.

102. MCINTOSH & CATES, *supra* note 19, at 9–12.

enormous sense of independence.”¹⁰³

Throughout his career, Weinstein has demonstrated his independence in a number of ways. He refuses to wear robes during sentencing.¹⁰⁴ He handles motions around a table.¹⁰⁵ He has publicly criticized proposals put forward by “judicial superiors,” such as Chief Justice Warren Burger and Chief Judge of the Court of Appeals for the Second Circuit Irving Kaufman, that imposed new standards on trial and appellate advocates.¹⁰⁶ Aware of the risks to judges of granting bail to unpopular defendants, he has continued to do so even though the court of appeals reverses.¹⁰⁷ Weinstein presided over a celebrated trial of “two corrupt New York City policemen who had been on the payroll of the Mafia”—even committing murder.¹⁰⁸ After he sentenced each to life imprisonment, Weinstein overturned their convictions on statute of limitations grounds.¹⁰⁹ “He explained that if he had not acted on the statute of limitations problem”¹¹⁰ and the appeal had just been of the conviction, the court of appeals

would just affirm. They wouldn’t take the heat. But if I take the heat I think it’s more likely they will affirm my dismissal because then they can blame me. But I think that is appropriate. I don’t care. If you’re going to claim the Rule of Law then we have the Rule of Law.¹¹¹

Thus, criticism or skepticism of his work from other judges or from attorneys does not deter Weinstein.

With a rapid and eloquent pen, more accessibility to the press than most judges, and a willingness to give speeches, Weinstein has throughout his judicial career had the ability to attract attention beyond his district for his ideas, decisions, and activities, thus ultimately developing what may fairly be called a national constituency.¹¹²

Three factors *might* have limited Weinstein’s “career” as a judicial entrepreneur. First were the pressures of his docket. The life of a district judge is hurried and the flow of cases is unending. Much of what a district judge does is manage cases, sentence defendants, author findings

103. Weinstein Oral History, *supra* note 97 (manuscript at 20).

104. MORRIS, *supra* note 15, at 101.

105. *Id.*

106. *Id.* at 102.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Weinstein Oral History, *supra* note 97 (manuscript at 1839). On Weinstein’s independence, see MORRIS, *supra* note 15, at 102. Incidentally, the court of appeals did *not* affirm his dismissal of the case. *United States v. Eppolito*, 436 F. Supp. 2d 532, 571 (E.D.N.Y. 2006), *rev’d*, 543 F.3d 25 (2d Cir. 2008). The two convicted defendants remain in jail.

112. See MORRIS, *supra* note 15, at 108.

of fact, and preside over trials. Ordinarily, that leaves little time for deep thought or the writing of anything other than opinions. Weinstein overcame this factor because of his quick and absorptive mind, ability to sustain extraordinarily hard work, and the fact that he requires less sleep than most human beings.¹¹³

The second possible factor is the problem district judges have of not hearing enough cases in their area of potential entrepreneurship to develop a case line. Further, district judges ordinarily have no precedential authority over any other Article III court. The Supreme Court Justice writes for the nation. The court of appeals judge ordinarily has authority over district courts in their region (the Court of Appeals for the Federal Circuit is a special case). The district judge has authority only in his own courtroom. However, the class actions before Weinstein made it possible to develop a line of cases that gave national visibility to his work.¹¹⁴

One last factor which might have made entrepreneurial activity unlikely for Weinstein in particular was that he has never limited himself to “selling” a single idea. With his strong sense of where the law should be headed and his engagement with many ideas and innovations, it might not have been possible for him to focus enough of an effort in a single area of law to effectively sell his views to a variety of audiences. The development of Weinstein’s interest in class actions would give him the necessary focus.

B. *Jack Weinstein and Class Actions*

Judge Weinstein has been a prominent booster—a judicial entrepreneur even—of using class actions to deal with mass torts. Weinstein strongly believes that class actions generally make it feasible to bring justice to the individual in a flexible, efficient, and politically sensitive way.¹¹⁵ His *Agent Orange* litigation¹¹⁶ spurred the use of class actions for mass torts. In the thirty years since that litigation settled, Weinstein has been heavily involved in other mass tort class actions. He has written dozens of published opinions and law review articles, as well as a book on a range of problems from the definition of classes and subclasses to matters such as jurisdiction, attorneys’ fees, choice of law, excessive jury awards, lawyers’ ethics, and how to improve scientific testimony.¹¹⁷

113. *Id.* at 55.

114. *See infra* Part III.A.

115. Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299 (1973).

116. *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983).

117. Burbank, *supra* note 89, at 1983.

Professor Linda Mullenix of the University of Texas School of Law, a respectful yet stern critic of Weinstein, has stated that there has probably been “no judge more identified with the aggregate litigation movement of the late twentieth century” than Weinstein.¹¹⁸ Weinstein, she says, has earned the title “King of Mass Torts” and has, in turn, spawned generations of acolytes throughout the legal community.¹¹⁹ Yet, in spite of his support for the aggregation of mass tort cases, Weinstein has repeatedly emphasized the importance of individual justice.¹²⁰

One reason Weinstein has been so effective in the realm of mass tort class actions is his ability to find connections between apparently dissimilar legal issues when dealing with multi-level legal problems. Weinstein sees opportunities in the cases that come before him that others do not see and has the capacity to devise novel remedies.¹²¹

Weinstein’s earliest experience with class actions occurred during his practice shortly after law school graduation.¹²² When he was exposed to shareholders’ derivative suits, he saw that the class action was proving useful in treating the rights of a great many dispersed small claims holders.¹²³ He came to realize that “a lot of poor people” that he was dealing with “were not going to get any place . . . unless they were able to assemble their forces through class actions.”¹²⁴

Only months before Weinstein began his judicial career in 1967, the Federal Rules of Civil Procedure were amended to get around the inflexibility of their joinder provisions.¹²⁵ A year later, Congress enacted legislation dealing with multidistrict litigation that “liberally provided for the transfer of cases within the federal system to [a single] venue for coordinated pre-trial proceedings.”¹²⁶ These changes “made possible modern federal complex litigation.”¹²⁷

Contemporaneously, in *Dolgow v. Anderson*,¹²⁸ Weinstein took the position that class actions were important. Several years later in his first

118. Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. (forthcoming 2014) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426829.

119. *Id.* at 2.

120. *Id.* at 19.

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

122. MORRIS, *supra* note 15, at 127.

123. *Id.*

124. *Id.*

125. *Id.* at 74.

126. Mullenix, *supra* note 118, at 7.

127. *Id.* at 5–7.

