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Article 6

## **The Feminist Jurisprudence of Judge Jack B. Weinstein**

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## THE FEMINIST JURISPRUDENCE OF JUDGE JACK B. WEINSTEIN

Anita Bernstein\*

### INTRODUCTION

The comedian Sam Levenson, a near-contemporary of our honoree, once said that “[i]f you ever need a helping hand,” you can always find one: Just check “the end of your arm.”<sup>1</sup> Desiring feminist decisional law, legal scholars turned to the same ever-helpful nearby source. Their project, launched at a wine-and-dinner table in Toronto in 2004,<sup>2</sup> set out to write new versions of published judicial decisions that had disappointed them. They planned a revisionist corpus that would show readers “what substantive equality [could] look like.”<sup>3</sup>

Take for example a decision allowing the government of Newfoundland to renege on an obligation it had negotiated. Financial exigency in the province permitted the breach of a promise to give female employees \$24 million in pay equity adjustments, the Supreme Court of Canada said in response to a protest that the Canadian Charter of Rights and Freedoms forbids sex discrimination in the public sector.<sup>4</sup> Two years later, a fictitious tribunal called the Women’s Court of Canada purported to undo this outcome: “[F]iscal considerations should never suffice as a pressing and substantial basis for overriding equality rights,” it declared.<sup>5</sup> *Newfoundland (Treasury Board) v. N.A.P.E.* joined five other decisions of the Women’s Court of Canada in a special issue of a law journal.<sup>6</sup>

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\* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. *Kol hakavod* to the Judge. Thanks to Jacob Corré, Liz Schneider, and Deborah Widiss for their answers to my questions, and to Jamie Maguire for research assistance that included brainstorming on methods.

1. SAM LEVENSON, IN ONE ERA AND OUT THE OTHER 1 (1973). Levenson was born less than a decade before Judge Weinstein but has been deceased for thirty-four years. *Humorist Sam Levenson Dies*, NEWS & COURIER, Aug. 29, 1980, at 13-A.

2. Diana Majury, *Introducing the Women’s Court of Canada*, 18 CANADIAN J. WOMEN & L. 1, 1 (2006).

3. *Id.* at 2.

4. Jennifer Koshan, *Judgments, Newfoundland (Treasury Board) v. N.A.P.E.*, 18 CANADIAN J. WOMEN & L. 321, 327 (2006). The nonfictitious decision is *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (Can.).

5. Koshan, *supra* note 4, at 359. Professor Koshan, author of the fictitious decision, teaches at the University of Calgary Faculty of Law.

6. 18 CANADIAN J. WOMEN & L. 1 (2006).

The initiative soon moved across the seas to Ireland, Australia, the United Kingdom, and other jurisdictions. It remains active, recently taking root in United States soil.<sup>7</sup> As explained by three of its U.K. participants, the Feminist Judgments Project seeks to “put theory into practice in judgment form, by writing the ‘missing’ feminist judgments in key cases.”<sup>8</sup> Sometimes, as in *Newfoundland (Treasury Board) v. N.A.P.E.*, a feminist judgment will reverse an offending decision. Other feminist-revisionist decisional law takes the form of concurring or dissenting opinions.<sup>9</sup> Reminiscent of Levenson’s quip, the editors of *Feminist Judgments* say that, “impatient with the glacial progress made to date,” they have decided “quite literally to take the law into [their] own hands.”<sup>10</sup>

Sam Levenson may have had a follow-up, less amusing than his first remark but more pertinent to this Article. The helping hand we need is at the end of our arm, true: but we also “have another hand,” Levenson has been quoted as saying. “The first is to help yourself, the second is to help others.”<sup>11</sup> In that spirit, I present what I identify as the feminist jurisprudence of Judge Jack B. Weinstein, a person who had no direct stake in the outcomes he crafted. What he built and achieved helped others.

The achievement did not originate in an agenda. As far as I know, Judge Weinstein never undertook to write anything feminist in a self-conscious or overtly ideological mode,<sup>12</sup> and so the working definition of “feminist jurisprudence” in this Article emerges only inductively,

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7. *Announcing New Book Project: Feminist Judgments—US Supreme Court Edition*, FEMINIST L. PROFESSORS (Feb. 11, 2014), <http://www.feministlawprofessors.com/2014/02/announcing-new-book-project-feminist-judgments-supreme-court-edition/>.

8. *Book Details: Feminist Judgments*, HART PUBLISHING, <http://www.hartpub.co.uk/books/details.asp?isbn=9781849460538> (last visited Mar. 19, 2015).

9. Renee A. Pistone, *Feminist Judgments: From Theory to Practice*, 21 L. & POLITICS Bk. REV. 715, 715 (2012) (book review), available at <http://www.lpbr.net/2012/01/feminist-judgments-from-theory-to.html>.

10. *Id.* at 716 (quoting FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 8 (Rosemary Hunter et al. eds., 2010)).

11. The not-so-funny injunction to “help others” appears nowhere in my copy of *In One Era*, but some attribute it to Levenson. See *Reaching Out to Others: It's What We Do Here*, SPECTRUM, Nov. 21, 2012, at C. Snopes.com purports to correct the misattribution of these words to Audrey Hepburn, saying that Sam Levenson was the true writer. *My Fair Lady*, SNOPES.COM (May 24, 2012), <http://www.snopes.com/glurge/beautytips.asp>. Because nobody cites an actual source and the rendering of the words varies, I doubt Levenson ever took the postscript seriously enough to publish it. He probably did have occasions to speak it, such as homilies with children in the audience.

12. When I gave the Judge a call to tell him about this project, he was gracious and a little bemused. “The ideology? The ideology is the individual without the capacity to get her rights gets her due,” he said. “She should be able to look to the courts to get her protection.” Telephone Interview with Jack B. Weinstein (Feb. 20, 2014).

with reference to a long record. A thoughtful judge reached the best decisions he could. In this process he happened to create, among many other things, feminist jurisprudence. His corpus of decisional law responds to a priority that feminist legal theorist Catharine MacKinnon emphasized by quoting John Stuart Mill: Reformers must “end the aristocracy of sex.”<sup>13</sup>

Emulating the architecture of Judge Weinstein’s judicial opinions (probably because I write as a former law clerk), this Article surveys the corpus by classifying cases as “Law,” in Part II, and then in Part III moves to what Judge Weinstein in his decisions likes to call “application of law to facts”—here, “Applications and Inferences.”<sup>14</sup> The survey of this Article claims that feminist jurisprudence can emerge and make important improvements without an ideology so labeled.<sup>15</sup>

## II. LAW

### A. *Women of Low Income*

One decision that may qualify as Judge Weinstein’s first work of feminist jurisprudence invalidated a welfare regulation.<sup>16</sup> New York City policy automatically reduced the stipend of any woman who had a man living in her home—by irrebuttable presumption, whether he made any contribution or not. “The poor do not necessarily cohabit on a bed of roses,” Weinstein wrote for a three-judge trial court panel, surveying the distress that the reduction in Rose Hurley’s shelter allowance from \$150 to \$115 a month would occasion.<sup>17</sup>

What may have looked to prosperous rule writers like extra space in an apartment being rented under the table for gain looked to Judge Weinstein like another tough tradeoff in a hard life. He quoted expert testimony from the Columbia University sociologist Herbert Gans:

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13. CATHARINE A. MACKINNON, *SEX EQUALITY*, at vi (2001); see also Katharine T. Bartlett, *MacKinnon’s Feminism: Power on Whose Terms?*, 75 CALIF. L. REV. 1559, 1570 (1987) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), and adverting to “the undoing of our system of gender-based oppression”).

14. Regrettably, I have not mastered the Judge’s technique of writing expository prose without footnotes, see JEFFREY B. MORRIS, *LEADERSHIP ON THE BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* 91 (2011), and so cannot replicate it here. Judge Weinstein does include heavy footnotes in his academic writing. *Id.* at n.15. Maybe I am hewing to his methods after all.

15. Cf. Louisa Peacock, *Tony Benn: What He Achieved for Women*, TELEGRAPH (Mar. 14, 2014, 10:30 AM), <http://www.telegraph.co.uk/women/womens-politics/10697433/Tony-Benn-the-feminist-What-he-achieved-for-women.html> (giving similar attention to the accomplishments of another contemporary of Judge Weinstein’s).

16. *Hurley v. Van Lare*, 380 F. Supp. 167 (S.D.N.Y. & E.D.N.Y. 1974). But see *infra* notes 160–164 and accompanying text (suggesting that a 1968 decision by the Judge may also qualify as feminist jurisprudence).

17. *Id.* at 171.

[W]here there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . [,] a very generous extension of help and hospitality to others, relatives and close friends.

And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligations, people helping each other because they know if they help somebody when they have a problem, they will be helped in return.

One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem.<sup>18</sup>

"This is a very important phenomenon that middle class people don't do much of and don't understand," Weinstein emphasized, continuing his quotation of Gans.<sup>19</sup>

*Hurley* went on to rebut what New York had deemed irrebuttable. The presence of a "lodger" does not demonstrate that a family has more space than it needs, Judge Weinstein found.<sup>20</sup> Moreover, not all men who take up residence in apartments deliver financial advantage to the female welfare recipients who live there.<sup>21</sup> Although a divided Second Circuit panel disagreed,<sup>22</sup> Weinstein's reading of the New York welfare rules went on to prevail in the United States Supreme Court.<sup>23</sup>

In *United States v. Leasehold Interest in 211 Nostrand Ave., Apartment 1-C, Brooklyn, N.Y.*,<sup>24</sup> Judge Weinstein blocked part of an eviction from a housing project in Williamsburg. The drug dealers in the household had to get out, he decided—he wrote an injunction to that

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18. *Id.* at 172 (alterations in original).

