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TRIBUTE TO JUDGE JACK B. WEINSTEIN

DEAN TREVOR MORRISON

Good afternoon and welcome. I want to thank all of you for joining us today as the NYU School of Law community pays tribute to the honorable Jack Weinstein. Each year, the *NYU Annual Survey of American Law* dedicates its forthcoming issue to an individual who has made a significant contribution to the legal field. We've had the privilege of honoring distinguished judges, including Supreme Court Justices Scalia and Breyer, Court of Appeals Judges Posner, Wood, and Wald, among others, as well as leading academics, including Arthur Miller, Anthony Amsterdam, and the late Derrick Bell and Ronald Dworkin.

We could not be more pleased that our students on the *NYU Annual Survey of American Law* have chosen to dedicate their 72nd Volume to the honorable Jack Weinstein, United States District Court Judge for the Eastern District of New York. I am delighted that the *Annual Survey* has chosen to recognize his massive accomplishments, and in doing so that they have brought together such a remarkable group of friends, family, and colleagues to celebrate his extraordinary career. I especially want to welcome Judge Weinstein's family members: Susan Burke and Ronny and Andy Rosenberg. We are delighted that you are here with us today.

The legal community has been profoundly influenced by Judge Weinstein's decisions, his teaching, his scholarship, and his leadership over many decades. This is clear to everyone who is here tonight, including former students and clerks, academic collaborators, and colleagues from the bench. He began his storied career by earning his B.A. from Brooklyn College in 1943. He then served as U.S. Navy Lieutenant before earning his law degree from Columbia in 1948. Soon after graduation, he joined the Columbia faculty as a lecturer before going on to clerk for Judge Fuld of the New York Court of Appeals. He would later return to Columbia as a faculty member at the school where he taught full-time until joining the U.S. District Court for the Eastern District of New York after having been nominated by President Johnson. He was Chief Judge from 1980 to '88 and assumed senior status (mocking the title) in 1993. During his time on the bench, he's also served as an adjunct professor at both Columbia Law School and Brooklyn Law School

and has taught countless students, hugely influencing their education, their careers, indeed, their lives.¹

Judge Weinstein is one of the longest serving members in the history of the federal bench.² Throughout his five decades of service, he's become well known across the country for the strength of his principles and his unflinching efforts to combat what he calls "the unnecessary cruelty of the law."³ He's gone to great lengths to protect and promote that concept of justice, like for a time refusing to handle drug cases out of opposition to mandatory minimums and issuing a series of rulings that attack the mandatory five-year prison sentence for defendants charged with receiving child pornography.⁴

As the bench's boldest overseer of mass tort litigation, he has presided over thousands of cases and has set many of the country's important mass tort precedents. In the 1980s, he brought together thousands of claims against the government by Agent Orange victims into one case and later brokered a \$180 million settlement,⁵ which set the stage for nearly every large class action lawsuit since in the mass torts area. He has called on Congress to expand social security into a national health insurance and comprehensive disability plan and to create a federal court for helping victims of mass disasters, from train crashes to terrorist attacks.⁶ Throughout his career, he has made numerous innovative contributions to the field of class action and aggregate litigation, while showing a resolve to interpret law in a way that prioritizes the public over private interest. It is therefore only fitting that our students decided to make his work the centerpiece of their newest volume.

I'd now like to turn the program over to this year's Editor-in-Chief of the *Annual Survey*, Christina Liu, class of 2015. Christina earned her B.A. in biology and neuroscience from Williams College. She worked as a paralegal for the Justice Department's Environmental Crime section before joining us here at the law school.

1. Biographical Directory of Federal Judges: Weinstein, Jack Bertrand, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2539&cid=999&cctype=na&instat=na> (last visited Oct. 21, 2016).

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

3. *Id.*

4. *Id.*

5. William Glaberson, *Agent Orange, the Next Generation*, N.Y. TIMES (Aug. 8, 2004), <http://www.nytimes.com/2004/08/08/nyregion/agent-orange-next-generation-vietnam-america-some-see-wrong-still-not-righted.html>.

6. Robert Kolker, *High Caliber Justice*, N.Y. MAG., <http://nymag.com/nymetro/news/crimelaw/features/893/> (last visited Mar. 9, 2015).

While at NYU, she has worked as a research assistant to professor Erin Murphy, has served as a student fellow for the Center on the Administration of Criminal Law, and after graduation, she plans to clerk first for Judge Gorton of the District of Massachusetts and then for Judge Chin of the Second Circuit. The journal has had another spectacular year under Christina's direction, so thank you Christina for your leadership and for all of the hard work you have put into the effort this year.

TREVOR MORRISON
Dean, N.Y.U. School of Law
Eric M. and Laurie B. Roth Professor of Law
N.Y.U. School of Law

TRIBUTE TO JUDGE JACK B. WEINSTEIN

CHRISTINA LIU

Each year, the *Annual Survey* dedicates its upcoming volume to a preeminent jurist, legal scholar, or legal practitioner. To that end, the student editors at the *Annual Survey* nominate and select an outstanding contributor to American law. We then honor the dedicatee at a ceremony held every spring at the Law School, where we invite colleagues and friends to deliver tributes and to celebrate the dedicatee's legal legacy.

Tonight, we honor Judge Jack B. Weinstein, for his many contributions to legal scholarship, legal practice, and jurisprudence. My role in this ceremony is to speak on behalf of the journal and to underscore the praiseworthy qualities that led to our decision to dedicate the journal's 72nd Volume to him.

Judge Weinstein: with so many respected and experienced scholars, practitioners, and a fellow judge speaking tonight, we wanted to explain your impact on us—on students.

First, we thank you for your towering contributions to the legal scholarship of civil procedure, evidence, and complex litigation. You wrote leading treatises and authoritative textbooks in all three subject areas and more,¹ you reformed the rules of civil procedure in the state of New York,² and you transformed the landscape of mass tort litigation and class actions.³ Today, law students across the country study and learn from the words of your case opinions, your books and treatises, and your prolific law review articles.

Second, we honor your work ethic and your unwavering commitment to justice, which inspire both the people who have actually met you, and the people who have heard so much about you, that *they* feel like they have met you too. You work hard. You graduated high school early, and you worked on a submarine in the Navy

1. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE (Mark Brodin, ed., Matthew Bender 2d ed. 2015); JACK B. WEINSTEIN & MAURICE ROSENBERG, ELEMENTS OF CIVIL PROCEDURE: CASES & MATERIALS (2d ed. 1970); JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977).

2. Jack B. Weinstein, *Revision of New York Civil Practice*, 30 N.Y.S. B. BULL. 298, 299 (July 1958).

3. *E.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995).