128. 43 F.R.D. 472, 482 (1968), *rev'd*, 438 F.2d 825 (2d Cir. 1970).

mass tort case, he dealt with litigation growing out of eighteen separate accidents in which children were killed or maimed by blasting caps.¹²⁹ The effect of the explosion made it impossible to determine which corporation had manufactured a particular blasting cap.¹³⁰ Since the national pattern of production and distribution of the blasting caps was known and the companies were bound together by their decision to oppose legislation requiring markings to warn of the danger, Weinstein held all the wrongdoers jointly liable for creating an unreasonable risk of harm.¹³¹ Reflecting on the blasting cap cases, Weinstein said that he had been thinking about the problem of dealing with indeterminate defendants in defective product liability cases for some time, and the blasting cap cases were the catalyst to reach “fairly firm conclusions about it.”¹³² The new theory Weinstein used for expanding defective product liability in indeterminate defendant cases to cover an entire industry would exercise a strong influence on the way the high courts of California and New York would deal with the problem.¹³³

During the 1970s, Weinstein gained experience in class actions by dealing with securities and labor matters, as well as in cases involving schools and prisons.¹³⁴ However, the first time a class action was used in a mass tort case occurred in the Eastern District of Kentucky, where a fire in a supper club killed 159 people and injured another one hundred.¹³⁵ But the litigation which crystallized attention in the legal world on the potential of the class action for mass torts was the *Agent Orange* litigation over which Weinstein presided.¹³⁶

The *Agent Orange* litigation was based upon the damage that may have been caused by the toxic substance dioxin contained in the herbicide Agent Orange, which the U.S. armed forces used in Vietnam to defoliate jungles and mangroves.¹³⁷ Between 600,000 and 2.4 million veterans were believed to have had some exposure to the herbicide.¹³⁸ During the 1970s, veterans and their families began to attribute a variety

129. See *Chance v. E.I. Du Pont de Nemours & Co.*, 371 F. Supp. 439, 440 (E.D.N.Y. 1974); *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 358 (E.D.N.Y. 1972).

130. *Hall*, 345 F. Supp. at 358.

131. *Id.* at 365–66.

132. Weinstein Oral History, *supra* note 97 (manuscript at 256).

133. See Weinstein Oral History, *supra* note 97 (manuscript at 146); see also Robert L. Rabin, *Judge Weinstein and the World of Tort: Institutional and Historical Perspectives*, 64 DEPAUL L. REV. (forthcoming 2015) (manuscript at 6–9).

134. Mullenix, *supra* note 118, at 8 n.41.

135. See *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 44 (E.D. Ky. 1977).

136. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987). See also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 111–42 (1986).

137. *In re “Agent Orange,”* 597 F. Supp. at 775–77.

138. *Id.* at 756.

of illnesses and reproductive problems to exposure to the herbicide.¹³⁹

As a result of multidistrict procedures, the *Agent Orange* litigation became the largest mass tort case up to that time. Already, six hundred lawsuits had been filed by 15,000 individuals.¹⁴⁰ However, the *Agent Orange* litigation was not a typical mass accident case in which many persons are simultaneously harmed in the same way by the same cause. In *Agent Orange*, there had been multiple occurrences of various related harms over a considerable amount of time and space. The plaintiff's class was indeterminate because, in the future, other individuals might become aware that they suffered from conditions that could be attributed to Agent Orange. Weinstein, however, was not only confronted with the dilemma of an indeterminate plaintiff class. The defendants, too, were indeterminate because the armed forces had mixed together the defoliants produced by different companies before they were used.¹⁴¹

The *Agent Orange* cases were consolidated for pretrial purposes to an able colleague of Weinstein, Judge George Pratt.¹⁴² Eventually the case was reassigned to Weinstein as a result of Pratt's elevation to the Court of Appeals for the Second Circuit.¹⁴³ Weinstein rapidly mastered the essentials of the case, developing a view of the litigation as being not just a product liability case multiplied many times over, but also a major social problem needing settlement.¹⁴⁴ He aimed for a solution whereby the veterans would "not be left without a sense of recourse," but the defendants would be charged only for the harm they had caused.¹⁴⁵ Some scholars argue that this made the litigation more a problem of politics than of law.¹⁴⁶

Judge Weinstein took a comprehensive role in managing and structuring the *Agent Orange* litigation. He certified the case as a class action, making possible a classwide determination of the total harm to the entire body of plaintiffs.¹⁴⁷ He also saw that, under the enterprise liability theory he had set forth in the blasting cap cases,¹⁴⁸ each corporation could be held liable for a pro rata share of the plaintiffs' injuries.

Weinstein helped settle the *Agent Orange* litigation by emphasizing

139. *Id.* at 766–67.

140. *Id.* at 749–50.

141. *Id.* at 748.

142. MORRIS, *supra* note 15, at 325.

143. *Id.* at 326.

144. *Id.*

145. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 550 (1994) [hereinafter *Ethical Dilemmas*].

146. David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2085 (1997).

147. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

148. *See supra* notes 129–33 and accompanying text.

to each set of attorneys the weaknesses and risks in their own cases and by appointing a magistrate, Shira Scheindlin (now an Article III judge), to telescope three years of discovery into three months.¹⁴⁹ Each side, therefore, was facing an imminent trial that neither was ready for. Weinstein was unable to get around the fact that the United States government was immune from suit, but he kept the government formally in the case, hoping that it would realize its moral liability and contribute to devising a more comprehensive political solution than could be achieved through litigation.¹⁵⁰

Weinstein made one major step towards resolving the case by determining the appropriate law to apply. Though he was apparently bound by the court of appeals' reversal of then-District Judge Pratt's decision to apply one single law—federal common law—to the case,¹⁵¹ Weinstein hit upon an ingenious solution. He chose to apply what he called a “national consensus” standard as the appropriate governing law.¹⁵² Weinstein did everything he could to avoid that issue coming before the court of appeals before the case settled. He denied certification of the interlocutory appeal from his order certifying a class action and avoided writing formal opinions, instead giving many un-appealable signals from the bench through “tentative” rulings,¹⁵³ which revealed his preliminary thinking to lawyers.¹⁵³ Essentially, he was working within the interstices of the final judgment rule.¹⁵⁴

Weinstein appointed three special masters to iron out the details of the settlement, of which the principal terms “seem to have been quite literally dictated by Weinstein” himself.¹⁵⁵ Weinstein insisted on \$180 million dollars, which was \$20 million less than what the attorneys for both sides would have actually agreed upon.¹⁵⁶ After the settlement, Weinstein held fairness hearings for six days and nights.¹⁵⁷ During these hearings, he heard the tragic stories of hundreds of victims.¹⁵⁸ At the end of that process, he issued his “fairness” opinion upholding the

149. MORRIS, *supra* note 15, at 327–28.

150. *In re* “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1221, 1222 (E.D.N.Y. 1985); *In re* “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 1242, 1244 (E.D.N.Y. 1984).

151. *In re* “Agent Orange” Prod. Liab. Litig., 635 F.2d 987, 995 (2d Cir. 1980) (distinguishing *Owens v. Haas*, 601 F.2d 1241 (2d Cir. 1979)).