19. *Id.*

20. *Id.* at 173.

21. *Id.* at 174–75. For a book-length exposition of this thesis, see KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005).

22. *Taylor v. Lavine*, 497 F.2d 1208 (2d Cir. 1974).

23. *Van Lare v. Hurley*, 421 U.S. 338 (1975).

24. 760 F. Supp. 1015 (E.D.N.Y. 1991).

effect—but a fifty-one-year-old great-grandmother could stay.<sup>25</sup> She had no other place to go, and Weinstein found credible her statement that she did not know her nineteen-year-old granddaughter was selling crack.<sup>26</sup> He later told an interviewer that “the only hope of saving the largest part of the group was in saving the apartment and the [great-]grandmother’s control of the children.”<sup>27</sup>

A more famous set of feminist decisions by the Judge, known in the aggregate as *Nicholson*,<sup>28</sup> addressed low-income women less directly. The women made better off by it have been overwhelmingly poor, however.<sup>29</sup> *Nicholson* halted a policy of the Administration for Children’s Services in New York to remove children from their homes if domestic violence had occurred there.<sup>30</sup>

Judge Weinstein responded to Sharwline Nicholson’s complaint with speed, care, and compassion. He invited the Juvenile Rights Division of the Legal Aid Society to participate as amicus, requested that the parties consider amici representation of other interested persons—the children themselves, the alleged perpetrators of domestic violence—and considered a motion for class certification.<sup>31</sup> At the same time, he ordered the parties to get ready to go to trial immediately, class or no class.<sup>32</sup> In granting a preliminary injunction supportive of the plaintiff class, Judge Weinstein found “widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts.”<sup>33</sup>

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25. *Id.* at 1018.

26. *Id.* at 1033–34.

27. MORRIS, *supra* note 14, at 240. On the feminist importance of this decision, see Melissa A. Cohen, *Vindicating the Matriarch: A Fair Housing Act Challenge to Federal No-Fault Evictions from Public Housing*, 16 MICH. J. GENDER & L. 299, 317 (2009) (using a Weinstein quote as an epigraph).

28. See *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002); see also *Nicholson v. Williams*, 205 F.R.D. 92 (E.D.N.Y. 2001); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (holding that some mothers in the class had statutory and due process rights to effective counsel). Decisional law in *Nicholson* by other judges includes *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003) (certifying questions to the New York Court of Appeals); *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004) (partially answering questions certified); and *Nicholson v. Scoppetta*, 116 F. App’x 313 (2d Cir. 2004) (remanding to the trial court to reconsider in light of the answers to the certified questions).

29. *Nicholson*, 203 F. Supp. 2d at 153, 252.

30. *Id.* at 163–64.

31. *Id.* at 163.

32. MORRIS, *supra* note 14, at 296–97.

33. *Nicholson*, 203 F. Supp. 2d at 163. Judge Weinstein also paid careful attention to the well-being of the children involved. See *id.* at 202–04.

*B. Sentencing Female Offenders*

Because my clerkship with Judge Weinstein took place early in the era of the Federal Sentencing Guidelines, I had a ringside seat at the discomfort that these constraints imposed on him. His disapproval of their severity would eventually help to undo the prescription that Congress imposed for more than two decades.<sup>34</sup> Before the end of this era in 2007, female offenders presented the Judge with several opportunities to temper the Guidelines with humanity.

Judge Weinstein described *United States v. Concepcion*, a matter that, like *Nicholson*, prompted him to publish several decisions,<sup>35</sup> as “the largest criminal case in terms of numbers of defendants ever brought and processed in this district.”<sup>36</sup> The defendants, most of them single mothers, were poor Dominican immigrants who used fake documents to cheat the government to the tune of about \$45 million.<sup>37</sup> Sentencing them more leniently than the Guidelines seemed to decree, Weinstein explained his clemency in part by sharing blame beyond the women who had been convicted. The Dominican community in New York “must assume responsibility for dealing with unacceptable criminal behavior,” he wrote in one of the *Concepcion* decisions;<sup>38</sup> for its part, the city government had been remiss for not even bothering to match stated Social Security numbers with names.<sup>39</sup> The defendants were “very good mothers,” Judge Weinstein told an interviewer years later.<sup>40</sup> They stole money “to give their children something better.”<sup>41</sup>

Another device Judge Weinstein used to reduce sentence terms, similar to the blame sharing he applied to sharp effect in *Concepcion*, was to find in the Guidelines themselves an omission or even cluelessness. Both during and after the Guidelines era, Weinstein invoked rehabilitation—a value not embraced by the Sentencing Commission<sup>42</sup>—to support lenient sentences for female defendants.<sup>43</sup>

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34. MORRIS, *supra* note 14, at 278–79.

35. See *United States v. Concepcion*, 825 F. Supp. 19 (E.D.N.Y. 1993); see also *United States v. Concepcion*, 808 F. Supp. 166 (E.D.N.Y. 1992); *United States v. Concepcion*, 795 F. Supp. 1262 (E.D.N.Y. 1992).

36. *Concepcion*, 825 F. Supp. at 23.

37. MORRIS, *supra* note 14, at 263–64.

38. *Concepcion*, 825 F. Supp. at 24.

39. *Id.* at 25.

40. MORRIS, *supra* note 14, at 263.

41. *Id.*

42. See *United States v. Dunnigan*, 507 U.S. 87, 98 (1993) (stating that “rehabilitation is no longer a goal of sentencing under the Guidelines”).

43. See, e.g., *United States v. Smith*, No. 07-CR-377(JBW), 2008 WL 1946018 (E.D.N.Y. May 1, 2008); *United States v. DeRoover*, 36 F. Supp. 2d 531 (E.D.N.Y. 1999); MORRIS, *supra* note

Sometimes, he could avoid an overt condemnation of this omission by simply availing himself of the Guidelines' catchall "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."<sup>44</sup>

In *United States v. Perez*,<sup>45</sup> for example, Weinstein concluded that the defendant had suffered enough. She had given birth while in custody for selling cocaine, turned the baby over to relatives, learned that the baby (her only child) had died suddenly, and now faced deportation.<sup>46</sup> "The Commission did not take into account" what the death of an only child would feel like for an offender under these circumstances, he wrote.<sup>47</sup>

Three sentences issued by Judge Weinstein in the next year continued this empathy for women in trouble expressed in the form of downward departures. Pregnancy and its consequences under New York state law supported two of them.<sup>48</sup> In *United States v. Gaviria*,<sup>49</sup> Weinstein noted that the Guidelines gave him no room to consider the devastating consequences of coercive control on the defendant by a batterer.<sup>50</sup> Unable to depart downward, he would at least tell her story.

The downward-departing and arguably soft-on-crime posture was made more compelling by the backbone that nobody could deny, I think. Over the years, Weinstein had declined to coddle many offenders. Numerous prison terms that he imposed struck courts and observers as too severe.<sup>51</sup> A respected judge with a history of stiff sentences who opts for lenity draws attention to circumstances that impose penalties of their own.

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14, at 260 (citing the unpublished 1995 decision *United States v. Rodriguez*). For an example of when Judge Weinstein postponed sentencing to await information about whether rehabilitation had occurred, see *United States v. Flowers*, 983 F. Supp. 159 (E.D.N.Y. 1997).

44. 18 U.S.C. § 3553(b)(1) (2012).

45. 756 F. Supp. 698 (E.D.N.Y. 1991).

46. *Id.* at 698.

47. *Id.*

48. In two decisions, Judge Weinstein noted that defendants who had been pregnant when they were arrested faced losing custody of their children under New York law if they went to prison for as long as the Guidelines mandated. *MORRIS*, *supra* note 14, at 258 (citing *United States v. Pokuaa*, 782 F. Supp. 747 (E.D.N.Y. 1992), and *United States v. Arize*, 792 F. Supp. 920 (E.D.N.Y. 1992)).

49. 804 F. Supp. 476 (E.D.N.Y. 1992).

50. *Id.*

51. See *MORRIS*, *supra* note 14, at 272–73 (noting reversals of sentences imposed by Judge Weinstein by the Second Circuit on the ground that they were too harsh); see also *id.* at 273 n.188 (recalling the Judge's decision to sentence a jockey to ten years in prison for his conduct in a betting scandal).



A final example in this category of sentencing female offenders adds the complication of a tripartite struggle, rather than the standard binary of prosecutors versus defendants. It too is a downward departure, but with more internal conflict. *United States v. Blake*<sup>52</sup> gave Judge Weinstein a chance to parse the eloquent impact statement that came in the form of two letters about a female defendant from a female victim. Summer Blake had stabbed Sheron Nauzo repeatedly in her left hand while committing a clumsy, unavailing bank robbery.<sup>53</sup> The stabbing caused Nauzo to suffer lingering disability, described with care in her first letter;<sup>54</sup> Nauzo wrote again after reviewing a transcript of the sentencing hearing.<sup>55</sup> Weinstein quoted from both letters, and also elaborated on the importance of victim-impact considerations, before giving Blake a relatively lenient noncustodial sentence that included \$5,000 as restitution to her victim.<sup>56</sup>

### C. Women's Civil Rights

Employment discrimination plaintiffs have a tough row to hoe all over the country;<sup>57</sup> and as a New York lawyer with a bit of limited (though fairly recent) litigation experience on point, I have observed especially tough barriers to entry in the Southern and Eastern Districts. When he sat by designation on a panel of his antagonist-and-supporter, the Second Circuit,<sup>58</sup> Judge Weinstein took the unusual step of reversing summary judgment for an employer and remanding an employment discrimination claim for trial.<sup>59</sup> The political scientist, law professor, and Symposium participant Jeffrey B. Morris has said that the Judge "is no enthusiast about employment discrimination claims," despite being "liberal in most ways."<sup>60</sup> Yet in *Gallagher v. Delaney*,<sup>61</sup> Weinstein defied both the local consensus among judges and whatever skepticism he may have felt about the category.

