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# ACKNOWLEDGMENT

*JUDGE JACK B. WEINSTEIN*

Thank you, Dean Morrison, for your overly generous remarks.

The crystal gavel you presented will be a deeply-appreciated memento. I have never used a gavel, so there is little chance that I will shatter this one.

Thank you, my dear friends and colleagues, for your presence here today. Thank you, Editor-in-Chief Christina Liu and your staff, for arranging today's events.

A Dedication by the *NYU Annual Survey of American Law* is important.<sup>1</sup> I owe much to New York University School of Law:

One of your distinguished alumni, Judge Eddie Weinfeld, was my advisor;

NYU law clerks have been critical to my work;

The distinguished writings of many NYU faculty, such as Arthur Miller, whose proof of foreign law scholarship I relied upon last month; Burt Neuborne, whose new book on Madison I quoted last week in a case involving election law; Sam Issacharoff, whose American Law Institute book on aggregate litigation is an essential reference in mass litigations; and Diane Zimmerman, one of my first law clerks, she taught me how to pronounce epidemiology and, more importantly, how to be a judge.

I am grateful, too, for the presence today of some of my most insightful tutors:

Elizabeth Cabraser, who shattered the litigation glass ceiling in precedent-setting litigations such as the Exxon Valdez Disaster and by her leadership of the plaintiff's bar;

Judge John Gleeson, who is teaching the nation how to rationalize sentencing, while revolutionizing credit card practice with multi-billion dollar settlements;

Les Fagen, a stellar law clerk of mine, now a leading litigator at Paul, Weiss, Rifkind, Wharton & Garrison and, most notably, legal adviser to Judge Judy;

Ken Feinberg, Special Master to the World, my co-clerk to Judge Stanley Fuld, and a dear friend; and

My distinguished Eastern District colleagues.

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1. See notes 8–25 *infra*.

This Dedication is accepted on behalf of all our federal district judges. It has been an honor to have served alongside this devoted and courageous band for almost fifty years. My admiration for them continues to grow.

Trial judges are the eyes and ears of the judicial system. We apply the law to real world problems. Our grasp of the facts and societal changes are essential, not only in deciding individual cases, but in providing the basis for needed changes in the law.

Bringing the world to the courthouse, and the courthouse to the world, is our job.

Deciding our cases is not an abstract exercise in forensic logic. It involves the lives of real people.

In my lifetime, this nation has taken huge steps for equal rights:

It has protected against many forms of invidious discrimination;

It has spread a safety net for the deprived;

It has defended workers' rights; and

It has ensured equal voting rights and enforced the Bill of Rights.

Federal trial judges vigorously enforce these laws. We have the necessary power and procedural discretion under the broad principles of the Federal Rules of Civil and Criminal Procedure and Evidence to ascertain the truth and to secure the just and the speedy determination of each case.<sup>2</sup>

When seeking truth, passivity is not a virtue.

Swift justice requires us to be skeptical. To doubt. To question. To test. To think creatively.

That we may be reversed on appeal must not inhibit us. A famous example is "don't ask, don't tell." It was ruled unconstitutional by Judge Gene Nickerson, but his judgment was reversed on appeal.<sup>3</sup> Then, the People, the Congress, and the President agreed that Gene was right—and they changed the law to what he said it had to be.

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2. FED. R. CIV. P. 1 ("administered to secure the just, speedy, and inexpensive determination of every action and proceeding."); FED. R. CRIM. P. 2 ("provide for the just determination of every criminal proceeding"); FED. R. EVID. 102 ("ascertaining the truth and securing a just determination").

3. *Able v. United States*, 880 F. Supp. 968, 970 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996).

When thinking about our role as judges, we are driven to follow one of the law's greats: Justice Cardozo, once a trial judge himself. In 1928, he put the essence of the judge's challenge this way:

[W]ithout a full and rich background of knowledge and culture in fields foreign to the law itself, we shall never reach the perception of the problems to be solved . . . . The concept of the continuity of knowledge is teaching us day by day the need for an enriched equipment, and is pointing the path to be followed by the lawyer [and judge] of tomorrow.<sup>4</sup>

When Cardozo spoke of the need for “enriched equipment,” he could not have imagined the kinds of technological help we now employ. We gather and quickly process information from huge databases. Statistics provide insight. Virtual reality helps recreate events. Remote parties participate in trials via videoconferencing. Democratization of litigation is developing.<sup>5</sup>

There are dangers in relying on modern technology: discovery with massive amounts of documents is challenging; statistics can be misleading; virtual reality may seem so real as to trick us into relying on misleading opinions or unreliable hearsay; bringing masses of potential parties into the electronic courtroom may complicate reaching a settlement.