(which must have been difficult with a height of six-foot-two). You balanced a full-time job working on the docks with attending night school at Brooklyn College. You became a father during your first week at Columbia Law School, and you were hired as a full-time professor at Columbia Law shortly after your graduation.⁴ And you have now served as a judge for the Eastern District of New York for almost fifty years.⁵

You bring that boundless determination to the courthouse, where you strive to achieve a fair and just result, even when the task seems daunting or superficially impossible. You use creative procedural methods to deliver justice when it is otherwise unavailable, perhaps by creating a limited fund class using compensatory damages and a punitive multiplier, as in the Agent Orange litigation,⁶ or, by declaring a multi-district litigation case a quasi-class action and by modifying the contingency fee arrangement, so that people harmed by anti-psychotic medication would receive their fair share of the settlement proceeds.⁷ You also generously volunteered to reduce the backlog of habeas corpus petitions in the Eastern District, by singlehandedly taking on, and deciding, 500 petitions in less than a year.⁸

Third, we admire your warm personality and humble demeanor. In the midst of developing groundbreaking insights and safeguarding justice in the courts, you still find the time and energy to reach out to colleagues, to friends, and to strangers through little acts of kindness—gestures that might seem small to you, but that mean the world to the people receiving them. One professor told me that, when she was a very junior professor, she received a handwritten note from you, even though she had not yet met you. You wrote that you very much enjoyed reading one of her articles. She remembers that day as one of the happiest of her professional career, and that it served as inspiration for her future scholarship. A fellow journal member told me that, when she was a summer intern, she attended a hearing in your courtroom and was pleasantly

4. Jeffrey Toobin, *Talk of the Town: Benchmark*, NEW YORKER, May 3, 1993, at 34–36.

5. Biographical Directory of Federal Judges: Weinstein, Jack Bertrand, FEDERAL JUDICIAL CENTER (last visited Oct. 21, 2016), <http://www.fjc.gov/servlet/nGetInfo?jid=2539&cid=999&ctype=na&instate=na>.

6. *See In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd* 818 F.2d 145 (2d Cir. 1987).

7. Mary Williams Walsh, *Judge to Unseal Documents on the Eli Lilly Drug Zyprexa*, N.Y. Times, Sept. 6, 2008, at C4.

8. Order Withdrawing Power of Magistrates over Habeas Corpus Matters, *In re Habeas Corpus Cases*, 03-MISC-66 (May 9, 2003).

surprised when you asked her for her name and her school. And later, she was even more surprised that you remembered her, when she returned to your courtroom for another proceeding.

And, I've heard from many people that you choose to wear a suit rather than robes in your courtroom, and that you enjoy sitting with the litigants at counsel table instead of at the bench, because you want to make the courts more accessible to the people. Another professor told me that you only wore your robes at formal induction ceremonies, or when your mother came to visit you in your courtroom. That professor received a note from you too, thanking him for organizing a conference that you attended.

While you have personally described yourself as “just a tired old judge who has temporarily filled his quota of remorselessness,”⁹ your colleagues, friends, and students would undoubtedly disagree. Your self-awareness, self-deprecating humor, and appreciation for your position not only make you an influential leader, but also an incredibly present individual. You have sat face-to-face with defendants, have placed a defendant's hand in your hand when you sentenced him, and have put your arm around a defendant's family member to provide comfort in times of need. You are ever conscious that you are dealing with *people*, and that *you* are just like them.

Judge Weinstein, you have made tremendous contributions to our law school experience and to our own personal development as students. Your scholarship, produced while you carried a full caseload, has challenged us to search for greater meaning in the law—to fall in love with a discipline and join the conversation. On top of all that, you still make time to personally thank, or to recognize the accomplishments of, the people around you, whether they are colleagues at a conference, professors at the start of their careers, or even student editors on law journals.

As we complete our studies and prepare to leave the law school nest, we will internalize the lessons we have learned from your compassion, your scholarship, and your craft, so that we may embark on our own careers with clear eyes and full hearts. On behalf of the student editors at the *Annual Survey of American Law*, and on behalf

9. Jack B. Weinstein, Memorandum, 5 FED. SENT. R. 298 (1993).

of all law students across the United States, we are so honored to celebrate you and your legacy at this Dedication.

CHRISTINA LIU
Editor-in-Chief
N.Y.U. Annual Survey of American Law

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JOHN GLEESON

Thank you Trevor. Thank you Christina.

I can't tell you how flattered I am to be included in this ceremony and to be on the stage with this elite group of speakers.

It's true you're going to hear about Jack Weinstein's scholarships and jurisprudence, but not from me. In thinking about how I could be a value added to this ceremony it occurred to me I'm the only one here who grew up as a trial lawyer in Jack Weinstein's courtroom. And then just when he started to think he was making a little progress with me as a trial lawyer, I grew up as a judge on his court, and he's still working on that.

So as I say you'll hear from these other speakers about the contributions that Jack Weinstein has made to our profession and really to our society. The reasons he's become the single most influential judge of our time even while occupying the lowest rung on the Article III ladder. What I hope to contribute to our collective presentation are a few things about the great Weinstein that you have to just appear before him in court, or be his colleague, to learn.

Before I became a judge, I was a prosecutor, as Trevor just mentioned, and through the sheer luck of the draw, I had a lot of cases in Judge Weinstein's courtroom. He's always very pleasant—Christina began to describe the atmosphere in his courtroom—he doesn't wear a robe. Actually there was an exception to that rule—and if I keep digressing they're never going to get to speak—but the exception to that rule was when we prosecuted Justice William Brennan for conducting the affairs of an enterprise, specifically the Supreme Court Queens County, through a pattern of racketeering activity consisting of accepting bribes.¹ And when Justice Brennan was on trial in Jack Weinstein's courtroom, he wore the robe. And someone asked him why, and he said he wanted the jury to be sure that they knew which judge in the courtroom was on trial. But typically he doesn't wear the robe, and he doesn't even sit up on the bench, as Christina mentioned, he sits down in this huge conference table in the well of the courtroom where conversations are

1. *United States v. Brennan*, 685 F. Supp. 883 (E.D.N.Y. 1988).

had. It's very civilized, much more like a book group than a courtroom.

The rules of engagement are different as well, which is something that takes some getting used to as a young lawyer. I learned this the hard way early in my career. The first appearance in a drug trafficking case, and in every other courtroom these appearances include pro forma pleas of not guilty and they set another adjourn date, but things are different in Jack Weinstein's courtroom. And in this case he asks the defense lawyer if he anticipated filing any motions. Defense lawyer said he was thinking about moving to suppress some statements, maybe moving to suppress some fruits of the consent search.

We were all sitting around the table and the judge pointed with his chin at the man sitting next to me and said, "Is this your case agent?"

I said, "yes."

He said to the guy, "Raise your right hand," and he swore him in. Then he turned to me and said, "Go ahead."

Now I had this agent who was sitting there enjoying this Starbucks-like atmosphere in the well of the courtroom, all of a sudden he was wide eyed. He said, "What's going on? What's happening?"