"[A] jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether bor-

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52. 89 F. Supp. 2d 328 (E.D.N.Y. 2000).

53. *Id.* at 331.

54. *Id.* at 334.

55. *Id.* at 336.

56. *Id.* at 352-53.

57. See generally Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001).

58. See James L. Oakes, *Tribute, Jack Weinstein and His Love-Hate Relationship with the Court of Appeals*, 97 COLUM. L. REV. 1951 (1997).

59. *Gallagher v. Delaney*, 139 F.2d 338, 350 (2d Cir. 1998) (Weinstein, J., sitting by designation).

60. MORRIS, *supra* note 14, at 307.

61. 139 F.2d 338 (2d Cir. 1998).

derline situations should be characterized as sexual harassment and retaliation,” Judge Weinstein wrote.<sup>62</sup> Juries know more on point than an Article III judge: this decider may have started out someplace different, but now “usually lives in a narrow segment of the enormously broad American socio-economic spectrum” and also lacks “real-life experience” relevant to the controversy.<sup>63</sup> Weinstein sent the dispute to this factfinder.<sup>64</sup>

*Hill v. Berkman*<sup>65</sup> is a feminist Title VII case of a different stripe. Nothing went to a jury: Judge Weinstein granted summary judgment to a defendant employer. What was feminist was its engagement with a statutory impediment. In this respect, it resembles *United States v. Gaviria*, the sentencing decision in which Judge Weinstein found no ground for the downward departure he wanted. Recall that in *Gaviria*, Judge Weinstein did all he could for a woman by writing sympathetically about her plight and adverting to the justice of what she had sought in his court.<sup>66</sup>

Taken on pro bono by an elite New York firm along with nonprofit amici, *Hill v. Berkman* asked the court to apply Title VII to the United States Army as an employer. The undertaking was quixotic, to put it mildly. No precedent supported it. The U.S. Attorney and the Judge Advocate General moved for sanctions.<sup>67</sup> Judge Weinstein denied their Rule 11 motion and also gestured favorably toward Hill and her attorneys, stating that “on balance, the arguments in favor of granting women in the armed services the protection of Title VII of the Civil Rights Act are persuasive.”<sup>68</sup> Joan Hill had to lose, he went on to hold, because her combat-ineligibility functioned as a bona fide occupational qualification for the Army’s discriminatory classification,<sup>69</sup> but she fared well in the dicta and statutory interpretation included in the opinion.<sup>70</sup> Although a year later a student commentator faulted *Hill v. Berkman* for not taking a strong enough stance against sex discrimination,<sup>71</sup> it was then—and as far as I know it remains—the

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62. *Id.* at 342.

63. *Id.*

64. *Id.* at 350.

65. 635 F. Supp. 1228 (E.D.N.Y. 1986). This case is the only one discussed in this Article on which I worked as a law clerk.

66. See *supra* note 49 and accompanying text.

67. *Hill*, 635 F. Supp. at 1231.

68. *Id.*

69. *Id.* at 1239.

70. *Id.*

71. Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2094 (1987).

only holding ever issued by any court “that Title VII applies to the uniformed military.”<sup>72</sup>

Another feminist decision, *Leibovitz v. New York City Transit Authority*,<sup>73</sup> falls into the *Hill v. Berkman* category of moving civil litigation in a progressive direction notwithstanding the failure of the plaintiff’s claim: Judge Weinstein ruled in favor of an ambitious litigant but was reversed on appeal.<sup>74</sup> He stated the problem crisply in his opening paragraph:

This is a pristine hostile work environment case. The plaintiff, herself a highly-regarded member of middle management, was always treated appropriately and with respect by her co-workers and by her employer. She was never discriminated against on the basis of sex, nor was she personally the target of inappropriate sexual behavior. There was, however, evidence of sexual harassment of other women in her shop that caused her emotional distress. Whether this was sufficient to create an actionable claim for hostile work environment appears to be an issue of first impression.<sup>75</sup>

Making no apologies for the approach he took, Judge Weinstein asked a provocative rhetorical question—“Would a rare Jewish person in a Nazi concentration camp afforded privileged treatment while other Jews were being horribly persecuted have no claim for the psychological trauma of having to witness the abuse?”—and noted the harm of an abusive environment with reference to Primo Levi, the Holocaust, and the Soviet gulag.<sup>76</sup>

Weinstein dismissed some of the claims at the end of trial, and the jury went on to reject more of them.<sup>77</sup> At the end, the Judge entered judgment for Leibovitz and the jury awarded her \$60,000 for emotional distress.<sup>78</sup> He endorsed the jury’s affirmative answer to “Did defendant New York City Transit Authority violate plaintiff Diane Leibovitz’s rights by its deliberate indifference to widespread discriminatory practices and sexual misconduct against others?”<sup>79</sup>

Judge Dennis Jacobs, writing for a Second Circuit panel, took a different view: “We hold that Title VII’s prohibition against hostile work

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72. Robin Rogers, Comment, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CALIF. L. REV. 165, 186 n.115 (1990).

73. 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

74. *Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179 (2d Cir. 2001).

75. *Leibovitz*, 4 F. Supp. 2d at 146.

76. *Id.* at 152. For a criticism of Judge Weinstein’s so-called “reductio ad Hitlerum” discourse in *Leibovitz*, see Gabriel H. Teninbaum, *Reductio ad Hitlerum: Trumping the Judicial Nazi Card*, 2009 MICH. ST. L. REV. 541, 556–57.

77. *Leibovitz*, 4 F. Supp. 2d at 146–47.

78. *Id.*

79. *Id.* at 147.

environment discrimination affords no claim to a person who experiences it by hearsay.”<sup>80</sup> He rolled down the slippery slope: if Leibovitz could recover for what she knew of only through the words of others, the court might as well accept liability for harassment that was “going on in a nearby office of another firm,” known to the plaintiff only via “an infuriating newspaper article,” or even “a false rumor of a kind that would be upsetting if true.”<sup>81</sup> Federal decisional law on the issue has been mixed.<sup>82</sup>

In this context, Judge Weinstein’s position went about as far as it could to recognize the destruction inflicted by an environment rife with harassment at some remove from the person who complained about it. His carefully written opinion may have generated some concessions by the reversing court.<sup>83</sup> It won attention in the secondary literature.<sup>84</sup> It also comports with what the appellate court precursor to the leading Supreme Court decision on sexual harassment, *Meritor Savings Bank, FSB v. Vinson*,<sup>85</sup> had to say about the *Leibovitz* issue, admittedly in dicta: “Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive.”<sup>86</sup>

*P. v. Delta Air Lines, Inc.*<sup>87</sup> holds a curious place in the Weinstein feminist corpus. The Judge granted summary judgment to a defen-

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80. *Leibovitz*, 252 F.3d at 182.

81. *Id.* at 189.

82. See *Leibovitz*, 4 F. Supp. 2d at 151 (“Dicta from other circuits support a broad prohibition of hostile work environments encompassing gender harassment that degrades the workplace, regardless of its initial direct targets” (citations omitted)); see also *Dabney v. Christmas Tree Shops*, 958 F. Supp. 2d 439, 459 (S.D.N.Y. 2013) (concluding that reports about harassment of coworkers was the type of hearsay condemned by the Second Circuit in *Leibovitz* and so the plaintiff had to lose); *Maluo v. Nakano*, 125 F. Supp. 2d 1224, 1231 (D. Haw. 2000) (“A sexual harassment plaintiff need not have been the direct object of harassing behavior, and may base his or her claim upon damages caused by the harassment of other employees.”).

83. For example, the Second Circuit (1) agreed that Diane Leibovitz had standing, *Leibovitz*, 252 F.3d at 185; (2) declined to use the doctrine of prudential standing against her claim, *id.* at 187–88; and (3) agreed that what it had scorned as “hearsay” could be considered in support of support a direct claim of harassment, *id.* at 190.

84. Soon after its issuance, the decision occupied the center of student commentary. Compare Christopher M. O’Connor, Note, *Stop Harassing Her or We’ll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501 (1999) (admiring the decision), with L. Robert Guenther, III, Recent Development, *Who Is the Victim Here? Vicarious Sexual Harassment After Leibovitz v. New York City Transit Authority*, 55 WASH. U. J. URB. & CONTEMP. L. 299 (1999) (arguing that Judge Weinstein’s recognition of the claim conflicts with congressional intent and is unwise). See also Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 129–31 (2002) (examining through the lens of “solidarity” what Diane Leibovitz experienced and objected to at work).

85. 477 U.S. 57 (1986).

86. *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985).

87. 102 F. Supp. 2d 132 (E.D.N.Y. 2000).

dant employer in a Title VII claim by a female employee who alleged hostile environment sexual harassment and New York torts. Doesn't sound very feminist, perhaps, but as I read the case Judge Weinstein did part of the necessary progressive work. The Second Circuit, affirming in part and reversing in part, did the rest.<sup>88</sup>

The Weinstein opinion in *P. v. Delta Air Lines, Inc.* may be read as an answer to the student commentator who responded to *Leibovitz* by asking, in effect, "What can a well-intentioned employer do to win in Judge Weinstein's court?"<sup>89</sup> *P.* offers a thoughtful response. In tossing the hostile environment claim of a flight attendant who blamed Delta for the sexual assault she said she suffered after a coworker drugged her in his Rome hotel room,<sup>90</sup> Judge Weinstein reasoned that Delta was not at fault. The assailant had no supervisory authority over the plaintiff, Penny Ferris; Delta had insufficient knowledge of his propensities, Weinstein concluded; and Delta maintained an admirably comprehensive policy with respect to the harassment complaints of its employees.<sup>91</sup> Although a woman lost and a big publicly traded company won, *P. v. Delta Air Lines, Inc.* can rest in the Weinstein feminist column. Delta received summary judgment but had to go through a trial, present its sexual harassment policy for close review, and respond to the New York tort claims that Ferris included in her complaint. The decision gave guidance to employers while taking sexual harassment and sexual assault seriously.