152. MORRIS, *supra* note 15, at 330.

153. Minow, *supra* note 121, at 2030.

154. *In re* “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984). *See also* SCHUCK, *supra* note 136, at 118, 130–31; Burbank, *supra* note 89, at 1988–89; Burt Neuborne, *Innovation in the Interstices of the Final Judgment Rule: A Demurrer to Professor Burbank*, 97 COLUM. L. REV. 2091, 2092 (1997).

155. MORRIS, *supra* note 15, at 331.

156. *Id.*

157. *Id.*

158. *Id.*

settlement.¹⁵⁹

Weinstein, in *Agent Orange*, laid out a series of rulings and opinions which would prove enormously influential throughout the nation when judges were dealing with aggregated cases in such areas as class certification, choice of law, attorneys' fees, and the appointment of special masters.

After a prolonged delay, a panel of the Court of Appeals affirmed most of Weinstein's appealable rulings in *Agent Orange*, but he was partially reversed on lawyers' fees.¹⁶⁰ Additionally, while he had not intended to oversee the work of the foundation created to distribute the 70 million dollars in the settlement that had been awarded to assist members of the veterans' families, the court of appeals told him to do so.¹⁶¹

Ultimately, the United States government did aid the veterans. In 1991, Congress passed legislation providing payments for diseases "presumptively" caused by Agent Orange.¹⁶² Weinstein put the class action in this perspective:

We got out a little money in order to permit the government ultimately to step in and do what the government had to do that was right [T]he court order was just a stop gap to permit something good to happen on the political field.¹⁶³

If Agent Orange was "[p]erhaps the most emblematic, seminal mass tort litigation"¹⁶⁴ of the 1980s, it was not alone. There was, for example, litigation over the Dalkon Shield in the Northern District of California and the Eastern District of Virginia, and litigation involving Bendectin in the Southern District of Ohio. A number of judges began to believe that, in the face legislative inaction, the centralization of decisions and aggregation of claims were preferred methods of case management in mass tort cases. If handled individually, they thought, the sheer volume of cases would deny individuals their day in court.¹⁶⁵

Such support would last into the 1990s, but then concerns arose as commentators began questioning whether the rationales supporting class certification subverted rights of litigant autonomy, which was generally

159. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 857–58 (E.D.N.Y. 1984). See MORRIS, *supra* note 15, at 332–33. *But see* Luban, *supra* note 146, at 2081 (criticizing the *Agent Orange* opinion).

160. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 226 (2d Cir. 1987).

161. *In re "Agent Orange,"* 818 F.2d at 186; MORRIS, *supra* note 15, at 335.

162. MORRIS, *supra* note 15, at 336.

163. *80th Birthday Roundtable*, *supra* note 28, at 225.

164. Mullenix, *supra* note 118, at 10.

165. *But see id.* at 11.

described as the right to manage one's litigation, to have the opportunity to develop the litigation, and to appear and give testimony before a jury.¹⁶⁶ Rising doubts began to appear in appellate decisions. One of the particular concerns involved the enormous transaction costs of such class actions.¹⁶⁷

In the meantime, Judge Weinstein was dealing with other mass tort litigations. While he would make other important contributions, never again would he achieve a global resolution. Perhaps the most significant defeat occurred in the area of asbestos litigation where tens of thousands of new cases every year were plaguing the federal courts,¹⁶⁸ and the Multidistrict Litigation Panel was continuing to reject consolidation.¹⁶⁹ In 1990, Weinstein joined with ten other judges in an ill-fated attempt to forge a grand resolution of all asbestos claims throughout the nation.¹⁷⁰ The effort failed, although it may well have stimulated the Multidistrict Litigation Panel to assign all the cases to Judge Charles Weiner of the Eastern District of Pennsylvania, who closed out 78,000 lawsuits, but also could never achieve a global resolution.¹⁷¹

Weinstein's major contribution to the asbestos problem was to order a complete overhaul of the Johns Manville Trust ("Trust") and to settle or try several thousand asbestos claims from workers exposed to asbestos in the Brooklyn Navy Yard.¹⁷² He would also make two unsuccessful efforts to save from bankruptcy two smaller companies that had manufactured asbestos by way of class action settlements.¹⁷³

"The Johns Manville Corporation, the largest manufacturer of asbestos, overwhelmed by asbestos claims, [had] filed for bankruptcy in 1982."¹⁷⁴ The result of the bankruptcy was the creation of the Manville Trust, funded by a majority of the company's stock.¹⁷⁵ The Trust came to own eighty percent of the working company's stock.¹⁷⁶ However, the behavior of the Trust's first trustees proved to be profligate.¹⁷⁷ Perhaps as much as two-thirds of the trust's funds were going to the plaintiffs'

166. *Id.* at 12; *see generally In re Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).

167. *See Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 651 (E.D. Tex. 1990).

168. MORRIS, *supra* note 15, at 342.

169. *Id.* at 345.

170. *Id.*

171. *Judge Charles Weiner: Record Matched by Few*, THIRD BRANCH (July 2003), http://www.uscourts.gov/news/thethirdbranch/03-07-01/judge_charles_weiner_record_matched_by_few.aspx. *See also* MORRIS, *supra* note 15, at 345–46.

172. MORRIS, *supra* note 15, at 344, 346–47.

173. *Id.* at 348.

174. *Id.* at 342.

175. *Id.* at 343.

176. *Id.*

177. *Id.*

lawyers and to the expenses of running the trust.¹⁷⁸ In 1990, when it became Weinstein's duty for the first time to attend to the running of the Trust, he found that it had spent 900 million dollars to settle some 22,000 claims at an average of \$40,000 per claimant.¹⁷⁹ However, some two dozen attorneys may well have received as much as 200 million dollars for their work.¹⁸⁰

Weinstein wielded extraordinary equitable powers when he dealt with the Trust.¹⁸¹ He issued an injunction barring anyone from introducing evidence in *any* court case involving other asbestos defendants that might hold the Manville Trust jointly liable or in any way responsible.¹⁸² On July 9, 1990, Weinstein, sitting jointly with New York State Supreme Court Justice Helen Freedman, ordered the complete overhaul of the Trust and replaced the trustees.¹⁸³ Staking out broad authority over all problems arising out of the Manville reorganization, Weinstein appeared to have achieved a new class action settlement: this was the first instance a major corporation's bankruptcy plan was rewritten years after it had been approved.¹⁸⁴ In June 1991, Weinstein approved the revision of the trust in a 503-page opinion.¹⁸⁵ A year and a half later, the Court of Appeals for the Second Circuit completely overturned the restructuring of the first Manville Trust.¹⁸⁶ In 1994, a settlement was ultimately reached.¹⁸⁷ The reconstructed trust would become a paradigm for compensation of asbestos victims.