I said, "I'm not sure but I think we're in the middle of a suppression hearing right now."

Trials were always a delight in Judge Weinstein's courtroom. He knows a little about evidence, which is good for prosecutors. You know, in some courtrooms you have to be careful what you ask for because you're probably going to get it. And then you could find yourself trying a case again after the appeal. Not so in Jack's courtroom. He's smart. He'll protect you from yourself, if you're a prosecutor. And he can make a pretty good record.

In one of my early trials before him, I offered into evidence a recorded statement made by an undercover agent a couple of minutes after the deal went down.² For appearances sake, when the agents came in and made the arrest, they arrested the undercover agent as well. So they couldn't turn off his body recorder, and he made a critical statement about which one of the defendants had passed the sample of the heroin.³ I offered that statement in evidence at sidebar.

2. *United States v. Obayagbona*, 627 F. Supp. 329 (E.D.N.Y. 1985).

3. *Id.*

Judge Weinstein made an eloquent ruling, complete with case citations even though it was an oral ruling, admitting the evidence—holding it fell within the present sense impression exception to the hearsay rule.⁴ So I head back to the podium feeling pretty good about myself, and he summons us back to sidebar and he says, and this is a quote, “Just in case those people up there can’t understand that ruling, let me make another,” and he makes another equally eloquent ruling about the statement being an excited utterance.⁵

And I remember thinking this guy makes a pretty good record. And given the way he baits the court of appeals judges, it’s a good thing he makes a good record.

Those rulings of course are no accident. Among his many accomplishments is Weinstein’s *Federal Evidence*,⁶ the Bible of the federal law of evidence. As of a couple of weeks ago, that treatise had been cited twenty-five times by, in opinions of the Supreme Court of the U.S., more than 4,300 times in the published decisions of the lower courts.

But I’m here to tell you this afternoon that not all of Weinstein’s rules of evidence can be found in that treatise. For some of them you just have to hang out in his courtroom for a while.

Take for example, the “*you’ve got enough*” rule of evidence preclusion, which I ran into more than once. Each time it was the same: I would pose a question on direct. “Sustained,” came a ruling from the bench.

Being the lawyer that I am, I scurry up to sidebar. I’d say, “Judge, this is perfectly admissible evidence. It’s quite probative. I don’t understand why you said ‘sustained,’ especially since no one said ‘objection.’”

“You have enough evidence already let’s finish up this trial.”

I start explaining why the evidence isn’t cumulative, but he cuts me off, “I’m not saying it’s cumulative. I know its relevant, admissible, probative evidence. I’m just saying you have enough evidence to win your case, so we’re going to end this trial.”

And he’s got that big smile on his face, so I know it’s okay to push back and I say, “Judge, you know I’m glad you’re persuaded, but you don’t get a vote. I’ll make you a deal, ask the jurors if

4. *Id.* at 339.

5. *Id.* at 338.

6. JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE* (Mark S. Brodin, ed., Matthew Bender 2d ed. 2015).

they've heard enough to convict. If they all raise their hand, I'll rest."

He says "no," excuses the witness, tells us to get ready to sum up. He sees I'm not too happy with this decision. And then he gets the last laugh, he points to the court reporter's machine, and he says to me, "Don't worry, you have your record for appeal." And as I say he's got that smile on his face because he knows just what I'm thinking, which is the only way that record will ever be of any use to me is if they amend the Constitution to get rid of the double jeopardy clause because you can't appeal an acquittal.⁷

His compassion is legendary. He's never been one to let a legal technicality get between him and what he knows is the right result. My friend and co-author Gordon Mailer—who I just saw walk into the room, there he is back there—tried a multi-defendant case in front of the Judge. And when he rested, the main defendant's girlfriend moved for a judgment of acquittal. She was clearly guilty, but she was just as clearly a marginal player involved in the crime only because of her unfortunate love interest in one of the main defendants.

Now, a motion for a judgment of acquittal is rarely granted because the law says it can only be granted if no rational juror, looking in the evidence in the light most favorable to the government, could find the defendant guilty.⁸

After hearing argument, Judge Weinstein made exactly that finding. Based on this evidence, he said no one could rationally find this woman guilty, and he dismissed the charges against her. And then he turned to her, she was seated at the defense table, and he said, "Now, get out of here, and don't ever do this again."

He can be mischievous. One of my trials before him was *United States v. Vic Orena*.⁹ Little Vic, as he was known, was the boss of the Colombo crime family. And he was a real gentleman truth be told, but he was a crime boss. And after we convicted him of a bunch of a crimes including murder, he was facing a mandatory sentence of life in prison without the possibility of parole.

7. *United States v. Sanges*, 144 U.S. 310, 318 (1892) ("[A] writ of error cannot be sued out in a criminal case after a final judgement in favor of the defendant."); *see also* *United States v. Ball*, 163 U.S. 662, 671 (1896) (holding that a verdict of acquittal is a bar to a subsequent prosecution for the same offense).

8. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

9. *United States v. Orena*, 811 F. Supp. 819 (E.D.N.Y. 1992).

Exactly one week before the sentencing date, Judge Weinstein issued a one line order putting the defendant on notice that he was considering upwardly departing. Now when you think about it, there's really only one sentence more severe than life without parole.

When we showed up for sentence, the Judge said he was thinking about an upward departure in the fine. In the meantime poor Vic got very little sleep in the MCC.

As a colleague, Judge Weinstein was a godsend. He's always available, always has clear, decisive advice, no matter the context. I always have the same reaction to his advice, which is, "Can we really do that?"

This should come as no surprise to any of you. This is the judge that just last week told the Governor: "If you don't schedule a special election by Friday, I will."

He writes notes to us frequently. Christina, the woman you mentioned who received that note had a little taste of what Jack Weinstein's colleagues experience on a regular basis. Handwritten notes on cards that are kind of hard to read, but once you read them they're perfect. They congratulate, they console, they compliment—whatever the circumstances call for, he nails it. And they always end with "Fondly, Jack."

He visits our chambers in September to wish us a "Happy New Year." Even us Irish kids get that "Happy New Year" in September. He does it again in late December.

He still has an insatiable intellectual curiosity and boundless energy almost halfway through the tenth decade of his life. No book that's worth reading goes unread. He invites speakers to the courthouse who enlighten us. He travels the world too many places to mention now, but just to mention a few in the last few years: Antarctica, Egypt, he just got back from Cuba. He and his staff write and perform a play each year for the entertainment of us all.

In the past year he's taken to writing haikus, which show up in the morning e-mails. Here's one of my favorites from last September: ancient judges were ordered to listen, good idea for modern ones.

He's funny, he can make us laugh, and much more importantly, he can laugh at himself. He's generous and he's kind, he's magnetic, he's inspiring.