For its part, the Second Circuit honed in on the weak spot of Judge Weinstein's decision. Whereas Weinstein did not think that past reports that the coworker, Michael Young, had used date rape drugs were sufficient to create notice on Delta's part, Judge Pierre Leval, writing for the Second Circuit panel, disagreed: "A reasonable factfinder might conclude that Delta's negligence made it responsible for Ferris's rape. Delta had notice of Young's proclivity to rape coworkers."<sup>92</sup> Leval also faulted the choice of a Delta supervisor to minimize and bury an earlier report.<sup>93</sup> Read together, *P. v. Delta Air Lines, Inc.*, the Weinstein decision, and *Ferris v. Delta Air Lines, Inc.*, the Second Circuit reversal, yield a comprehensively progressive response to the claim of a vulnerable female worker. Judge Weinstein

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88. *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2d Cir. 2001).

89. See Guenther, *supra* note 84, at 314–15.

90. The jury had ten members; Judge Weinstein declared a mistrial when it "split nine to one in favor of defendants on the underlying question of whether a rape had in fact occurred." *P.*, 102 F. Supp. 2d at 135.

91. *Id.* at 138–42.

92. *Ferris*, 277 F.3d at 133, 136.

93. *Id.* at 136.

did not provide all the feminism—and he probably erred on the question of Delta’s knowledge and responsibility—but the respect he showed an employee’s complaint provides a model for trial judges who believe that they must give summary judgment to a defendant employer.

Judge Weinstein achieved additional feminist progress in construing another antidiscrimination statute. Title IX, as applied to sports, has long been a target of conservative critics: individuals who refrain from attacking bans on discrimination in housing and employment refrain less when they have a chance to attack bans on discrimination in athletics.<sup>94</sup> Undisturbed by this backlash, Weinstein ruled capaciously for a plaintiff in *Sternberg v. U.S.A. National Karate-Do Federation*.<sup>95</sup> Ilyse Sternberg alleged that the defendant, whose name Weinstein shortened to the Karate Federation, withdrew its support for sending a Karate sparring team to the world championships for sex-discriminatory reasons.

Weinstein issued several bold rulings: (1) that the Karate Foundation’s work was “educational” and thus eligible for Title IX coverage; (2) that its withdrawal of support was state action (via funding from the federal government to the United States Olympic Committee which, in turn, sends money to the Karate Foundation);<sup>96</sup> and (3) that Sternberg had a private right of action under the Ted Stevens Olympic and Amateur Sports Act of 1978.<sup>97</sup> None of these conclusions had much precedent behind it; the Judge simply called them as he saw them. Unlike *P. v. Delta Air Lines, Inc.*, a divided victory, *Sternberg* gave a sex-discrimination plaintiff everything she asked for.

#### D. The Woman’s Constitution

When he proposed a “woman’s constitution,”<sup>98</sup> Kenneth L. Karst partook of what sometimes gets called “relational feminism,” an aca-

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94. Although this criticism occasionally strays into other topics—see, for example, Linda Flanagan & Susan H. Greenberg, *How Title IX Hurts Female Athletes*, ATLANTIC (Feb. 27, 2012), <http://www.theatlantic.com/entertainment/archive/2012/02/how-title-ix-hurts-female-athletes/253525/>—most of it complains that young men are being shortchanged. See Valerie Strauss, *Has Title IX, Now 40 Years Old, Harmed Male Athletics?*, WASH. POST (June 24, 2012, 11:30 AM), [http://www.washingtonpost.com/blogs/answer-sheet/post/has-title-ix-now-40-years-old-harmed-male-athletics/2012/06/14/gJQArSCqdV\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/has-title-ix-now-40-years-old-harmed-male-athletics/2012/06/14/gJQArSCqdV_blog.html) (summarizing these criticisms).

95. 123 F. Supp. 2d 659 (E.D.N.Y. 2000).

96. *Id.* at 661.

97. *Id.* at 662–63, 666.

98. Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447.

democratic effort focused on differences between men and women.<sup>99</sup> One need not embrace relational feminism—I don’t, and as far as I can tell Judge Weinstein doesn’t either—to find a woman’s constitution in the Weinstein corpus. Judge Weinstein has had occasion to read the United States Constitution as a source of rights and opportunities for women, without needing to generalize about women’s nature.

*Ganzy v. Allen Christian School*<sup>100</sup> lands in the woman’s constitution section of this Article for reasons I’ll get to in a minute: it also construed Title VII and thus had a home with the civil rights cases directly above. Decided the same year as Weinstein’s stint on a Second Circuit panel noted above,<sup>101</sup> *Ganzy* made the same choice to send a gendered dispute to what Weinstein called “the Constitutional Institution for Resolving Ambiguity.”<sup>102</sup> The defendant, a church-affiliated school,<sup>103</sup> fired Michelle Ganzy, an unmarried woman, from her job as a teacher after its managers learned (from reading student toilet-stall graffiti) that she was pregnant.<sup>104</sup> Ganzy had signed the school’s Statement of Belief agreeing that her life was “governed” by Holy Scripture, but made no promise to abstain from premarital sexual intercourse.<sup>105</sup>

Judge Weinstein included what he called a “brief, non-comprehensive” disquisition on the history of American sexual mores, including a discussion of virginity and chastity demands imposed on women and the rise of abstinence promotion in U.S. schools; it ran several pages.<sup>106</sup> He provided a similar summary history of women in the workforce.<sup>107</sup> The actual decision portion of the opinion was relatively short. Weinstein agreed with the school that it was a religious institution, but held that this status did not immunize it from Title VII liability.<sup>108</sup>

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99. Norma Basch, *Reconstructing Female Citizenship: Minor v. Happersett*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH CENTURY EXPERIENCE* 52, 54–55 (Donald G. Niemen ed., 1992) (so characterizing Karst).

100. 995 F. Supp. 340 (E.D.N.Y. 1998).

101. See *supra* notes 59–63 and accompanying text (discussing *Gallagher v. Delaney*, 139 F.2d 338 (2d Cir. 1998)).

102. *Ganzy*, 995 F. Supp. at 360.

103. The Allen Christian School was founded in 1982 by Floyd Flake, a minister and former member of Congress, and his wife, also a minister. Maria Alvarez, *Allen Christian School in Queens To Close*, *NEWSDAY* (Feb. 15, 2012), <http://www.newsday.com/news/new-york/allen-christian-school-in-queens-to-close-1.3533617>. For three decades, the school was a fixture in the mostly African-American neighborhoods of southeastern Queens. *Id.*

104. *Ganzy*, 995 F. Supp. at 345, 360.

105. *Id.* at 344.

106. *Id.* at 350–54.

107. *Id.* at 354–58.

108. *Id.* at 359–61.

*Ganzy* presented the Judge with an instance of free exercise rights in tension with antidiscrimination principles—a conflict that preceded this 1998 dispute and that has grown more pointed in years following.<sup>109</sup> As Judge Weinstein analyzed the rights of Allen Christian School, this employer could fire a female employee for failing to adhere to the religious teachings it espoused, but only if it held male employees to the same standard. It could not fire a female employee for becoming pregnant out of wedlock, even if its objections to premarital sex were sincere.<sup>110</sup> What had really happened between the parties—sex discrimination on the one hand or a principled, gender-neutral stance against fornication on the other—was, for the Judge, a question of fact best sorted out by a New York “heterogeneous jury.”<sup>111</sup>

If I were the plaintiff in *Ganzy v. Allen Christian School*, I suppose I would have rather had an entry of summary judgment in my favor than the actual Weinstein decision I won.<sup>112</sup> Cheaper, less stressful, less risky, less embarrassing. But sending the case to lay factfinders was almost as likely as summary judgment to come out in favor of the plaintiff and did more for the Woman’s Constitution.<sup>113</sup> Jurors might have started their work wrongly believing that a religious entity is exempted from sex discrimination law—they know about the all-male Roman Catholic priesthood, for example—and *Ganzy v. Allen Christian School* jury instructions would have taught them otherwise. Going to trial would have forced the church-affiliated defendant to emphasize its commitment to a workplace free of sex discrimination. It might never have had to express this position before.<sup>114</sup> Especially because women are, or at least appear to be, disproportionately vul-

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109. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783–84 (2014); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (ruling against a photography company whose principals, citing religious objections, had refused to photograph a lesbian couple’s commitment ceremony).

110. *Ganzy*, 995 F. Supp. at 359–60.

111. *Id.* at 360. A more recent free-exercise-meets-discrimination case from the Sixth Circuit came to the same conclusion about the need to send the factual question of pretext to the jury. *Ward v. Polite*, 667 F.3d 727, 740–41 (6th Cir. 2012) (involving a claim by a graduate student who claimed that her First and Fourteenth Amendment rights were violated when she was expelled from a master’s program).

112. Summary judgment for plaintiffs in employment discrimination cases is rare, but it does get granted. *EEOC v. CITI Global Solutions, Inc.*, 815 F. Supp. 2d 897, 908 (D. Md. 2011); see also *Hillesland v. Paccar, Inc.*, 722 P.2d 1239, 1242–44 (Or. Ct. App. 1986) (reversing trial court for the error of failing to enter summary judgment for plaintiff).

113. As Judge Weinstein wrote, a jury “might simply not believe the Plaintiff’s version of the incident.” *Ganzy*, 995 F. Supp. at 360.