The cases coming from the Brooklyn Navy Yard were handled successfully. In these cases, Weinstein had authority as judge of *both* the Eastern and Southern Districts of New York, and he again worked in tandem with Justice Helen Freedman of the New York State Supreme Court.¹⁸⁸ This may have been the first time a state court and a federal

178. *Id.*

179. *Id.*

180. *Id.*

181. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 978–80 (E.D.N.Y. 1991).

182. *Id.*; Weinstein Oral History, *supra* note 97 (manuscript at 1019–20). Other manufacturers could then file a claim with the Manville Trust. The settlement was to be reviewed for fairness by the general counsel of the AFL–CIO. See Sharon Walsh, *Overhaul of Manville Fund Set; Settlement Proposed for Asbestos Victims*, WASH. POST, Nov. 20, 1990; Sharon Walsh, *Asbestos the Faces Behind the Case Numbers; More Than 8,000 Plaintiffs in Area Wait Out the Protracted Legal Process*, WASH. POST, Nov. 29, 1990, at B1.

183. MORRIS, *supra* note 15, at 344.

184. *Id.*

185. *In re Joint E. & S. Asbestos Litig.*, 129 B.R. 710.

186. *In re Joint E. & S. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992).

187. Edward A. Adams, *Parties Reach Settlement in Manville Trust Cases*, N.Y. L.J., July 28, 1994, at 1.

188. MORRIS, *supra* note 15, at 343–44. Some of the cases were also handled by Judges Charles P. Sifton of the Eastern District and Robert W. Sweet of the Southern District.

court jointly exercised federal and state power.¹⁸⁹ The two “held hearings together, issued orders together, and . . . intend[ed] to try cases together, though ultimately that did not prove necessary.”¹⁹⁰ By March 1992, the courts in New York City had disposed of all their asbestos cases.¹⁹¹

To spare the Eagle-Picher company from bankruptcy, “Weinstein issued a series of near path-breaking opinions on the power of the [district] court to stay litigation in state and federal courts.”¹⁹² This decision provided legal authority in the Manville Trust case. Weinstein also approved a class action settlement covering 175,000 claimants, but, at the last minute, the deal collapsed, and Eagle-Picher filed for bankruptcy.¹⁹³ Weinstein was also unsuccessful in attempting to use a settlement class action to save the Keene Corporation. The court of appeals, now showing its preference for disposition of such claims through bankruptcy rather than class actions, vacated and dismissed the action.¹⁹⁴

Additionally, Weinstein made three significant contributions to class actions involving injuries caused by DES, a synthetic estrogen, which as the years of its use wore on would be connected to uterine deformities, ectopic pregnancies, and defects in the female children of women who had taken the drug.¹⁹⁵ Two of Weinstein’s decisions would add to the pressures on the defendant companies to settle.

The first decision dealt with jurisdiction. Weinstein wrote a lengthy opinion that clearly departed from U.S. Supreme Court doctrine. At issue in the case was jurisdiction over an out-of-state company that had virtually no contacts with New York.¹⁹⁶ Weinstein, however, held that New York could exercise personal jurisdiction over a nonresident manufacturer of DES without a showing that a manufacturer had minimum contacts or any territorial connection with New York.¹⁹⁷

Weinstein’s intimate familiarity with questions of jurisdiction could be dated back to his work on the New York Civil Practice Act and

189. *Id.*

190. *Id.* Weinstein tried sixty-four Navy Yard cases, including fifty in one sitting. See Kenneth P. Nolan, *Weinstein on the Courts*, 18 *LITIG.*, no. 3, Spring 1992, at 24, 25.

191. MORRIS, *supra* note 15, at 347.

192. *Id.* at 348.

193. *See id.*

194. *In re Joint E. & S. Dists. Asbestos Litig.*, No. 93-cv-02129, 1993 WL 604077, at *1 (E.D.N.Y. & S.D.N.Y. July 1, 1993), *vacated*, 14 F.3d 726, 727 (2d Cir. 1993).

195. MORRIS, *supra* note 15, at 349.

196. *Id.*

197. *In re DES Cases*, 789 F. Supp. 552, 591 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

Rules,¹⁹⁸ or perhaps even earlier to his work as a professor of civil procedure.¹⁹⁹ It continued to be an area to which he gave much thought. Believing that the area of the law was “all fouled up,” he not only wanted to modernize it, but to replace it with a politico-economic philosophy.²⁰⁰ Weinstein’s theoretical (as well as practical) view was that the “United States constitutes a common economic pond that knows no state boundaries. A substantial interjection of products at any point of the national market has ripple effects in all parts of the market.”²⁰¹ Weinstein was attempting to create a single forum in which all the significant players could be united.²⁰² He must have known that such a reform would benefit plaintiffs, but it is not clear that was a goal of his. He certainly must have been aware that, although the court of appeals would likely reverse, the case before him would probably settle. In that event, Weinstein’s 103-page treatise-like opinion would be out there for use in other mass tort cases.²⁰³ The case did settle. The opinion received praise, and he would return to it in the light cigarette litigation.²⁰⁴ No one, however, rushed to adopt it, and Weinstein was later criticized for writing the opinion, knowing that it was unreviewable by the court of appeals.²⁰⁵

Weinstein’s second important opinion in the DES case dealt with the statute of limitations.²⁰⁶ The New York statute of limitations for personal injury would begin to run from the time that the plaintiff discovered her “injury.”²⁰⁷ But, when would that be for the daughters of DES mothers? Did it date “from the time they first found out that their mothers had taken the drug twenty years before?”²⁰⁸ At that time, the daughters could hardly have known that their potential infertility problems and reproductive track abnormalities might be the result of their mothers’ having taken DES.²⁰⁹ “Weinstein held that awareness of the medical problem alone did not trigger the statute of limitations”; rather, it was only “triggered when the daughters had a good reason to

198. See Oscar G. Chase, *The CPLR at Fifty: Its Past, Present, and Future*, 16 LEG. & PUB. POL’Y 643, 647–53 (2013).

199. Morris, *supra* note 15, at 46.

200. Weinstein Oral History, *supra* note 97 (manuscript at 1128–30).

201. *In re DES Cases*, 789 F. Supp. at 576.

202. Neuborne, *supra* note 154, at 2097.

203. MORRIS, *supra* note 15, at 351.

204. *Id.* at 352; see *infra* notes 262–67 and accompanying text.

205. See Burbank, *supra* note 89, at 2004–05; Neuborne, *supra* note 154, at 2097–99.

206. *Braune v. Abbott Labs.*, 895 F. Supp. 530 (E.D.N.Y. 1995). The discussion of *Braune* draws from my prior work. See MORRIS, *supra* note 15, at 352–53.

207. *Braune*, 895 F. Supp. at 542 (citing N.Y. C.P.L.R. 214-c (McKinney 1995)); MORRIS, *supra* note 15, at 352.