Now this is a time of reflection for us Eastern District folks. 150 years ago tomorrow, President Abraham Lincoln created our district and here we are, there's quite a few of us here, we're blessed to

enjoy serving on that court with a judge who has spent almost a third of the life of the court on its bench.

It's a time for reflection for me too because, coincidentally, 30 years tomorrow, I started in the Eastern District. I've been working in the courthouse as an AUSA or a judge ever since. More importantly, 20 years ago I was appointed to fill Jack Weinstein's seat on our bench, a judgeship that was created when he took senior status.

You know, I grew up in an immigrant's household with parents short really on everything: education and money. Short on everything but faith and kids, which they both had an abundant supply. And we were better off than most, but my parents were the quintessential little people. So you can imagine how I felt then, and how it feels to this day, to succeed the Judge, who more than any judge in history, looks out for the little people just like my parents.

Now you're going to start to hear in a moment about Jack's accomplishments, but here's one that can't be overstated. He has taught his colleagues, and the profession as a whole, that federal judges, and particularly federal district judges, are uniquely positioned to make real and positive differences, not just in the lives in the people who bring their complaints and disputes before us, although that's hugely important, but in society at large, across a broad range of legal and social issues. And he's taught us that it's our responsibility to do everything in our power to make that difference.

So, to the *Annual Survey of American Law*—thank you for honoring our Jack here today. It really doesn't matter what your views are about the wisdom of his decisions, or about his conception of the judicial role in our democracy and society. The truth is that no one has ever embodied all of Jack Weinstein's vision, energy, scholarship, creativity, kindness, and dedication to delivering justice. He is truly a great American, and his life and career in the law are well worth celebrating, even while they're works in progress still.

So thank you Jack for being you, and congratulations, and thank you all for listening.

JOHN GLEESON
Judge, United States District Court
Eastern District of New York

TRIBUTE TO JUDGE JACK B. WEINSTEIN

ELIZABETH CABRASER¹

It's a tremendous honor to be here. I'm in awe of the audience and I can't follow Judge Gleeson, but I can talk about what an inspiration Judge Weinstein has been and continues to be to those of us who labor as lawyers in civil litigation, particularly in what is sometimes called mass tort or aggregate litigation.

Not too long ago, somebody asked me what my favorite civil procedure books were. There are a few of us who actually have favorite civil procedure books, and I guess somebody pegged me as one of them. And I came up with four—my little first aid kit. Of course, the *Federal Rules of Civil Procedure*—we must have rules. The *Manual for Complex Litigation*,² how to bend those rules in complicated cases. And another book, Lewis Carroll's *Alice in Wonderland*.³ It can be read as history. You'll remember the trial: who stole the tarts. That is what happens when someone attempts to conduct a coherent trial before the advent of Weinstein's evidence: it can't be done. It can also be read as a cautionary tale. It's what happens to us in the law when, through pomposity and pretention, we fall into the abyss of absurdity. There is an antidote to Alice, and that's the fourth book—I think it's probably the most dog-eared volume in my little collection. And it's Judge Weinstein's book, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices*, written in 1995.⁴

It is a slender volume. Its writing is plain, clear, and true, and it both poses a profound paradox in modern litigation and points us to the solution. How do we preserve the dignity and value of individuals in our mass age? How do we counteract the digitization and the depersonalization when people are victimized by mass wrongs? How do we avoid compounding the indignity of deperson-

1. Ms. Cabraser is a founding partner of Lief, Cabraser, Heimann & Bernstein, LLP, a plaintiffs' litigation firm with offices in San Francisco, New York, and Nashville. Although the esteem with which Judge Weinstein is held by those who have practiced before him is universal, the particular opinions expressed in this tribute are the author's own.

2. FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* (4th ed. 2004).

3. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (1865).

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

alization when we attempt, through aggregations or class actions or mass torts, to bring some measure of fair and efficient justice to a multitude?

Judge Weinstein sees the solution in the inherently democratic nature of our litigation system, because it is a reflection of our inherently democratic society—at least by aspiration. We have a representative system of government, and we have representative litigation. The problem, for those of us who represent victims and those of us who represent the companies that have to make profound decisions about how to respond to wrongdoing or disaster, face this problem every day. It's an ethical obligation and it's an ethical dilemma, and Judge Weinstein has written and written and written, both in his case decisions, in works like *Individual Justice in Mass Tort Litigation*,⁵ that it is an obligation that endures, it's an obligation that must be met, and that we must pay attention to the individual if the integrity of our legal system is to survive.

Fortunately, Judge Weinstein not only writes about the problem and the moral imperative of its solution, he provides an example of solving that problem: in pioneering litigation in *Agent Orange*;⁶ in *DES*;⁷ in *Asbestos*;⁸ in *Tobacco*;⁹ in *Breast Implants*.¹⁰ He has sat with victims and explained the case to them. He has traveled the country to make sure that those who could not come to him were able to participate in the process that affected not only their legal rights, but their lives. And, he invented Ken Feinberg. The rest is history.

When Judge Weinstein wrote *Individual Justice in Mass Tort Litigation*,¹¹ it was 1995. And in the years since then, that book, alone of the many works written in those days, has not become obsolete because we still face ever-increasing standardization and globalization. The problem has intensified. Recently, Judge Weinstein wrote a coda to that book; an article in 2012 called *The Democratization of*

5. *Id.*

6. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd* 818 F.2d 145 (2d Cir. 1987).

7. *In re* N.Y. Cnty. DES Litigation, No. 43003 (N.Y. Sup. Ct.).

8. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

9. *See, e.g., Judge Wants Tobacco Talks*, CNN MONEY (April 19, 2000, 6:35 AM), http://money.cnn.com/2000/04/19/companies/tobacco_report/.

10. *See, e.g., Barry Meier, Judges Set Up Review Panel for Lawsuits on Implants*, N.Y. TIMES (April 4, 1996), <http://www.nytimes.com/1996/04/04/us/judges-set-up-review-panel-for-lawsuits-on-implants.html>.

11. WEINSTEIN, *supra* note 19.

Mass Actions in the Internet Age,¹² and that title embodies the solution. If we remember that we are democrats with a small “d,” whether we’re on the bench or at the bar, we can solve the problem of not only delivering justice at large, but justice that is meaningful to the individual who is submerged within a mass.

You have heard anecdotes about how Judge Weinstein treats people: his colleagues, students, clerks, and litigants, and that is the key—nothing more and nothing less than that, I think. To remember that when we are about what we sometimes think of as the lofty and complicated business of the law, sometimes justice is nothing more than giving to each person involved in the system what matters to them, which is what matters to each of us: we want to be heard; we want not to be forgotten.

I appeared before Judge Weinstein at the turn of the century in a piece of the *Tobacco* litigation that he was handling. And I went through the tremendous experience of almost, as he reminded me, almost settling *Tobacco* litigation. We were this close, he said. Well, what happened? We lawyers messed it up.