114. See *id.* (noting that the record was sparse).



nerable to harms launched in the name of free exercise,<sup>115</sup> Judge Weinstein's rigorous application of the doctrine brings their interests to the constitutional fore.

*Kramer v. New York City Board of Education*<sup>116</sup> presents a constitutional complement to *Ganzy*. Whereas *Ganzy* reads the free exercise portion of the First Amendment relatively narrowly, understanding it to protect one value that must coexist with others, *Kramer* expands constitutional rights relating to free speech; both decisions advance the welfare of female litigants.

Faith Kramer was "a forty-eight-year-old, tenured, state-licensed, twenty-six-year veteran teacher in the New York City public schools"<sup>117</sup> who got into trouble when she took a bold approach to a mandatory lesson on HIV transmission with her class of eighth-graders. "Ms. Kramer," Judge Weinstein wrote, "asked the students to provide words that they had heard or used when speaking about sexual acts, body parts, or bodily fluids." She wrote the volunteered slang words on the blackboard, and "[w]here applicable, she associated each word with its more socially acceptable equivalent, such as 'breast,' 'penis,' and 'vagina.'"<sup>118</sup>

The next day, Kramer was summoned to the assistant principal's office and told that parents had objected to her pedagogy. The day after that, the school sent Kramer a letter saying she was out of her classroom, effective immediately, pending investigation of an allegation that Kramer's presentation consisted of, oddly enough, "Corporal Punishment."<sup>119</sup> Kramer's HIV lesson caused her to be

removed from the classroom, kept in non-teaching detention for eight months, investigated, provisionally determined by her principal to have committed a serious violation of a school regulation, denied a satisfactory rating for the school year, and deprived of the extra income she had previously been earning from extra "per session" assignments.<sup>120</sup>

Faith Kramer brought an action in the Eastern District.

Judge Weinstein relied on lack of notice to find for the plaintiff. The pedagogy she chose violated no regulations, as the Board of Education conceded.<sup>121</sup> The "corporal punishment" accusation the defendant first lobbed was absurd, Judge Weinstein found, and the

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115. See cases cited *supra* note 109.

116. 715 F. Supp. 2d 335 (E.D.N.Y. 2010).

117. *Id.* at 342.

118. *Id.* at 345.

119. *Id.* at 347.

120. *Id.* at 341.

121. *Id.* at 360.

substitute rationale the Board came up with later, a ban on “verbal abuse of students” via “language that tends to cause . . . mental distress,”<sup>122</sup> could not work either: “Ms. Kramer was trying to help, not to hurt, her students.”<sup>123</sup>

Judge Weinstein did not conclude that Kramer’s free speech rights had been violated. He couldn’t: what government employees may say is limited by crabbed decisional law.<sup>124</sup> Faith Kramer spoke pursuant to her job duties, which were to follow state regulations for the curriculum.<sup>125</sup> She had to hew to something close to a script.

Constrained by precedent, Weinstein found an ingenious way to honor Kramer’s freedom of speech. He published an appendix to his decision that defined the student-volunteered words Kramer had written on the board, relying on eight lexicons (including Spanish and Yiddish dictionaries, useful for terms like *puton* and *schlong*).<sup>126</sup> He also devoted a long section of his opinion to a discussion of sexually explicit language in literature, popular culture, and public health.<sup>127</sup> At a hearing in Weinstein’s court, Kramer testified that she had returned to the classroom where she was receiving her usual high marks.<sup>128</sup> She still elicited street slang for her HIV discussion, she said, but “felt extremely uncomfortable with it because I’m afraid, honestly,”<sup>129</sup> and so she now asked her students “to write down terms they knew on large sheets of paper” instead of the blackboard.<sup>130</sup> Reprinting photocopied pages from Kramer’s students’ notebooks, *Kramer v. New York City Board of Education* gave back to Faith Kramer the nearest equivalent of her big word-filled blackboard.

Another enlargement of the Woman’s Constitution appears in *Pulinario v. Goord*,<sup>131</sup> a habeas decision. As I can attest from my experience in chambers and as has been documented, Judge Weinstein grapples with the often-chaotic pile of habeas petitions himself rather

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122. *Kramer*, 715 F. Supp. 2d at 360 (alteration in original).

123. *Id.*

124. I had occasion to consider the state of this case law when I composed a moot court exercise involving adverse consequences of speech spoken by a fictitious state-employed plaintiff. See Anita Bernstein, *Themes, Doctrine, and Pedagogy in the 2013–14 National Health Law Moot Court Competition Problem*, 35 AM. J. LEGAL MED. 345 (2014). Judge Weinstein himself once contributed to this constraining decisional law, although he tempered his ruling with dicta supportive of “asylum” from dismissal. See MORRIS, *supra* note 14, at 300–01 (discussing *Gordon v. Griffith*, 88 F. Supp. 2d 38, 44 (E.D.N.Y. 2000)).

125. *Kramer*, 715 F. Supp. 2d at 357.

126. *Id.* at app. A 373–77.

127. *Id.* at 362–70.

128. *Id.* at 350–51.

129. *Id.* at 351.

130. *Id.* Judge Weinstein did the questioning himself.

131. 291 F. Supp. 2d 154 (E.D.N.Y. 2003).

than punt them to a law clerk or magistrate judge.<sup>132</sup> More than a decade ago, at the age of eighty-two, he volunteered to clear nearly eight hundred backlogged habeas cases pending in the Eastern District. The grateful court assigned five hundred of them to him, along with a former law clerk as special master.<sup>133</sup> One successful petition came from Keila Pulinario, a twenty-one-year-old killer whose I.Q. had been measured at 70.<sup>134</sup>

Judge Weinstein ruled that the defendant's Sixth Amendment right to counsel had been violated by the decision of a state trial judge to prohibit her from introducing evidence of post-traumatic stress disorder that could have supported a "mental disease or defect" defense entitling her to acquittal of the murder charge she faced, or a defense of extreme emotional disturbance that would have permitted the jury to convict her of manslaughter instead of murder.<sup>135</sup> Especially because the Sixth Amendment has rendered so much advantage to rapists and batterers,<sup>136</sup> *Pulinario* makes a vital contribution to gender-progressive case law. It shares with women the benefit of a constitutional right enjoyed on the ground much more by men.

### *E. Women's Redress for Personal Injury*

If Judge Weinstein had sat on the state court bench,<sup>137</sup> or if the *Erie* doctrine did not bar him from making or finding the common law of torts in an overt way, I suppose I could have had more of my dream clerkship with him in these alternate universes, torts being my favorite subject. Fortunately, Judge Weinstein is large, he contains multi-

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132. See MORRIS, *supra* note 14, at 291. He did the same thing with the equally hard-to-read Social Security disability appeals, at least back in my day.

133. *Id.* at 290.

134. *Pulinario*, 291 F. Supp. 2d at 157.

135. *Id.* at 162.

136. See, e.g., *Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011) (observing that *Crawford* confrontation rights for defendants raise "a heavy price" for "battered women, small children, and other fragile witnesses . . . but it is the price that our constitution and our Supreme Court requires"); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749 (2005) (noting that *Crawford* undermined numerous "domestic violence cases that would have presented little difficulty [for prosecutors] in the past"); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545 (1980) (concluding "reluctantly" that some prohibitions on cross-examining victims to elicit testimony about their sexual history "violate the sixth amendment right to defend oneself").

137. Weinstein once tried to get there. He ran for the chief judgeship of New York's highest court back when it was an elective office; he almost won the Democratic nomination. MORRIS, *supra* note 14, at 155-57.

tudes,<sup>138</sup> and so he had time to change tort law too. He used the tools he had at hand, mainly procedural rules. Women gained.

Diethylstilbestrol (DES) litigation occupies two illustrative cases. The first, *Braune v. Abbott Laboratories*,<sup>139</sup> which reached Judge Weinstein's court via diversity jurisdiction, read a New York statute of limitation to expand redress for an all-female group of plaintiffs injured by DES.<sup>140</sup> *Braune* featured a statute, enacted in 1986, that created a special discovery rule for DES claims: the three-year limitation period starts to run on "discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence *such injury should have been discovered* by the plaintiff, whichever is earlier."<sup>141</sup> For Judge Weinstein, this discovery rule meant not a victim's awareness of illness, but "her awareness that her medical problem was 'caused' by something extrinsic to her biology—that someone has done something to her."<sup>142</sup> This interpretation of discovery conflicted with all prior New York holdings on the issue (none of them binding in *Braune*), as Weinstein scrupulously reported,<sup>143</sup> but to hew to this narrow view would have made "New York's discovery rule the most restrictive in the nation."<sup>144</sup> The Judge opted for humane empathy instead, and did so without condescending to the plaintiffs.<sup>145</sup>

Like *Braune*, the second illustrative case also examined the juncture of DES with rules of adjudication. Two manufacturers claimed that they were not subject to jurisdiction in New York because they had no corporate office or presence inside the boundaries of the state, never shipped DES to New York, and never had a license to do business in New York.<sup>146</sup> Weinstein disagreed, and also construed choice of law doctrine to provide for application of New York rather than California

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138. See WALT WHITMAN, *LEAVES OF GRASS* 55 (1855); see also MORRIS, *supra* note 14, at 57 (reporting that former law clerk Joan Wexler found Judge Weinstein "interested in everything"); Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2153 (1997) (remarking that "an invitation to write about 'one of Judge Weinstein's interests' resembles an invitation to write about Life").

139. 895 F. Supp. 530 (E.D.N.Y. 1995).

140. New York was a leader among the states on this issue. See Anita Bernstein, *Markets of Mothers*, in TORTS STORIES 151, 251 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (examining *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989)).

141. *Braune*, 895 F. Supp. at 542 (citing N.Y. C.P.L.R. § 214-c).