208. MORRIS, *supra* note 15, at 352.

209. *Id.*

conclude that a human-made product had led to the difficulty.”²¹⁰

Weinstein’s third influential contribution to the DES litigation involved the four meetings he held in his chambers with DES plaintiffs. He held these meetings so he could hear the stories of the DES daughters and other family members.²¹¹ These conversations left a profound mark on the Judge and undoubtedly intensified his very strong view that plaintiffs in mass torts actions needed to be heard and allowed “to vent, to express their frustrations, to feel that the system really cares what happened,”²¹² and that part of a judge’s role in class actions was to expose himself or herself to the emotional and other needs of the litigants. He would even title his book on class actions *Individual Justice in Mass Tort Litigation*.²¹³

Judge Weinstein was also involved in two other aggregations of mass torts cases in the early to mid-1990s.²¹⁴ He presided over the earliest-filed repetitive stress injury (“RSI”) cases in the district.²¹⁵ These cases dealt with plaintiffs whose injuries were “arguably caused by the routine use of computers, super-market checkout scanners, and other devices.”²¹⁶ Weinstein chose to consolidate cases covering a number of different ailments for which there might have been numerous causes.²¹⁷ While the court of appeals dismissed appeals of Weinstein’s consolidation, it did grant the writ of mandamus making Weinstein’s approach to the RSI cases impossible to achieve.²¹⁸ The one significant contribution Weinstein made to the RSI cases was an opinion that was essentially a small treatise on how a court should go about determining whether a damages award is reasonable.²¹⁹ This opinion would go on to become very influential in both federal and state courts.²²⁰

In litigation involving silicone breast implants certified by Judge Sam Pointer of the Northern District of Alabama, Weinstein and Harold Baer, a judge from the Southern District of New York, were assigned to

210. *Id.*; *Braune*, 895 F. Supp. at 545.

211. MORRIS, *supra* note 15, at 352.

212. *Bilello v. Abbot Labs.*, 825 F. Supp. 475, 480 (E.D.N.Y. 1993).

213. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 135 (1995) [hereinafter *INDIVIDUAL JUSTICE*]. After the hearings, Weinstein denied a motion for reversal, writing that “[t]he fact that a judge empathizes with other human beings does not render him or her partial.” *Bilello*, 825 F. Supp. at 481.

214. This discussion draws from my prior work. See MORRIS, *supra* note 15, at 354–62.

215. *Id.* at 356.

216. *Id.*

217. *In re Repetitive Stress Injury Cases*, 142 F.R.D. 584 (E.D.N.Y. 1992), *vacated*, 11 F.3d 368 (2d Cir. 1993).

218. *Debruyne v. Nat’l Semiconductor Corp.*, 35 F.3d 640, 643 (2d Cir. 1994); *In re Repetitive Stress Injury Litig.*, 35 F.3d 637, 640 (2d Cir. 1994).

219. *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640 (E.D.N.Y. 1997).

220. MORRIS, *supra* note 15, at 357.

try the pending cases in their districts.²²¹ The two judges coordinated their cases with New York State Supreme Court Justice Joan B. Lobis.²²² The one significant contribution Weinstein and Baer made was the naming of “a team of three special masters to help identify what science the judges needed to know to [understand] the connection between breast implants and serious health problems.”²²³ They also helped select the panel of experts to advise the court.²²⁴ After Weinstein and Baer acted, Pointer, acknowledging the use of Weinstein’s procedures, employed Rule 706 of the Federal Rules of Evidence (dealing with court-appointed expert witnesses) to appoint such a panel to aid him.²²⁵ A study by the Federal Judicial Center strongly supported the value of Pointer’s experiment.²²⁶

In addition to his opinions, Weinstein also addressed the subject of mass torts in a number of law review articles.²²⁷ Weinstein’s philosophy in dealing with mass torts is paradoxical: he favors class actions as the only meaningful way for litigants with small claims to get their day in court. Yet, he achieves this by aggregating thousands of cases. Weinstein is quite aware that aggregation can be a bonanza for plaintiffs’ lawyers and that many claims that are filed as class actions are spurious. However, he believes that the judge handling a class action can limit the transaction costs.

While Weinstein’s judicial philosophy and actions as a judge have demonstrated his sympathy for the “little guy,” he is also concerned with safeguarding the economic viability of defendant corporations—not only for their own good and for the good of their victim-creditors, but also for their employees and shareholders. A corporate defendant’s pros-

221. *Id.* at 355.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. See Joseph M. Price & Ellen S. Rosenberg, *The Silicon Gel Breast Implant Controversy: The Rise of Expert Panels and the Fall of Junk Science*, 93 J. ROYAL SOC’Y MED. 31, 34 (Jan. 2000). A similar effort by Judge Robert E. Jones of the District of Oregon was also applauded. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392 (D. Or. 1996).

227. Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985); Jack B. Weinstein & Jonathan B. Weiner, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN’S L. REV. 429, 436 (1988); Jack B. Weinstein, *Modern Teaching at Brooklyn Law School—The Example of Toxic Torts*, 52 BROOK. L. REV. 329 (1986); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. REV. 1 (1988); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269 (1991); Jack B. Weinstein, *Preliminary Reflections on the Law’s Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 4 (1986); *Ethical Dilemmas*, *supra* note 145. See also Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases*, 31 HOFSTRA L. REV. 323 (2002).

perity, he firmly believes, may be a significant community asset.²²⁸

Weinstein's book on mass torts is largely about ethical issues and emphasizes the need for ethical behavior by judges, parties, lawyers, legislators, and others.²²⁹ His broad sense of ethics "orbits steadfastly around a moral sun: individual dignity and moral worth."²³⁰ In creating what have been called temporary administrative agencies made for the situation, he focuses on a critical question: "how can we use our system so we do not lose that sense of the dignity of the individual without losing efficiency?"²³¹ In class actions, the judge must be the central player. "We need," he has said, "to rethink the obligation of the judge to our society in mass torts"²³² As he told a room of judges, lawyers, and professors at the symposium honoring him on his eightieth birthday:

No matter how routine or how massive or complex the case, justice is ultimately measured by how it affects the lives of real individuals as well as institutions. If the law cannot make lives better—or at least prevent unnecessary harm—then it has failed²³³

The increasing skepticism of the use of class actions for mass torts by judges of the courts of appeals was strengthened by the first two U.S. Supreme Court decisions to deal with this area of the law. In *Amchem Products, Inc. v. Windsor*,²³⁴ an asbestos class action, the Supreme Court agreed with a Third Circuit decision that had overturned a settlement.²³⁵ A major concern in this litigation was a separate settlement approved by an overly passive judge. The Supreme Court rejected that settlement on the grounds that the settlement class was too disparate to certify for class purposes.²³⁶

Two years later, in *Ortiz v. Fibreboard Corp.*,²³⁷ the Supreme Court rejected a mandatory limited fund settlement of nationwide asbestos claims because it impaired the due process rights of class members and absent future claimants.²³⁸ In both *Amchem* and *Ortiz*, the Court telegraphed in dicta its distaste for the innovative experiments federal judges had been using to resolve mass tort cases through the class action rule and suggested that judicial authority under the Rules Enabling Act

228. See Luban, *supra* note 146, at 2073–74.

229. See generally INDIVIDUAL JUSTICE, *supra* note 213.

230. Luban, *supra* note 146, at 2070.

231. *80th Birthday Roundtable*, *supra* note 28, at 172.