Technique cannot substitute for the bar's and bench's learning, empathy, and critical analysis—and for the courage of the bar and bench to fight for justice.<sup>6</sup>

Ultimately, our legal system depends upon the good sense of counsel and judges.

Fortunately, we can depend upon great law schools like NYU to train the women and men who will provide justice in this great nation in the years ahead.

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4. Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 233 (1939).

5. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451, 455 (2012); *see also* Chase T. Rogers, Chief Justice, Sup. Ct. Conn., Address at the Institute of Judicial Administration 21st Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice: Keeping Courts Relevant: The Need To Shed a One-Size-Fits-All Mentality When Resolving Court Cases (Feb. 25, 2015).

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

## APPENDIX:

Trends in the *N.Y.U. Annual Survey of American Law* Show the Increased Importance of the Active Role of a Judge Today

In preparing for tonight, with the aid of Qingliu (Mary) Yang, a student of Columbia Law School, I reviewed the academic scholarship of the *NYU Annual Survey of American Law* (Survey) from 1942 to 2013.<sup>7</sup> That is 71 years. Several trends seem discernible across time: the increasing diversity of scholarship writings, the increasing breadth of specialized topics, and the increasing normative role of articles.

Articles in the 1940s tended to be abstract, doctrinal, and reliant on precedent. Titles were simple: “Contracts: Part Three”<sup>8</sup> or “Civil Rights: Part One.”<sup>9</sup> They were largely removed from the facts on-the-ground.

Starting in the 1960s, the subject matter of the articles diversified to include international law,<sup>10</sup> mining and oil law,<sup>11</sup> and mental illness law.<sup>12</sup> Other topics also departed from the narrow ivory tower of legal theory to highlight the concrete effects of legal policy on society. The focus shifted towards asking how people in institutions were acting, and what changes ensued as a result of institutional activity.

In this second era, key issues such as women’s rights were at the forefront. People from all walks of life, with their own eyes, saw the dreams of their wives, daughters, and nieces realized. In response, jurists, scholars, politicians, and practitioners described these real world changes and incorporated this knowledge into new substantive rules. Personal experiences would spur similar changes decades later, particularly with the question of same-sex marriage.

Another notable trend in the *Survey*—one that is particularly relevant today—was the increased focus on technology and its implications for the law and society. In the 1980s, there appeared to

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7. N.Y.U. ANN. SURV. AM. L. 1942–2013.

8. Arad Riggs, *Contracts Part III*, 1942 N.Y.U. ANN. SURV. AM. L. 479 (1942).

9. Milton Konvitz, *Civil Rights Part I*, 1942 N.Y.U. ANN. SURV. AM. L. 80 (1942).

10. Thomas Franck, *International Law*, 1962 N.Y.U. ANN. SURV. AM. L. 1 (1962).

11. Clyde Martz, *Mining, Oil and Gas Laws*, 1962 N.Y.U. ANN. SURV. AM. L. 544 (1962).

12. Bruce Ennis, *Mental Illness*, 1969 N.Y.U. ANN. SURV. AM. L. 29 (1969–1970).

be a shift toward issues of copyright,<sup>13</sup> intellectual property,<sup>14</sup> and privacy.<sup>15</sup> In 1994, an issue focused solely on “Fundamental Rights on the Information Superhighway.” A 1995 issue was dedicated to “The Powers and Pitfalls of Technology,” and included articles such as “Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship between Court and Counsel,”<sup>16</sup> and “Technology-Enhanced Surveillance by Law Enforcement Officials.”<sup>17</sup> Two full volumes in 1999 and 2000 were dedicated to “Law and the Media: Striking a Balance for the Future.” In the 2000s, new topics received emphasis: gene technology,<sup>18</sup> e-discovery,<sup>19</sup> and the role of the law in policing social media<sup>20</sup> and child pornography.<sup>21</sup>

The trend toward reliance on new technology is relevant to our exploration of the role of district court judges in developing new

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13. Alan Latman, *Copyright Law*, 1980 N.Y.U. ANN. SURV. AM. L. 433 (1980); David Goldberg & Jane C. Ginsburg, *Copyright Law*, 1984 N.Y.U. ANN. SURV. OF AM. L. 515 (1984); Margot Metzger, *Copyright Law: Recent Developments*, 1988 N.Y.U. ANN. SURV. AM. L. 1017 (1988).