I was also fortunate to witness a *tour de force* of class action jurisprudence. A decision in a case called *Simon II*,¹³ smokers’ class action litigation, that was both elegant in simplicity and audacious in scope. The certification of a nationwide class for punitive damages purposes, so that everyone who received compensatory damages in their own individual suits could share equitably in a punitive damages award that fully reflected the wrongdoing as a jury would find of the conduct of the tobacco industry without over-deterrence. It was a breathtaking solution to a horrible problem. It endured on the books for two years, I think, before it was reversed by the Second Circuit, which took a more conventional view of whether or not Rule 23(b)(1) mandatory class certification¹⁴ could be extended beyond the traditional bounds of a limited fund.¹⁵ Judge Weinstein had written eloquently of the limited punishment theory of punitive damages. That theory, the ideas in that decision, did endure, were influential across the country and in decisions of many courts and the thinking of many commentators. Just one example of the ripple effect of Judge Weinstein’s writing on the law, on justice, and how to strike that necessary balance—the very bal-

12. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451 (2012).

13. *In re Simon II Litig.*, No. 00-CV-2340, 2002 WL 35078407 (E.D.N.Y. Oct. 22, 2002), *vacated and remanded*, 407 F.3d 125 (2d Cir. 2005).

14. FED. R. CIV. P. 23(b)(1).

15. *In re Simon II Litig.*, 407 F.3d 125, 128 (2d Cir. 2005).

ance of the scales of justice between the rights and autonomy of the individual, and the need to find mass solutions for mass wrongs in modern society.

I've talked about Judge Weinstein's book among the four on my little shelf. There was another man who wrote another book in 1963, just four years, I think, before President Johnson appointed Judge Weinstein to the bench in Brooklyn. In his 1963 book *Strength to Love*, Dr. Martin Luther King observed, "social change cannot come overnight. But it causes one to work as if it were a possibility the next morning."¹⁶ Substitute justice for social change and think about Judge Weinstein's deeds—not his words, for a moment, but deeds. Since his appointment to the bench in 1967, Judge Weinstein has worked for justice as if it were a possibility the next morning, by rising and presiding on a daily basis over his courtroom to dispense justice that day and every day. The daily work of progress towards justice, the daily example of Judge Weinstein has reinforced Dr. King's admonition to each of us: to work as if change were possible the next morning. And that is why Judge Weinstein is the conscience, the voice in our head and in our heart for every lawyer who tries to make a difference in civil litigation today. We fail every day, we fall short, but we keep trying because we have an example. We have an example of a jurist who strives to increase the net store of justice in this country, for everyone in this country, through whatever procedural and substantive means come to hand, and to whatever extent his boundless energy and ability allow. When justice comes one morning, I believe it will stop first at a courtroom in Brooklyn. Thank you.

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16. MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 18 (Fortress Press 2010) (“[S]ocial change will not come overnight, yet he works as though it is an imminent possibility.”).

TRIBUTE TO JUDGE JACK B. WEINSTEIN

LESLIE GORDON FAGEN

As I was sitting here, listening to these wonderful remarks about the Judge, I said to myself “what a unique and fabulous experience it would be, to clerk for this guy.” Then I said “wait a minute, I did clerk for this guy!”. I was Judge Weinstein’s law clerk some forty years ago. And, I just realized, Judge, that I never really thanked you for the opportunity. It would seem that I am just a little bit slow in expressing gratitude. None of my legal experiences over the last four decades has quite matched the exhilaration I felt in helping you to render justice. Thank you, Judge.

But I do have one grievance. When I started my clerkship, I was only 24 and right out of law school. Judge Weinstein, already a renowned jurist, was more than 30 years my senior.

Back then, I would have expected to grow older in step with all my colleagues, especially my elders. Indeed, as we all know, one of the few compensations for aging is to be able to see how much worse your older friends look. Jack Weinstein has deprived me of that compensation. In the last four decades, he has steadfastly declined to age. So, while my joints have begun to creak, and I can easily forget why I have gone into a room, Judge Weinstein has not changed at all. He looks the same, works the same, and thinks the same. It is so profoundly annoying.

Jack Weinstein may well be one of the most honored judges in America. He has honorary degrees from Yale and Columbia. He has won innumerable awards, including the Edward J. Devitt award, the Harvard Law Medal of Freedom, the Columbia Alumni Medal, and the Lawrence A. Wien Prize for Social Responsibility. Countless law review articles have analyzed his countless law review articles and opinions. An entire issue of the *Columbia Law Review* is dedicated exclusively to him.¹ One rather enthusiastic commentator from academe has said:

1. *A Special Issue Dedicated to Judge Jack B. Weinstein*, 97 COLUM. L. REV., No. 7, (Nov. 1997).

Jack Weinstein [is a] . . . man of vast imagination, . . . and almost blinding brilliance, as uncomfortable with traditional formulations as any individual of genius in any field is.²

And, of course, there is today's wonderful honor from the *NYU Annual Survey of American Law*.

The Judge accepts all these honors and plaudits with humility and gratitude. But also with a dose of bemusement that the son of Lou and Bessie Weinstein, who in those old days in Bensonhurst, delivered milk from a milk wagon for a dollar and a quart of milk per day, has come so far.

At the same time, the Judge has generated criticism. Some of it has come from the Second Circuit Court of Appeals which, I must acknowledge, has reversed the Judge's decisions just a couple of times. I am told one Fifth Circuit judge privately said: "Jack Weinstein doesn't think he's a judge. He doesn't even think he's a congressman. He thinks he's the whole damn Congress." He has the distinction of having been condemned by both the TV personality Dr. Phil and the late FBI director J. Edgar Hoover. And the bar has not been silent. Years ago, upon the Judge's entrance into the courtroom one day, a plaintiff's lawyer whispered in my ear "There, but for the grace of God, goes God".

Why does Judge Weinstein generate such controversy? There are, I am sure, many reasons. But I would submit that there is one primary reason. He has honestly and loudly expressed his view that a judge not only has the power but the moral obligation to interpret and apply the law expansively to reach the just result. Many judges proclaim themselves strict constructionists and disavow the duty to do justice through equity. Still others, notwithstanding hard-edged rules, exercise their discretion to get to the right outcome, but covertly, and in silence. In contrast, Jack Weinstein has said over and over again that a judge is, and I quote:

require[d] to exercise discretion and assume responsibility for decisions that require hard thought and balancing of alternatives rather than applications of rigid and "simple" rules.³

He has written: "The duty to decide cases in accordance with statutes, precedent, or regulations cannot be absolute."⁴ Accordingly, in his judicial career, Judge Weinstein has used his moral vi-

2. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 112 (1986).

3. Jack B. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1432 (1962).

4. 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. 101, 103 (2004).

sion, his creativity, and his genius—within the breathing space of the law—to render justice.