232. INDIVIDUAL JUSTICE, *supra* note 213, at 9.

233. Steven M. Gold & Peter G. Eikenberry, *Focus On: Judge Weinstein*, 8 FED. B. COUNCIL NEWS, Dec. 2001, at 1, 4.

234. 521 U.S. 591 (1997).

235. *Id.* at 597, *aff'g* *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

236. Luban, *supra* note 146, at 2080; see also *Amchem Prods.*, 521 U.S. at 623–25.

237. 527 U.S. 815 (1999).

238. *Id.* at 846, 864–65.

had been transcended.²³⁹

In the meantime, Judge Weinstein was occupied for about a decade (between 1996 and 2006) with class actions dealing with the two politically volatile industries of guns and cigarettes.²⁴⁰ Neither ended with global resolution, and each was marked by a considerable number of reversals by the Court of Appeals for the Second Circuit; yet, Weinstein's opinions and several of his law review articles contributed significantly to the literature on class actions.²⁴¹

Beginning in 1995, Weinstein presided over a series of cases aimed at limiting the flow of illegal guns into New York City.²⁴² One line of cases involved private suits for damages brought by plaintiffs whose family members had been killed with guns.²⁴³ In this line of cases, it was alleged that the guns had reached New York as the result of negligence either by manufacturers in their distribution or by later sellers.²⁴⁴ The other line of cases was based upon a theory of nuisance.²⁴⁵

In *Hamilton v. Accu-Tek*, Weinstein held that there had been industry-wide activity posing a substantial risk of personal injury.²⁴⁶ In an opinion similar to that of the DES cases, he held that there was jurisdiction over the gun manufacturers and distributors even though some had not done business in New York or maintained an office there.²⁴⁷ He then upheld a special jury verdict that the manufacturers had "over-supplied [stores in] states with weak gun laws, leading to illegal sales in states with stricter gun laws."²⁴⁸ However, when it answered certified questions sent to it by the Court of Appeals for the Second Circuit, the New York State Court of Appeals refused to hold the gun industry liable under New York law.²⁴⁹ While Weinstein was willing to extend market

239. *Id.*; see also Mullenix, *supra* note 118, at 20.

240. See MORRIS, *supra* note 15, at 358–64.

241. See generally *The Future of Class Actions in Mass Tort Cases: A Roundtable Discussion*, 66 FORDHAM L. REV. 1657 (1998). See also Jack B. Weinstein, *Science, and the Challenges of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005 (1998); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001); Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165 (2001); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1 (2001); *Compensation for Mass Private Delicts*, *supra* note 99.

242. The discussion of the gun cases draws from my prior work. See MORRIS, *supra* note 15, at 358.

243. *Id.*

244. *Id.*

245. *Id.*

246. 62 F. Supp. 2d 802, 838 (E.D.N.Y. 1999).

247. *Hamilton v. Accu-Tek*, 32 F. Supp. 2d 47 (E.D.N.Y. 1998); see also MORRIS, *supra* note 15, at 359.

248. MORRIS, *supra* note 15, at 359; see also 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

249. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001).

share liability beyond the DES case, the state court would not go so far. As a result, the Second Circuit vacated Weinstein's judgment.²⁵⁰

The gun cases that were based on a theory of nuisance were brought by the NAACP and New York City. In the NAACP litigation, Weinstein relied on the public safety rationale for public nuisance, holding that "an interference with a public right occurs when the health, safety or comfort of a considerable number of persons in New York is endangered or injured, or the use by the public of a public place is hindered."²⁵¹

The NAACP case was tried over a period of six weeks.²⁵² Weinstein used an advisory jury to determine whether there was a "nuisance" and to advise on the nature of a potential injunction.²⁵³ He would, however, dismiss the case because the NAACP was unable to demonstrate that it suffered harm different in kind from that suffered by the public at large, which was a requisite of the law.²⁵⁴

While the NAACP case had been thrown out, the City of New York was a proper representative that could assert the harm suffered by the public at large. In this litigation, Weinstein rendered a number of important opinions finding "jurisdiction over small, out-of-state gun shops."²⁵⁵ As a result of the litigation, twenty of twenty-seven defendant gun shops settled with the city, "agreeing to allow their sales practices to be monitored and to attend training sessions on how to avoid practices that could lead to the sale of guns in New York."²⁵⁶

In the gun cases, in addition to his opinions on jurisdiction, market share, and nuisance, Weinstein engaged in a remarkable duel with Congress over the use of data collected by the Bureau of Alcohol, Tobacco, Firearms and Explosives.²⁵⁷ The data was needed as evidence.²⁵⁸ Pressured by the gun lobby, Congress passed four different laws attempting to prevent the bureau from disclosing the evidence for use in gun litigation.²⁵⁹ Weinstein's case was a major target. Three times Weinstein

250. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *see also* Rabin, *supra* note 133, at 15–16.

251. *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003); *see also* *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383 (E.D.N.Y. 2004).

252. *Morris*, *supra* note 15, at 360.

253. *Id.*

254. *NAACP v. Acusport*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

255. *MORRIS*, *supra* note 15, at 361; *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 425 (E.D.N.Y. 2007).

256. *Morris*, *supra* note 15, at 361. *See also* Alan Feuer, *U.S. Appeals Court Rejects City's Suit to Curb Guns*, N.Y. TIMES, May 1, 2008, at B2.

257. *Id.*

258. *Id.*

259. *See* Consolidated Appropriations Act, Pub. L. No. 108-199, § 118 Stat. 3 (2004); Consolidated Appropriations Act, Pub. L. No. 108-447, § 118 Stat. 2809, 2859 (2004); Protection

found ways to evade complying with the legislation, while avoiding a constitutional confrontation.²⁶⁰ Finally, the Second Circuit put an end to the struggle and to the litigation by holding that a legislative bar to litigation was constitutional and applicable to Weinstein's gun case.²⁶¹

Weinstein was no more successful in achieving a global resolution in the various class actions he presided over involving light cigarettes.²⁶² In those suits, the plaintiffs' general theory was that, when the cigarette companies marketed light cigarettes, they had engaged in misrepresentations leading consumers to believe that the light cigarettes were less of a health hazard than regular cigarettes.²⁶³ The cases raised difficult jurisdictional and choice of law questions, and Weinstein put an immense effort into the litigation.²⁶⁴

The first time that Big Tobacco was successfully sued by a third party—when HMOs and asbestos trusts sued for what they had spent on the health care of those they had covered—was before Weinstein in the light cigarette case.²⁶⁵ In a forty-four day trial in 2001, the jury actually ruled against the tobacco companies, but rendered a verdict with only miniscule damages.²⁶⁶ The Second Circuit and New York Court of Appeals then made it impossible for the plaintiffs to collect what they had won.²⁶⁷

The *Simon I* case was a traditional class action brought by lung

of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 119 Stat. 2095 (2005); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, Pub. L. No. 109-108, § 119 Stat. 2290, 2296 (2005).