14. Michael Bernard, *Intellectual Property*, 1983 N.Y.U. ANN. SURV. AM. L. 463 (1983).

15. See, e.g., Michele G. Falkow, *Electronic Surveillance: Protection of Privacy Expectations in Participant Monitoring Cases*, 1984 N.Y.U. ANN. SURV. AM. L. 55 (1984); Rochelle Cooper Dreyfuss and David W. Leebrown, *Privacy and Information Technology*, 1986 N.Y.U. ANN. SURV. AM. L. 495 (1986); Anne Chwat, *Accuracy and Dissemination: Privacy Interests in Criminal Records*, 1986 N.Y.U. ANN. SURV. AM. L. 545 (1986); Wendell Finner, *Privacy of Employment Records in the Private Sector*, 1986 N.Y.U. ANN. SURV. AM. L. 569 (1986); Lisa Anne Albinger, *Personal Information in Government Agency Records: Toward an Informational Right to Privacy*, 1986 N.Y.U. ANN. SURV. AM. L. 625 (1986); Michael Rogovin, *Privacy of Financial Records*, 1986 N.Y.U. ANN. SURV. AM. L. 587 (1986); Ellen Waldman, *Privacy Versus Open Government: Section 7(c) Exemption of the Freedom of Information Act*, 1986 N.Y.U. ANN. SURV. AM. L. 609 (1986); Anne E. Crane, *Unsealing Adoption Records: The Right to Know Versus the Right to Privacy*, 1986 N.Y.U. ANN. SURV. AM. L. 645 (1986).

16. Frederic I. Lederer, *Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship between Court and Counsel*, 60 N.Y.U. ANN. SURV. AM. L. 675 (2005).

17. Ric Simmons, *Technology-Enhanced Surveillance by Law Enforcement Officials*, 60 N. Y. U. ANN. SURV. AM. L. 711 (2005).

18. Matthew Karlan, Note, *Patent Policy, Natural Products, and the Gene Patent Debate: Seeking the Proper Judicial Mode of Analysis*, 67 N.Y.U. ANN. SURV. AM. L. 95 (2011).

19. Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201 (2008).

20. Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook, and the Arab Spring*, 68 N.Y.U. ANN. SURV. AM. L. 319 (2012); Kevin Park, Note, *Facebook Used Takedown and It Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites*, 68 N.Y.U. ANN. SURV. AM. L. 891 (2013).

procedures to enforce substantive rights. The world is more factually complex. With increasing sophistication of technology, facts are more easily accessible, but often more difficult to evaluate. A recent article in *The New York Times* suggested that appellate judges and justices “settle for what briefs tell them” when it comes to facts put forth in *amicus* briefs.<sup>22</sup>

The attractiveness of statistics has grown in recent years. Back in 1995, I wrote an opinion which noted that “a LEXIS search of district court opinions using the words ‘statistic,’ ‘statistics,’ or ‘statistical’ turned up 608 examples in the years 1960 to 1969; 2786 cases from 1970 to 1979; 4364 cases from 1980 to 1989; and 3015 from 1990 thru July 31, 1995.”<sup>23</sup> Today, statistical evidence is widely relied upon, for example, in evaluating DNA evidence. When it comes to expert evidence, raw statistical data can mislead the trier. There is an “unavoidable uncertainty in every measurement underpinning an expert opinion.”<sup>24</sup>

Considering these changes, the need for judges to step outside their traditional roles in the courtroom is greater than ever. When we leave the courtroom to gain firsthand knowledge of facts, we acquire the background information necessary to apply a healthy skepticism towards evidence and disputes before us.

This critical attitude results in fairer, more informed, and more just adjudications. But counsel must be informed of the court’s independent research so they can prevent the judge, as amateur scientist, from making grave mistakes. Rendering justice is a joint responsibility of experts, counsel and judges.

JUDGE JACK B. WEINSTEIN  
Judge, United States District Court  
Eastern District of New York

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21. Jason Scheff, Note, *Disproving the “Just Pictures” Defense: Interrogative Use of the Polygraph to Investigate Contact Sexual Offenses Committed by Child Pornography Suspects*, 68 N.Y.U. ANN. SURV. AM. L. 603 (2013).

22. Adam Liptak, *Seeking Facts, Justices Settle for What Briefs Tell Them*, N.Y. TIMES, Sept. 2, 2014, at A10.

23. *United States v. Shonubi*, 895 F. Supp. 460, 514 (E.D.N.Y. 1995), *vacated*, 103 F.3d 1085 (2d Cir. 1997).

24. Edward Imwinkelried, *The Importance of Forensic Metrology in Preventing Miscarriages of Justice: Intellectual Honesty About The Uncertainty of Measurement In Scientific Analysis*, 7 J. MARSHALL L. J. 333, 372 (2014).