All this makes some people uncomfortable. But it is a necessity. A moral necessity. Statements recognizing this moral responsibility in doing your job are plentiful. My favorite: Shakespeare's Henry V in disguise debated essentially the same issue with his soldiers on the eve of the Battle of Agincourt. He disguises himself to hear what the men are saying. One soldier argued:

[W]e know enough, if we know we are the king's subjects: if his cause be wrong, our obedience to the king wipes the crime of it out of us.⁵

The King, still in disguise, surprisingly responds "Not so," saying:

Every subject's duty is the king's; but every subject's soul is his own.⁶

Undeterred by controversy, Jack Weinstein goes on with the job of judging. He follows the law. But when he finds that the rigidity of the law is inadequate to do justice, he follows his soul to interpret, apply or shape the law or even, on very infrequent occasions, to defy it. He has not hidden his philosophy. He has explicitly, directly, and repeatedly stated it. In this way and in so much of what he does, he is our conscience.

At his law clerks' party for his 90th birthday some time back, the Judge ended his remarks with a commitment to future service just by saying, "there is much work to be done." A few people in the audience wondered why at this point he did not take more time to relax. One woman at my table even suggested that he should buy a condo in Florida. (Can you imagine Jack Weinstein playing shuffleboard?) Those people did not understand. He is in the courthouse every working day. He presides over trials, motions, and settlements. The opinions and articles keep coming.

For him, it is all about rendering justice no matter what. That is surely our most noble impulse: the toil for justice, the battle for justice, the pursuit of justice—to the disdain of popularity or consensus. You see, he cannot stop. Great men of principle seldom do.

LESLIE GORDON FAGEN

Partner

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5. WILLIAM SHAKESPEARE, HENRY V, act 4, sc.1.

6. *Id.*

TRIBUTE TO JUDGE JACK B. WEINSTEIN

KENNETH FEINBERG

I want to thank the Dean and Christina and the staff of the *Survey* for being part of this. Now look, the hour is very late, and there has been a lot said about Judge Weinstein, and I'm last. So I can be relatively brief, so we can get on to the reception because everybody has said just about everything there is to say about Judge Weinstein. But, I want to start off my comments by just reading to you three brilliant paragraphs that best describe the career and success of Judge Weinstein. No oral presentation can rival the strength and eloquence of these three paragraphs. So just bear with me, they're very short, but it says what there is to say about this great judge.

"A law professor at Columbia, Weinstein has written hundreds of law review articles, speeches, essays, commentaries, on virtually every aspect of modern domestic and international law. Weinstein is still a nationally recognized legal scholar, author of definitive textbooks, legal treatises on evidence and civil procedure. His work is often cited by U.S. Supreme Court justices in the same opinion, both majority and dissents, in reinforcing the credibility and persuasiveness of their respective legal arguments. One Harvard Law School professor commented that Judge Weinstein was, 'the most important federal judge in the last quarter century.' And that was in 1981!

Weinstein uses his bully pulpit as a federal district judge to write a cascade of legal opinions on every conceivable subject. Whatever the definition of 'judicial activism,' he is the best, most convincing example. Undeterred by appellate court reversals of some of his most creative judicial opinions, Weinstein, still a federal judge in his 90s, offers almost daily legal commentary that, in its force and careful legal analysis, is more convincing than anything written by the court of appeals.

Weinstein became a valuable advisor to Senator Edward Kennedy, advancing effective arguments on almost an unlimited range of federal and state law policy initiatives. On one issue after another, Senator Kennedy would say 'Find out what Jack thinks.' In all-important matters, both professional and personal, he would not dream, no one would dream of making a key decision without first

checking with Judge Weinstein. It is not only his legal and political skills but more important, it is his judgment, his worldview on all issues big and small that lead everybody to his doorstep. In these countless other personal and professional matters, we look first to Judge Weinstein for advice, guidance, and friendship.”¹

Now, you can’t beat that, and if you want to read the rest of what that book says about Judge Weinstein, you’re going to have to get my book: *WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL*, PublicAffairs Press, 2012. Now you may have trouble finding this book today. Don’t worry, don’t worry. My personal supply of this book is virtually inexhaustible. And if anybody has trouble, we’ll get you a copy.

I just want to add one minute of comment about the Judge. Elizabeth said, “Judge Weinstein invented Ken Feinberg.” That statement is absolutely true. If not for Agent Orange, when the Judge just called me up and said, “I want you to mediate this case,” “Judge, I never took a course in mediation in my life, there isn’t a mediation course in 1984 at NYU,” “Doesn’t matter, you’re perfect for this, you’re perfect.” Overnight, that case, that one case, changed my life, my professional life. And Judge Weinstein did invent Ken Feinberg. So that’s just to clarify the record on that.

Judge Weinstein taught me over the last 40 years three overriding principles of great importance to the people in this room but particularly of importance to the students and the staff of the *Annual Survey*.

First, don’t plan too far ahead. Life has a way of changing the best-laid plans. Believe me, I know. If those planes hadn’t hit the World Trade Center and the Pentagon, if that oil rig hadn’t exploded in the Gulf of Mexico, if those poor Boston Marathon runners weren’t the victims of bombings, if some deranged student gunman at Virginia Tech hadn’t slaughtered 32 people, my life would be very, my professional life, would be very, very different. Law students who worry about their resume, especially at NYU, don’t worry so much about your resume. Judge Weinstein taught me, live professionally today to get satisfaction. Life has a way of changing the best-laid plans. That’s point number one.

Point number two he taught me, what it really means, the phrase, the “communitarian ethic.” He’s written about this.² But

1. KENNETH R. FEINBERG, *WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL* 11 (PublicAffairs 2012).

2. See, e.g., Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. REV.* 469, 485–93 (1994).

the communitarian ethic, we all have an obligation to give back to the community in countless ways. But it's very, very important that what you do, no matter what strain of work, no matter what your profession might be, no matter what line of legal career you enter, the communitarian ethic: We're one community and [we] give back to the community—that is such an essential part of civilization and the way we live in this country.

And finally, a very important lesson, which for me was reinforced every day by Senator Ted Kennedy, a pretty good friend of Judge Weinstein. And it was this: Every individual can make a difference. No matter what you do, no matter what your role in society, family, and jobs and profession, every individual can make a difference. Senator Kennedy lived that way. Judge Weinstein has lived that way. We've heard about how Judge Weinstein implements that axiom every day in his courtroom. Every individual can make a difference, and no matter what you're doing in law school, or when you graduate law school, remember that, that what you're doing interstitially, everybody together builds a community, and not only builds a community but builds a life. My life has changed dramatically because of Judge Weinstein and it's an honor and a privilege. And the book is available. It's an honor and a privilege. Thank you, Judge.