260. See *Johnson v. Bryco Arms*, 222 F.R.D. 48, 50 (E.D.N.Y. 2004); *City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51 (E.D.N.Y. 2004); *City of New York v. Beretta U.S.A. Corp.*, 228 F.R.D. 147, 157 (E.D.N.Y. 2005); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 271, 297 (E.D.N.Y. 2005); *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517, 520 (E.D.N.Y. 2006), *aff'd in part, rev'd in part*, 524 F.3d 384 (2d Cir. 2008), *and cert. denied*, 556 U.S. 1104 (2009).

261. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

262. The discussion of the light cigarette cases draws from my prior work. See MORRIS, *supra* note 15, at 362–64.

263. *Id.* at 362.

264. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 206–07 (E.D.N.Y. 2001) (listing over 40 opinions that Judge Weinstein had already issued on related cases).

265. MORRIS, *supra* note 15, at 362.

266. *Id.*

267. *Id.*; see also Christopher Francescani, *Big Tobacco to Cough Up \$17M in Health-Care Suit*, N.Y. POST, June 5, 2001, at 22, available at <http://nypost.com/2001/06/05/big-tobacco-to-cough-up-17m-in-health-care-suit/> (noting that, earlier that year, a hung jury forced a mistrial in a similar case brought by a trust set up to pay out health-care costs to sick asbestos workers who were past smokers).

cancer victims seeking compensation.²⁶⁸ After Weinstein suggested in court that the case be restructured and broadened, the *Simon II* suit was filed, asking for a once-and-for-all class action determination.²⁶⁹ In 2002, Weinstein granted class certification to a nationwide mandatory class of millions of smokers who alleged that they had been injured by smoking light cigarettes and would share a single pot of punitive damages.²⁷⁰ The Second Circuit Court of Appeals reversed, holding that punitive damages could not be tried without trying the underlying damages.²⁷¹ That ended *Simon II*—the plaintiffs’ attorneys believed that it would be too hard to prove medical causation liability and, afterwards, punitive damages.²⁷² The plaintiffs’ lawyers threw in the towel.²⁷³

One last light cigarette action came before Weinstein in 2006. In *Schwab v. Philip Morris*,²⁷⁴ Weinstein certified a class action under the Racketeer Influence and Corrupt Organizations Act (“RICO”) involving tens of millions of plaintiffs.²⁷⁵ In an extraordinary 540-page typed opinion accompanied by a 986-page appendix, Weinstein dealt with certification, fraud, RICO conspiracy, expert evidence, and other issues.²⁷⁶ In the appendix, Weinstein wrote a long treatise on the history of the cigarette cases.²⁷⁷ Years later, the court of appeals reversed.²⁷⁸

In the light cigarette litigations, Weinstein attempted to include as many parties as possible “in order to ensure all issues were raised, all interested parties were consulted and all who were harmed compensated.” Weinstein embraced the notion that punitive damages would be awarded “as punishment on behalf of the entire society.” He has been a pioneer innovator of the “punitive damages only class,” which is premised on the theory that there is an inherent public interest in punitive damages that is distinct from the individual interest in compensatory damages. So far, he has been successful.²⁷⁹

Jack Weinstein’s most recent (and, to date, most successful) inno-

268. *Simon v. Phillip Morris, Inc. (Simon I)*, 200 F.D.R. 21 (E.D.N.Y. 2001); see also MORRIS, *supra* note 15, at 363.

269. *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002).

270. *Id.* at 99–100.

271. *In re Simon II Litig.*, 407 F.3d 125, 127–28 (2d Cir. 2005).

272. MORRIS, *supra* note 15, at 363.

273. *Id.*

274. 449 F. Supp. 2d 992 (E.D.N.Y. 2006).

275. MORRIS, *supra* note 15, at 363.

276. *Id.*

277. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1278–2357 (E.D.N.Y. 2006).

278. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008).

279. See Catherine M. Sharkey, *The BP Oil Spill Settlement: Judge Weinstein’s Legacy*, 64 DEPAUL L. REV. (forthcoming 2015) (manuscript at 1–3) (on file with the DePaul Law Review).

vation is that of the “quasi-class action.”²⁸⁰ In litigation involving the drug Zyprexa, Judge Weinstein created a new way of achieving mass settlements in which mass aggregations are settled all together, although they cannot be certified as such.²⁸¹ Frustrated by judicial constraints in the class action arena, but still believing in the need to resort to innovative techniques for resolving mass claims, Weinstein created this approach that effectively circumvents the class action rule. In such litigations, the Multidistrict Litigation Panel transfers all related cases in the nation to one federal court so that discovery can be conducted. Weinstein’s approach, naturally, provides for judicial oversight over such matters as client consent, attorneys’ fees, and aims for settlement.

Employing this new approach, it was possible in *Zyprexa* to assemble one national archive for use in federal and state cases through electronic technology. Weinstein was able to help limit fees, set up a matrix for settlement utilizing four special masters, supervise discovery using a single special master, and settle national claims for Medicaid and Medicare liens in state and federal courts.²⁸² The Court of Appeals for the Second Circuit has backed Weinstein throughout the *Zyprexa* litigation.

Where class actions are concerned, the battle between litigant autonomy versus collective redress has continued to flare. Supreme Court decisions have generally strongly sided with the rule that a litigant is not bound by a judgment of which he or she is not a party. The Supreme Court’s view has been that plaintiffs are autonomous individuals free to seek or abandon a remedy tailored for them even if the protection of these very individuals will ultimately make impossible vindication of their claims.²⁸³

As one would anticipate, Judge Weinstein feels and acts differently.

280. The discussion of the *Zyprexa* litigation draws from my prior work. See MORRIS, *supra* note 15, at 364–67.

281. *Id.* at 364–66.

282. *In re Zyprexa Prod. Liab. Litig.*, 433 F. Supp. 2d 268, 269–70 (E.D.N.Y. 2006); *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006); *In re Zyprexa Prod. Liab. Litig. v. Eli Lilly & Co.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007); *McMillan v. City of New York*, Nos. 08-cv-2887, 03-cv-6049, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010); *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010) (limiting fees). See MORRIS, *supra* note 15, at 164–67; Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174–75 (2008); Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. (forthcoming 2015) (manuscript at 21–25) (on file with the DePaul Law Review); Mullenix, *supra* note 118, at 19, 22. See also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Discussion Draft 2006).