142. *Id.* at 545.

143. *Id.*

144. *Id.* at 549.

145. *Id.* at 550–52.

146. *Ashley v. Abbott Labs. (In re DES Cases)*, 789 F. Supp. 552, 559 (E.D.N.Y. 1992). Strictly speaking, one of the two defendants was licensed to do business in New York, but its liability stemmed from the actions of a predecessor corporation that had held no such license. *Id.* at 591.

law.<sup>147</sup> In response to an argument by one of the manufacturers that it was in essence too small to be worth suing, Judge Weinstein said no: New York precedent “regards the dismissal of even ‘small players’ as a significant harm to DES plaintiffs.”<sup>148</sup>

### F. *Feminism Beyond Women*

Decisional law that Judge Weinstein has published advanced gender progress even though women were not present as parties. In some of these decisions men sought relief, and what they won had good effects for women and gender justice generally. My examples of litigants “beyond women” also include a girl and a transgender plaintiff whose identity as a woman reached Weinstein as a matter of debate.

In *United States v. Bannister*,<sup>149</sup> Judge Weinstein considered what happens to nondefendants when young African-American men receive long prison sentences. Their families suffer in numerous ways: “Prisoners’ children,” he wrote, “may experience numerous consequences of incarceration, including loss of contact with the incarcerated parent, strained relationships with caregivers, a diminished sense of stability and safety, economic insecurity, social stigma, shame, increased risk of drug involvement, and susceptibility to adverse peer pressure and risky behavior.”<sup>150</sup> Nondefendant family members face detrimental collateral consequences of felony convictions,<sup>151</sup> as Judge Weinstein knew from his experience as a sentencing judge.<sup>152</sup> One alternative to incarceration he praised in *Bannister*, noncustodial sentencing, enables defendants to earn wage income and help support their (sometimes female) children and other dependents.<sup>153</sup>

At the end of the long opinion, Judge Weinstein returned to his long-held interest in rehabilitation,<sup>154</sup> noting how it benefits persons other than defendants:

For nonviolent, low-level drug crimes, the goals of sentencing—general and specific deterrence, incapacitation, retribution, and re-

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147. *Id.* at 576. This decision offered these female plaintiffs an advantage: the defendants did not have the opportunity to exonerate themselves by proving that they had not supplied DES to particular individuals, which California decisional law extended to them and New York decisional law withheld.

148. *Id.* at 593–94. For my development of a similar idea, see Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895 (2010).

149. 786 F. Supp. 2d 617 (E.D.N.Y. 2011).

150. *Id.* at 653.

151. *Id.* at 654.

152. See *supra* notes 24–27 and accompanying text (discussing the decision of Judge Weinstein to spare a great-grandmother from eviction from her public-housing apartment).

153. *Bannister*, 786 F. Supp. 2d at 656–57.

154. See *supra* notes 42–43 and accompanying text.

habilitation—could in most cases be achieved with limited incarceration, through a system of intense supervised release utilizing home visits; meetings with parole officers; a combination of counseling, drug and alcohol treatment, education, job training, and job placement; and electronic monitoring to prevent flight, promote positive choices, and deter and detect incipient crime. Such a regime would likely be more effective in reducing crime and much less costly than imprisonment. Given discouraging economic, social, and psychological conditions, it seems doubtful that the long sentences of incarceration imposed will appreciably reduce crime.<sup>155</sup>

Looking at a group of men who were suffering, in sum, Judge Weinstein also saw women.

Race and male gender came together in *McMillan v. City of New York*,<sup>156</sup> a decision that won academic feminist attention. This case posed the vexing problem of how to use actuarial data to build an informed estimate of future personal injury damages. Curiously, courts took a long time to notice the fairness concerns.<sup>157</sup>

James McMillan was rendered quadriplegic when a New York ferryboat crashed. He would need medical care for the rest of his life. How long would that be? Lawyers and judges have traditionally used race to inform this estimate, deferring to actuarial predictions that African-American persons live shorter lives than their Caucasian-American counterparts. In refusing to do so, Judge Weinstein joined a handful of courts and a strand in feminist scholarship, especially writings by Martha Chamallas and Jennifer Wriggins.<sup>158</sup> James McMillan was not a woman: but his victory aligned with and strengthened the victories of female personal injury claimants.<sup>159</sup>

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155. *Bannister*, 786 F. Supp. 2d at 690.

156. 253 F.R.D. 247 (E.D.N.Y. 2008).

157. “Many readers may be very surprised to learn that traditionally, courts have used, or allowed juries to use, race when determining damages in civil cases.” Anthony J. Sebok, *Judge Jack Weinstein’s Ruling Barring the Use of Race in Calculating the Expected Lifespan of a Man Seeking Tort Damages: An Isolated Decision, or the Beginning of a Legal Revolution?*, FINDLAW (Oct. 22, 2008), <http://writ.news.findlaw.com/sebok/20081022.html>.

158. *McMillan*, 253 F.R.D. at 251–55 (citing Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1442 (2005); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37 (2007)). I have long held an interest in this issue and once successfully encouraged a student to write about it. Sherri R. Lamb, Note, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299 (1996).

159. See *McMillan*, 253 F.R.D. at 254 (noting the decision by September 11 Victim Compensation Fund special master Kenneth Feinberg not to harm female worker–victims with gendered estimates of how long they would have remained in the workforce); see also Sebok, *supra* note 157 (pointing out that the *McMillan* reasoning applies not only to expected lifespans but expected earnings per year, and to gender as well as race).

A very different “feminism beyond women” decision comes from Judge Weinstein’s early days on the bench. *In re Johnson*<sup>160</sup> involved a naturalization petition filed back when the Immigration and Nationality Act provided that an act of adultery committed within five years of the filing precluded a finding of good moral character and thus barred an applicant from citizenship.<sup>161</sup> Mr. Johnson had not known that his wife was married to another man (she had been living apart from this husband) when they commenced their relationship.

At one level—an unfortunate level for anyone who would just as soon not dwell on a naturalization petitioner’s sexual relationship with a consenting adult who later became his wife—the adultery question was easy. Federal law did not define adultery, yet insisted it be heeded, suggesting a need to turn to state sources. New York criminal law at the time that Johnson engaged in the conduct defined adultery as “the sexual intercourse of two persons, either of whom is married to a third person.”<sup>162</sup> The state later liberalized this crime to permit a defense of reasonable mistake about the marital status of one’s partner, a change that implies that Johnson’s conduct fell within the boundaries of the prohibition when it occurred. For naturalization purposes, Judge Weinstein “acquitted” him anyway, insisting that the no-citizenship rule, which referenced moral turpitude, made no sense without a mens rea requirement.<sup>163</sup>

A trivial dispute, perhaps. Even Mr. Johnson’s nominal adversary, the Immigration and Naturalization Service, did not think the petition should have been denied. Yet the ruling contributed to gender progress. Joining a small number of earlier judicial decisions that came out the same way on the question,<sup>164</sup> *Johnson* took a stand for sexual privacy and liberty. Its struggle to site its result in principled reasoning, I speculate, helped Congress repeal the adultery bar to citizenship decades later.

Feminism Beyond Women covers not only male parties but also female children, and here Judge Weinstein’s care and attention achieved progress in *T.K. ex rel. L.K. v. New York City Department of Education*.<sup>165</sup> The plaintiff, a learning-disabled twelve-year-old girl identi-

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160. 292 F. Supp. 381 (E.D.N.Y. 1968).

161. See Immigration and Nationality Act § 101(f)(2), 8 U.S.C. § 1101(f)(2) (1976), *repealed* by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611 (codified at 8 U.S.C. § 1101(f)(2)).

162. *In re Johnson*, 292 F. Supp. at 382.

163. *Id.* at 383–84.

164. See, e.g., *In re Edgar*, 253 F. Supp. 951 (E.D. Mich. 1966); *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956). Judge Weinstein did not cite these precedents.

165. 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

fied as L.K., complained of bullying that a school district ignored. Judge Weinstein denied the city's motion for summary judgment, holding that under the Individuals with Disability Education Act, young L.K. had recourse if school personnel were "deliberately indifferent to, or failed to take reasonable steps to prevent[,] bullying that substantially restricted" her in her "educational opportunities."<sup>166</sup> Because the Second Circuit had not ruled on the issue, Judge Weinstein perused case law from other courts. He endorsed the most victim-supportive judicial analysis in the country, a decision from the Third Circuit.<sup>167</sup>

*Manago v. Barnhart*<sup>168</sup> ruled on gender identity disorder. I wish to make no grandiose claims for its status as feminist or otherwise progressive case law. Instead, consistent with the approach of this Article, I note the ways in which this Judge Weinstein decision went further in a progressive direction than contemporaneous statutes and cases. Judge Weinstein was ahead of his time.

Decided in 2004, *Manago* reversed an administrative ruling that an individual known as both Joseph Manago and Joanna Manago could not receive Social Security disability insurance.<sup>169</sup> Judge Weinstein put effort into the gendered-pronouns problem, using the noun "claimant" to avoid "he" and "she" and "claimant's" instead of "his" and "her."<sup>170</sup> This choice was more accepting of Manago's identity than the report by a psychotherapist who specialized in gender-identity disorders who had opined that Manago suffered "an ongoing total disability;" this expert used "he" as well as "he/she" and "his/her" — never "she" nor gender-evasion of the sort Weinstein adopted—in language the Judge quoted from the report.<sup>171</sup>

Next Weinstein, having noted that Manago cited no cases to support her petition,<sup>172</sup> read the record generously on questions of when the disability began and what the medical evidence showed.<sup>173</sup> When a student author several years later wrote that "it may be possible for some individuals who suffer from extreme distress over their gender identity to obtain Social Security disability insurance benefits,"

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166. *Id.* at 316. The Judge did grant the city summary judgment on an unrelated point. *Id.* at 319.