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TRIBUTE TO JUDGE JACK B. WEINSTEIN

SAMUEL ISSACHAROFF

I first encountered Jack Weinstein almost 35 years ago. I was in my apartment one night, it was in fact the night before my first day of law school, and the assignment for my first class for Civil Procedure of my first day of law school was to read an opinion called *Hart v. Community School Board #1*.¹

Fine, I sat there. I sat down. I opened it. First, it was 240 pages long. So for my students who are here, and you wonder why I don't listen to you when you complain about the amount of reading I assign, think again.

Two-hundred and forty pages. I had never read an opinion before. I'm not from a family of lawyers. I didn't know lawyers. *Two-hundred and forty pages.* And so I sit there, hour after hour, trying to get through this thing, and frankly I had no idea what was going on. I knew that there was segregation in New York City schools, I knew the desegregation case. That much I could follow. Then I started getting really lost. All of a sudden, there was a discussion about London courts in the 14th century, and summoning surgeons to explain whether a wound was fresh or not.² And that seemed to be the basis for appointing somebody who's a Columbia law professor named Curtis Berger as a Special Master.³ OK, I'm sort of following, but I have no idea what a Special Master is. I don't know who Curtis Berger is. Then I'm reading on and all of a sudden, Curtis Berger is reorganizing the fair zones and the directions of the NY subways and buses. And I couldn't believe it. I'd grown up largely in New York. And who is this Curtis Berger?

But that's not what really bothered me. I turned back to the first page of the opinion to see who had written this. And I see Jack Weinstein. Jack Weinstein. And I thought to myself who the hell is this guy, Jack Weinstein? Well, nearly 45 years later I am well aware that I was neither the first nor the last person to ask that question. Who the hell is this guy?

1. *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974) (liability decision/order appointing special master), *enforced*, 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

2. *See id.* at 763.

3. *See id.* at 767.

I got to know him when I moved to New York to join the Columbia faculty. I came to Columbia to fill out a tradition in Civil Procedure that I think in all fairness Jack Weinstein began and embodied. It was a great tradition, it had a few open positions, they were looking around and I filled it, and if you think back on what he created, you see part of the influence. Here were some of the junior folks that he brought on as his personal fellows that then went on to more or less success in the law. And by the time I got there, in the late 1990's, they had all moved on, and so there was a need for people like me.

So one of them was a guy who had gone up and finally ended up teaching up at Harvard, Arthur Miller.⁴ Another one, was a woman who did reasonably well but had left teaching altogether, moved to DC and had some position on the Supreme Court or something like that.⁵ And these were Jack's protégés. These were the people that he had picked out and brought into the law. And it was a great source of honor to me that he treated me as if perhaps, perhaps, I might belong in this tradition.

I never got quite the OK that I did from Jack, and I think the reason was that some years later I left Columbia to come here. And that provoked my first distinct moment of irritation that I saw of Jack with me. And he let it be known quite clearly, that he did not approve of this. And I think I might still be in the doghouse on this one. But, maybe he has forgiven me this.

I want to give an example of the place where I had the most contact with him. I've been in the classroom with Jack, I've appeared in his court, I've been on panels with him for the MDL gathering of judges, and I've been in many circumstances with him. But, the experience that is strongest in my mind is the role I had when I was a reporter for the aggregate litigation project that Trevor mentioned. Part of the ALI process is that they don't want to give the good name of the ALI over to people like me. So they appoint minders, they appoint people who have to say yes, you're doing OK, and if not, they can collectively fire you. And the minders I had included Ken Feinberg, and included Liz Cabraser, included Arthur Miller, and of course it included Jack Weinstein.

4. Arthur R. Miller, L. SCH.: MAG. N.Y.U. SCH. L., Autumn 2006, at 67 (“[Arthur Miller] went on to teach first-year procedure [at Columbia Law School] alongside the Honorable Jack Weinstein, a giant in the field.”).

5. See Kim Kirschenbaum, *Obama Picks Columbia Lecturer Sotomayor as Supreme Court Nominee*, COLUM. DAILY SPECTATOR (May 26, 2009, 1:02pm), <http://columbia.spectator.com/2009/05/26/obama-picks-columbia-lecturer-sotomayor-supreme-court-nominee>.

Because this is the area of law that Jack has shaped probably as no other judge has in the United States. If you think back to asbestos,⁶ you go back to *Agent Orange*,⁷ you go back to the liability of gun manufacturers,⁸ of pharmaceutical manufacturers⁹—in each of these circumstances, Jack is way out ahead of the law. Way out. And pushing the law. Now, to be fair, many of these decisions were overturned by the Second Circuit, in fact most of them were.¹⁰ In fact, who cares? Because he just kept doing it. And got overturned again, and kept doing it, and got overturned again, and kept doing it. Each time it got overturned, the law moved.¹¹ The circuit didn't look like it did before. It was an educational, interactive process. Somebody had to push.

So we started this project to start to bring some conceptual order to the world of mass litigation. This turned out to be a hard project, because this is a messy area, there's a lot of informality that goes on, you litigate for a while then you turn it over to Ken to do whatever it is that Ken does. And somehow it gets resolved. But there aren't a good set of principles that guide us through. We were trying to do this and there was skepticism. The betting line was that we would never produce anything because there were such sharp divisions in this area of law. Among all the advisors I had in this process, there was no sharper critic of the work that I produced than Jack. Jack thought from day one that I was underselling the capacity of the project. And it was a fight over a many-year period to see whether I could produce something that was worthwhile in his eyes. Let me explain why. Because it's a fundamental issue about the conception of the law. We were trying to work out how courts deal with the cases that are before them. The cases that are challenging but can be handled in some sense. Jack's view was that this was the wrong set of questions. The right set of questions is "how do

6. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

7. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

8. *City of N.Y. v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004).

9. *In re* DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993); *In re* Zyprexa Prod. Liab. Litig., 253 F.R.D. 69 (E.D.N.Y. 2008); *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606 (E.D. La. 2008).

10. *E.g.*, Dan Slater, *Weinstein Reversed Again, This Time in NYC's Suit Against Gun Makers*, WALL ST. J. (Apr. 30, 2008, 5:21pm), <http://blogs.wsj.com/law/2008/04/30/weinstein-reversed-again-this-time-in-nycs-suit-against-gun-makers/>.

11. *E.g.*, JEFFREY MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN, 315–69 (2011); James R. Hackney, *Judge Jack Weinstein and the Construction of Tort Law in America: An Intellectual History*, 64 DEPAUL L. REV. 495, 510–11 (2015).

we recapture and restore the concept of ‘equity’ which had driven the courts outside of the narrow domain of common law disputes, outside the narrow domain of what is known in the positive law, the statutory law, the Edicts of Parliament?” Jack’s view was that when you get into mass society, the concept of equity had to drive not just across the procedural domain, but in the areas of the evidentiary rules, how do you use epidemiological evidence, what does it mean to say somebody had an adverse effect from a drug when only you can show this greater than not likelihood that it’s correlated with drug exposure. All these kinds of questions, the evidence, then he wanted us to go after the substantive law. The substantive law of what it is to be wrongfully exposed to a potential hazard.