283. See *Taylor v. Sturgell*, 553 U.S. 880 (2008); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). See also David Marcus, *Two Models of the Civil Litigant*, 64 DEPAUL L. REV. (forthcoming 2015) (manuscript at 3) (on file with author).

For him, litigants are not isolated individuals but members of a community that defines them and to whom they have obligations. Weinstein attempts to balance human dignity against the efficacy of civil justice in an age of aggregation.²⁸⁴ Repeatedly, he has “tried to recognize the value of individual voices in litigation, while doing so within a procedural framework that makes successful aggregate adjudication of claims on their merits possible.”²⁸⁵

V. CONCLUSION

Judge Jack Weinstein has been the most significant figure in the area of mass torts for more than thirty years. His contributions have included hundreds of opinions and other judicial works, one book, a number of law review articles, speeches, law school teaching, as well as his influence upon a distinguished number of law professors. Among the aspects of mass torts in which he has left an important mark are case management, jurisdiction, choice of law, the use of special masters and magistrates, fairness hearings, the measure of damages, future claimants, the use of advisory juries, expert witnesses and statistics, attorneys’ fees, the use of the powers of equity, ethics, the administration of settlements, industry-wide liability, cooperation and coordination with state judges, and quasi-class actions.

More than three decades after the assignment of *Agent Orange* to Weinstein’s docket, his philosophy of mass tort class actions is not the prevailing position. Nevertheless, his body of work has had and continues to have an enormous impact. Professor Burt Neuborne, who acted as lead counsel in the Holocaust litigation against Swiss Banks²⁸⁶ (which was *not* handled by Jack Weinstein), has stated: “Every time I did any research . . . the parameters of both the law and the problems were set in Judge Weinstein’s remarkable corpus of work.”²⁸⁷ What Weinstein does, Neuborne states, is to “build[] stages on which people can’t escape from his courtroom, so that they have to discuss resolutions.”²⁸⁸

Kenneth Feinberg, the most prominent figure connected with victim compensation funds, including, for example, the September 11th Victim Compensation Fund, has said, “I think Judge Weinstein has made more of an impact on American law than any judge alive.”²⁸⁹

Mass tort injuries are unlikely to disappear in the future. Unless

284. Marcus, *supra* note 283 (manuscript at 2–3).

285. *Id.* at 23.

286. *In re Holocaust Victims Assets Litig.*, 424 F.3d 132 (2d Cir. 2005).

287. *80th Birthday Roundtable*, *supra* note 28, at 184.

288. *Id.* at 186.

289. MORRIS, *supra* note 15, at 2.

Congress chooses to place the problem of compensation for such disasters with administrative agencies, great aggregations of cases impossible to tackle on an individual basis will continue to arise. It seems likely then that these society-wide issues will have to be dealt with by the courts. If and when that happens, judges will have as a resource the work of the still very active ninety-three year old Judge Weinstein.²⁹⁰

What then have been the factors that led Judge Jack B. Weinstein to become a judicial entrepreneur? First, there are his personal abilities—his brilliance and exceptional knowledge of procedure and evidence, which leads the Multidistrict Litigation Panel to send cases to him.²⁹¹ Along with this is his ability to see cases as a whole, perceive connections between fields of law others do not see, and an ability to recast mundane issues brought to him by lawyers into important issues. There is also his ability to attract attention far beyond his district for his ideas, decisions, and activities; his nationwide “constituency.” There is also his still inhuman energy, which makes it possible for him to handle such cases, publish articles, give speeches, and even attend symposia, while keeping up with the rest of his docket. There is also his self-confidence, in part innate, but also coming from his mastery of so many fields of law. And then there is his view of the role of judges as shapers of the law. Finally, he continues to see class actions and other aggregations of cases as a place where the legal system can hear and protect the “little guy”—another way to give the law a “human face.”

Timing too has been important in Jack Weinstein’s entrepreneurship. *Agent Orange* came to him at a formative time when federal judges were just becoming aware of the potential class actions might have for dealing with mass torts. In addition, at the time of the *Agent Orange* litigation, the nation was in the midst of retreating from grand solutions coming through the legislative and executive branches. The federal government was being “downsized.” This left a vacuum for the judicial branch to fill and, at the time, there were many judges appointed by Presidents Kennedy and Johnson at the height of their careers who were liberal and activist. Weinstein provided an important model of what could be done in mass torts, a model that would be attractive to many on the bench.

Finally, from Weinstein’s perspective, there were no real risks. He was a strikingly independent judge. Reversal by the court of appeals never troubled him (and apparently never will). If he had greater ambi-

290. Helen E. Freedman & Kenneth R. Feinberg, *Managing Mass Torts*, 80 JUDICATURE 44 (1996) (reviewing JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995)).

291. He may also have been the beneficiary of some forum-shopping by plaintiffs’ attorneys. See MORRIS, *supra* note 15, at 368.

tions in the years prior to *Agent Orange* (and there is little to suggest that he did), he would have seen them frustrated by being passed over for appointment both to the U.S. Court of Appeals for the Second Circuit and to the New York State Court of Appeals.²⁹² Finally, his reputation as an important scholar might not protect him from criticism but would protect him from being viewed as some “off-the-wall crack pot.”

Already seriously interested in class actions before the *Agent Orange* case came to him, its uniqueness (for its time) forced Weinstein to write many opinions. Being Weinstein, the opinions were long, thorough, and all published. Thus, it was not just the size of the case or the fact that he was able to settle it that gained his work such wide attention in the legal community. It was also his body of opinions.

Weinstein would never again be as successful with the court of appeals as he was in *Agent Orange*. He was fortunate to have handled the first mass torts class action to reach the Second Circuit, which had not yet developed its skepticism of class actions.

But, if *Agent Orange* was the high point of Weinstein’s success with the Second Circuit, the shadow he left over the field would not disappear. Other class actions came to him—in part because of the respect of the Multidistrict Litigation Panel—and he continued to be interested in virtually every aspect of those litigations. And he continued to write and to speak. As his academic colleagues of his earlier career age retired or died, Weinstein proved able to excite younger scholars who carried on the fight from the law schools.

In their book, McIntosh and Cates indicated how unusual it is to find judicial entrepreneurs.²⁹³ They presented four—two from the U.S. Supreme Court, one from a court of appeals, and a state supreme court judge. They did not even suggest that it was a possibility for a trial judge. They should have considered Judge Jack B. Weinstein.

292. A few years after Judge Weinstein was defeated in the primary election for nomination as Chief Judge to the New York Court of Appeals, the position became appointive.

293. MCINTOSH & CATES, *supra* note 19.