167. *Id.* at 312–13.

168. 321 F. Supp. 2d 559 (E.D.N.Y. 2004).

169. *Id.* at 570.

170. *Id.* at 562–63.

171. *Id.* at 564–65.

172. *Id.* at 561.

173. *Id.* at 568–70.



*Manago* was the only case cited in the inevitable footnote.<sup>174</sup> This writer also pointed out that both the Americans with Disabilities Act and the Rehabilitation Act of 1973 explicitly exclude gender-identity disorders from disability protection.<sup>175</sup> *Manago* is not the nation's boldest-ever trans decision.<sup>176</sup> It is humble: only a Social Security disability appeal, readers might think. Yet here, consistent with other examples surveyed in this Article, Judge Weinstein achieved a gender-progressive outcome in a dispute before him. Most of his contemporaries in Congress and on the bench have not had an occasion to reach a humane and liberal end like this one.

### III. APPLICATIONS AND INFERENCES

We may now consider what is “feminist” in the primary sources gathered in the last Part. The conjunction of this word with law or legal theory creates a challenge for secondary writings like this Article. As Symposium participant Elizabeth Schneider once noted, “[T]here is no single feminist theory, but many feminist theories,” from which one can find—and one *must* find, if the category is to make any sense—“some common underlying themes.”<sup>177</sup>

I have mentioned that Judge Weinstein eschewed feminism in the sense that feminism amounts to an overt, conscious ideological agenda. How then could he have generated feminist jurisprudence? To find an answer, I follow Elizabeth Schneider's lead and focus on a few themes that characterize, rather than establish or define in any determinate fashion, feminist law.

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174. Jaime Johnson, Comment, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 L. & PSYCHOL. REV. 153, 157 & n.36 (2010).

175. *Id.* Camille Hébert notes that this exclusion could have been rooted in a progressive understanding—that is, “not wanting to pathologize certain individuals and conditions”—but in fact was attributable to the bigotry of some members of Congress. L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 540–41 (2009). Strife about transgenderism continues to thwart the Employment Non-Discrimination Act, a bill that remains unenacted twenty years after its introduction by the first openly gay member of Congress.

176. One might give that honor to *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), in which the Eleventh Circuit affirmed an Atlanta trial court's finding of a violation of the Equal Protection Clause when a Georgia governmental employer terminated an employee for gender non-conformity, or *Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014), a 2014 Maine Supreme Court decision holding that under state human rights law a transgender school child had a right to use the girls' restroom.

177. Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223, 1225 (1993).

## A. Cui Bono? Cui Pacat?

This theme is the simplest one. Reading the Weinstein corpus in terms of *Who benefits? Who pays?* identifies a practical kind of feminism.<sup>178</sup> Judge Weinstein caused women to fare better in material, concrete terms.

Think about the sets of cases with which we began. The Judge put slightly more money into a 1970s welfare check. He allowed a woman to remain in her home even though her grandchild, who also lived there, sold drugs. He allowed a mother to keep her child after she had been victimized by domestic violence. He adopted leniency in sentencing in recognition of mitigating conditions in a woman's record.

Slight? Easy? Pages of an academic journal keep oppressive environments at some remove, and the courtroom partitions litigants from an assigned judge. Poverty, crime, and a feeling of threat about dependent children have never kicked me personally in the gut. Jack Weinstein would be the first to acknowledge his good fortune on the point. Life tenured since 1968 in a job he enjoys, augmenting his judicial salary with royalty income from decades of classic books that sell well, he could have chosen to snuggle deeply in the comfort he worked to earn; the misery of female litigants could have escaped him. Instead, Judge Weinstein remains aware of the humanity that he and these people share.

Other women received unusually humane treatment in Weinstein's court. We have looked at the civil side of the docket and a habeas case for examples. *Gallagher v. Delaney* and *Ganzy v. Allen Christian School* sent to the jury questions that federal judges usually answer themselves in the form of summary judgment for the antagonists of female litigants.<sup>179</sup> *Sternberg* gave a Title IX victory to a female athlete.<sup>180</sup> *Hill v. Berkman* extended Title VII employment discrimination constraints on the Army, also to the benefit of a woman.<sup>181</sup> In the only decision discussed in this Article where a female plaintiff lost, Judge Weinstein went out of his way to note the progressive conduct of a corporate employer, aiding the cause of antidiscrimination efforts.<sup>182</sup>

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178. I used this approach to feminist jurisprudence in Anita Bernstein, *Gender in Asbestos Law: Cui Bono? Cui Pacat?*, 88 TULANE L. REV. 1211 (2014).

179. See *supra* notes 59–64, 100–108 and accompanying text.

180. See *supra* notes 95–97 and accompanying text.

181. See *supra* notes 65–70 and accompanying text.

182. See *supra* notes 89–91 and accompanying text.

*B. Substance in Procedure*<sup>183</sup>

Much of Judge Weinstein's creativity on the bench expressed itself through procedural innovation. These progressive maneuvers achieved important substantive ends. Returning again to Elizabeth Schneider, who observed that "a fundamental aspect of feminist theory and practice is an emphasis on process, the process of connection,"<sup>184</sup> we find feminist jurisprudence in ventures that Judge Weinstein has undertaken.

Take for example the Dominican-immigrant convicted criminals of *United States v. Concepcion* as Judge Weinstein described them: "very good mothers."<sup>185</sup> Not a procedural move on his part—he said these few words to an interviewer rather than in a judicial decision, off the record so to speak—but diction that sounds unfamiliar at first and then turns out to have substantive support. Judge Weinstein freshened a near cliché when he applied it to newcomers. His dynamic description is an exercise in procedure, or process, "important in and of itself, but also because process profoundly affects results and the way in which people experience both process and result."<sup>186</sup>

Liberal use of the jury also installed gains for women and feminist principles. *Ganzy v. Allen Christian School* ventilated a religion-based rationale for adverse conduct to a woman who had been aggrieved by it in the form of pregnancy discrimination. She might or might not deserve to prevail, but through this decision she reached peer factfinders. Other Weinstein decisions that sent civil cases to the jury, notably *Gallagher v. Delaney*, invited education for jurors, litigants, judges, and observers of the judicial system. A civil jury trial uses rules of procedure (and related sources like the law of evidence) to add nonprofessional experiences and perspectives to the otherwise isolated and self-referential environment of adjudication.<sup>187</sup> Jurors do not arrive in court free of elite antecedents, to be sure,<sup>188</sup> but the procedures that guide and underscore their powers add progressive influence to the law.

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183. Cf. Elizabeth M. Schneider, *Procedure as Substance*, 64 DEPAUL L. REV. XXX (2015).

184. Schneider, *supra* note 177, at 1226.

185. See *supra* note 41 and accompanying text.

186. Schneider, *supra* note 177, at 1226.

187. See generally Phoebe Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994) (finding in the jury a means to include contributions from outsiders and enhance representation).

188. Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 779 (2006) (observing that individuals can join a jury "only if they bear markers of relative privilege: driver's licenses, home ownership, registration on the voter rolls").

Another illustration (among too many to note)<sup>189</sup> of Judge Weinstein's progressive uses of procedure comes from the two DES cases noted above, in which a statute of limitations and rules of personal jurisdiction received open-minded yet carefully reasoned analysis. Weinstein treated the manufacturing defendants fairly when he ruled against them. Women benefited, but their benefit was not a foregone conclusion. Procedural innovation lived compatibly with principle in these decisions—as it always can.

### C. *Insights into Two Divides of Feminist Legal Theory*

The feminist jurisprudence of Jack Weinstein has another helpful effect: it bridges two gaps that have riven the field. To describe them, I'll oversimplify a bit.

#### 1. *The Third and Second Waves*

One of these two divisions emerged when third-wave feminism arose in the 1980s to challenge an ascendant older generation of the movement. According to one book calling itself an “encyclopedia” of the subject, third-wave feminism identifies “feminism and gender activism as only one part of a much larger agenda for environmental, economic, and social justice”; participants in this movement find it “counterproductive to isolate gender as a single variable.”<sup>190</sup> The related term “intersectionality” takes a somewhat narrower approach to antistatutory efforts, focusing on categories of social oppression other than gender—particularly race—that make oppression as a problem, and feminism as a solution, different for different groups of women.<sup>191</sup>

The contrary view, associated with second-wave feminism, appears somewhat in retreat. This position would prefer to leave “environmental, economic, and social justice” to others and consider the interest and position of women only, perhaps on the ground that no other

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189. I direct interested readers to the Judge's monograph on cases involving large numbers of injured plaintiffs, which explores the progressive potential of numerous federal rules of procedure. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

190. Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL'Y 255, 258 (2013) (citing 1 THE WOMEN'S MOVEMENT TODAY: AN ENCYCLOPEDIA OF THIRD-WAVE FEMINISM 366–67 (Leslie Heywood ed., 2006)). For an expression of this point by a feminist legal scholar, see Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 48, 50–51 (1988).

191. The late Trina Grillo spoke powerfully on the point. See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools To Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995).

social justice movement has made women its priority.<sup>192</sup> Second wavers have tried to refute the contention that their version of feminism comes blinkered with white privilege and racial inattention, with mixed results. A more recent challenge for feminists who want to focus on women only is the definitional question of who is a woman.<sup>193</sup>

Our protagonist, like everyone else, does not have a design that will bridge this gap:<sup>194</sup> but his feminist jurisprudence made progress on point using simple inclusion. He was happily indifferent to fractious labels. Recall what Judge Weinstein said about his “ideology”—in his court, “the individual without the capacity to get her rights gets her due,”<sup>195</sup> and this individual need not go by “her.” Weinstein’s feminism-beyond-women cases improved the law when they granted relief to numerous litigants who might not have been women themselves: children of any gender, male adults with connections to women, and transgender women whose identity as women was disputed.<sup>196</sup> As other cases discussed in this Article establish, plenty of women received relief in Weinstein’s court too. *Both, and*.<sup>197</sup> As third and second wavers alike would agree, Judge Weinstein’s energies have extended justice both to and beyond women.