That’s an amazing set of issues. The hardest issues. And he pushed and he pushed on that. I’ll conclude with a story about one of the last meetings we had with the advisors with the ALI. We were wrapping up the project, we were in Philadelphia, and for the reporter, for me, it’s a very difficult process. You have to go through several days of all day meetings. People are yelling at you, it’s contentious at various points, and on the last day Jack and I were having breakfast, and Jack said: “You know, I talk too much. I don’t listen enough. I think today, I’m going to sit and just be quiet and listen.” And I thought, “Yeah, and maybe the sun won’t set. But OK.” We get into the meeting room, Jack sits front and center as he always does. As soon as I start speaking, maybe before I start to speak, hand rises, right in front of me, you can’t miss him he’s a big man, you can’t miss the hand in front of you. He says “I don’t think you’re addressing the right set of issues.” I say “OK, here we go again.” And we spend the day on it and he’s pushing, and it’s an incredible thing to be pushed this way because it’s an intellectual force that’s coming after you—it’s not personal it’s not vindictive, it’s powerful. And we spent the day, we got through the whole thing, and then that evening, we took the train together back to New York, and we’re sitting on the train, and Jack says: “You know I have a few more thoughts, but you’re tired and you probably want to take a nap.” And I thought, “I’m not going to be put down for a nap by a man more than 30 years my senior. This is not going to happen.” And then, we talked for an hour about how far the law can push and what one needed to do.

And I realized three things in that conversation. First, I really was tired and wanted to take a nap. He was absolutely right about that. I was exhausted, but I wasn’t going to. Second, I realized just how coherent his idea of what equity and justice were, how it was. There was something that animated it, it had a holistic vision that’s

just incredible. This is someone who has spent decades on the district court bench. So he's dealt with day in, day out the minutia of the administration of the law, the criminal sentences, and there was this animating driving passion that stood behind it, that made all of this make sense. And the third thing I realized, sitting there on the train as I was listening to Jack was it had taken me a quarter century, and I wasn't so proud of how long it had taken, but finally, finally, finally I thought, I think I finally understand *Hart v. Community School Board #1*.¹²

Thank you.

SAMUEL ISSACHAROFF
Bonnie and Richard Reiss Professor of Constitutional Law
New York University School of Law

12. *Hart*, 383 F. Supp. at 699, *enforced*, 383 F. Supp. at 769 *aff'd*, 512 F.2d at 37.

TRIBUTE TO JUDGE JACK B. WEINSTEIN

DIANE LEENHEER ZIMMERMAN

Mercifully, given the time constraints, there are others here who have or will address Judge Weinstein's multiple contributions to the law. My account will be rather more personal. I have been a lawyer for more years now than I intend to reveal, but one of those years stands out above the rest—the year I clerked for Judge Weinstein. He had been on the bench for a decade by then, and already had a reputation as a judicial giant. Although the common wisdom was to clerk for an appellate judge, I guess I was eager for a little more action and the chance to observe a master/hero/role model/intellectual powerhouse operate in a courtroom. In short I wanted to clerk for Jack Weinstein. Needless to say, it was thrilling to receive the offer from him, although it was followed by fifteen more minutes of him trying to convince me not to accept until I had taken time to think it over!

What I quickly came to realize once the clerkship began was that the Judge really didn't need law clerks. We probably cost him more time than we saved. But he was a teacher, and he loved having new subjects to work on and to steer, hopefully, into the preferred path of academia. He certainly succeeded with me and with my co-clerk.

Well, what did I learn that year? This is just a small sampling, but a telling one. First, I learned genuine humility: I was never going to be the female Jack Weinstein. If General Motors had been run by him, the federal bailout wouldn't have been needed. He ran his docket and his court with stunning efficiency. No justice delayed in that courtroom. And he actually could multi-task—sit on the bench paying meticulous attention to a trial while simultaneously editing a speech or law review article. Much to his chagrin, I could never succeed in doing likewise.

Second, I learned what a first rate judicial system looked like in action. Above all, it was one that strived for fairness and for accessibility. In Judge Weinstein's world, judges rule their domains, but as servants of the public, not as life-tenured kings. As he once wrote, "[A] judge should . . . expose himself or herself on a person-to-

person basis to the emotional and other needs of litigants.”¹ Hence his well-known eschewing of judicial robes except at trial; his pioneering attempt to give poor pro bono civil litigants access to counsel; and, as a subsequent clerk has revealed, the occasional well-placed pressure on members of his chambers to give up a suit or a shirt or two so that pro se litigants could appear in court without the embarrassment of being poorly dressed. He always wanted people to experience the courthouse, to the extent possible, as a welcoming place, and so it was to successive waves of school kids who came to visit him. He hated metal detectors in the courthouse, even if prudence counseled their presence, and his chambers door was always open—a fact that sometimes led to some rather surprising visitors! Sentencing Fridays were painful operations and repetition never seemed to make the consequences of sending someone to prison easier for him.

Finally, the Judge opened my eyes to the importance of understanding the operation of law in a social context rather than solely as a formalistic matter of interpretation. He knew that ignoring the broader consequences of discrete legal decisions can be perilous; that society is poorer for each instance where law and justice diverge; and that the best way to deal with problems that have no obvious ideal solution is rarely to ignore or walk away from them. Rather, that was the time to evaluate the stakes and use a bit of well-known Weinstein creativity to craft a sensible compromise. He taught me that law has a heart and not merely a head.

Having learned all this, and having moved on to a happy career of my own, I must confess that I never stopped holding the Judge in serious awe, or got over my abiding fear that I might not live up to his expectations. You can imagine, therefore, that when he and I were asked to co-teach the Law and Society Seminar at the Aspen Institute one summer, I was more than a little nervous about sharing the podium with this amazing man. And to make matters worse, he got in touch with me before we headed to Colorado with an order. I had to call him Jack. We couldn’t teach together, he insisted, as Diane and the Judge. I secretly practiced, but I just couldn’t do it—it was as if my beloved but rather old-fashioned father had suddenly demanded that I address him as Adrian instead of Dad. So I hoped he didn’t mean it. But when I arrived in Aspen, it became clear that the Judge was absolutely serious. Good thing Jack and Judge start with the same letter because whenever he

1. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 9 (1995).

thought I was about to lapse, one of his famous eyebrows would go up a little and I would stammer out the amalgam, Ju-ack. Even now that both of us are old enough to qualify for Social Security, I have to tell you, Judge, that in my heart “the Judge” is who you will always be. Ju-ack is the best compromise I have been able to get past the censors of my inner hero worship!

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