## 2. *Emotion, Relation, Reason/Liberal-Versus-Cultural Feminism*

A second divide in feminist jurisprudence contrasts the “liberal” version with overlapping alternatives gathered under the rubric of “cultural” or “relational” feminism. Liberal feminism stresses the ways in which women and men are alike; cultural or relational feminism looks at ways in which they are different. These two flavors are far from the only varieties of feminism present in feminist legal theory, but they call for separate attention because they are oppositional as well as constituents of a pluralist mix.

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192. See generally Jennifer L. Pozner, *The “Big Lie”: False Feminist Death Syndrome, Profit, and the Media*, in *CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY* 31 (Rory Dicker & Alison Piepmeier eds., 2003) (arguing that feminism is under continual attack, including division into camps and waves, because its message threatens holders of power).

193. See generally CYNTHIA ELLER, *AM I A WOMAN? A SKEPTIC’S GUIDE TO GENDER* (2004).

194. I tried to find neutral ground on this question in Anita Bernstein, *A Feminist Revisit to the First-Year Curriculum*, 46 J. LEGAL EDUC. 217, 228–29 (1996).

195. See *supra* note 12.

196. See *supra* Part II.E.

197. The term “both-and,” commending attention to compatibility rather than exclusion, helps to describe Judge Weinstein’s capacious mind. See, e.g., RICHARD ROHR, *FALLING UPWARD: A SPIRITUALITY FOR THE TWO HALVES OF LIFE* 10 (2011) (“Mature people are not either-or thinkers, but they bathe in the ocean of both-and.”), quoted at Dianna Woolley, *Either/Or—Both/And . . .*, DIANNA WOOLLEY (Feb. 26, 2012, 8:25 PM), <http://diannawoolley.com/blog-notes/2012/2/26/eitheror-bothand.html>.

In his *Woman's Constitution* referenced above, Kenneth Karst, noting the work of Carol Gilligan, identified a “web of connection” as central to relational feminism.<sup>198</sup> This metaphor claims that women “tend to see the same interactions as part of ongoing, sharing connections in a network of relationships.”<sup>199</sup> By contrast, “[m]en tend to see human interactions as the contractual arrangements of individuals seeking positions in a hierarchy.”<sup>200</sup>

Continuing the necessary oversimplification, these two images of human interactions align in part with relational and liberal feminism respectively. They do not align perfectly, to be sure. Liberals might well reject my associating the “liberal” kind of feminism with hierarchy, even though Karst adverted only to the pursuit of a place within hierarchy. And the “web of connection,” like many metaphors, is imprecise. Yet the dichotomy is real enough for the Weinsteinian point I broach here. Rights, separation, boundaries, precepts lie on one side of the feminist divide; connection, relationships, and networks of human beings lie on the other.

The feminist jurisprudence of Jack B. Weinstein partakes of both. *Kramer*, for example, exemplifies the ideals of liberal feminism.<sup>201</sup> Weinstein respected Faith Kramer’s procedural rights, her entitlement to forewarning of what the Board of Education could do to her, her freedom of speech, and her qualifications to craft pedagogy in her classroom. Less obviously in this camp—but I would put it there—is *Pulinario*, where Judge Weinstein made the Sixth Amendment right to counsel effective for a woman, similar to how it has been so effective for many male defendants.<sup>202</sup> At the other side of the divide, Weinstein’s feminism beyond women found communities and cohorts to share in his gender-progressive vision.

As for emotion, a topic applied to the decisions of Judge Weinstein so insightfully in this Symposium by Susan Bandes,<sup>203</sup> sentencing decisions present the clearest illustration.<sup>204</sup> Above we encountered empathy in several manifestations: downward departures from

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198. See *supra* notes 98–99 and accompanying text.

199. KARST, *supra* note 98, at 462.

200. *Id.*

201. See *supra* notes 116–130 and accompanying text.

202. See *supra* notes 134–136 and accompanying text.

203. Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317 (2015).

204. It bears repetition, however, that a famous decision of Judge Weinstein’s outside the sentencing realm began with a reference to emotion: “The evidence reveals widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts . . . .” *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002); see also *supra* note 33 and accompanying text.

Guidelines fiat that reflected the Judge's compassion about painful biographical experiences;<sup>205</sup> concern for rehabilitation (itself an empathy-based perspective on punishment—no human being wishes to be thrown away, or judged with only incapacitation in mind);<sup>206</sup> and the nuanced *United States v. Blake*, where Judge Weinstein paid careful attention to a victim-impact statement when he sentenced the woman who had done the victimizing.<sup>207</sup> I would add here that Judge Weinstein does not assign emotion to female defendants alone. Emotions of men and children are also powerfully present in his sentencing decisions.<sup>208</sup>

#### D. Solidarity

Returning here to the divisions between third and second waves noted above, in an eloquent essay on the subject of unity among women, bell hooks distinguished between solidarity and sisterhood. "Sisterhood," wrote hooks, "[is] based on the idea of common oppression"<sup>209</sup>—a troublesome idea because common oppression does not really unite. Women experience very different types of oppression, some harsher or more varied or nuanced than others. Hooks contrasts with "sisterhood" a term she prefers: solidarity, or "political solidarity," which she deems cogent and central to women's liberation.<sup>210</sup> Some feminists, she wrote, made the mistake of throwing out solidarity when they (rightly) despaired of sisterhood: "We must learn to live and work in solidarity."<sup>211</sup>

Two Weinstein decisions discussed above nicely illustrate the theme of solidarity. In an early writing, the employment discrimination scholar Noah Zatz read *Gallagher v. Delaney*, which held that a female worker could bring a Title VII sexual harassment claim when she

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205. See *supra* notes 42–48 and accompanying text.

206. See Amanda Ploch, Note, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 N.Y.U. J. INT'L L. & POL. 887, 890 (2012).

207. See *supra* notes 52–53 and accompanying text.

208. See, e.g., *United States v. Lopez-Aguilar*, 886 F. Supp. 305, 305–06 (E.D.N.Y. 1995) (finding that a downward departure was warranted to give the defendant and his wife, who were struggling with infertility, a chance to have a child), *vacated sub nom.* *United States v. Londono*, 76 F.3d 33 (2d Cir. 1996); MORRIS, *supra* note 14, at 253 (recalling how Judge Weinstein bought a defendant's child a "whole tin of cookies" when he had to sentence her father to 123 months under the Guidelines and stating that he said, "She doesn't have a father, maybe at least she ought to have a tin of cookies").

209. Bell Hooks, *Sisterhood: Political Solidarity Between Women*, 23 FEMINIST REV. 126, 127 (1986). This publication rendered the author's name with initial capital letters, although she prefers to use this pen name in all lowercase letters.

210. *Id.* at 126–29.

211. *Id.* at 127.

found the harassment pervasive even though she was not a direct victim of the offending conduct, as recounting an encounter with “inter-group solidarity” that courts can recognize when they construe Title VII.<sup>212</sup> In *Nicholson v. Williams*, Judge Weinstein certified a class of welfare mothers who gained the benefit of his decision allowing them, as victims of domestic violence, to keep their children.<sup>213</sup> Certification of female-dominated classes toward progressive ends, a topic burgeoning in the law reviews especially after the feminist loss of *Wal-Mart Stores, Inc. v. Dukes*, provides a route to court for women otherwise unavailable to get there.<sup>214</sup> Class certification was not as necessary for Sharline Nicholson as Betty Dukes, but it boosted an important challenge with the strength of aggregation.<sup>215</sup>

#### IV. CONCLUSION

Imagine a nominee to fill a vacancy on the federal trial bench—a fictitious person, not the honoree of this Symposium. He arrives at his confirmation hearing before the Senate Judiciary Committee. A drowsy senator asks him something vague about his philosophy of judging and what he thinks the judiciary is tasked to do.<sup>216</sup> Other nominees have in the past responded to the question with bland evasion. Their pattern is exemplified by the answer of John Roberts, who when nominated to be Chief Justice of the United States defined his judicial role as calling “balls and strikes” in the quotidian mode of a humble home plate umpire.<sup>217</sup> Our nominee, let us suppose, takes a different tack. He tells the questioning senator that he wants to insert feminist jurisprudence into the Federal Supplement. *Tant pis* for his Article III prospects.

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212. Zatz, *supra* note 84, at 69.

213. See *supra* notes 28–30 and accompanying text.

214. See generally Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 80 (2011).

215. The class certification decision, *Nicholson v. Williams*, 202 F.R.D. 377 (E.D.N.Y. 2001), carefully certified two classes: Class A, consisting of adults subjected to domestic violence, and Class B, consisting of children living in the custody of Class A members. *Id.* at 380. Because the relief sought in *Nicholson* was injunctive rather than pecuniary, certifying Class A made it more likely that these custodial mothers would receive the benefit of the injunction. I thank Liz Schneider and Jacob Corré for their helpful reflections on the consequences of class certification in this decision.

216. On blandness, see William Ross, *The Questioning of Lower Federal Court Nominees at Senate Confirmation Hearings*, 10 WM. & MARY BILL RTS. J. 119, 135 (2001) (observing that oral questions of these nominees by senators “too often are superficial and encourage rote responses”).

217. See Douglas T. Kendall & James E. Ryan, *Liberal Reading: Taking Back the Constitution*, NEW REPUBLIC, Aug. 6, 2007, at 14, 15.



Jack B. Weinstein gave no such response to any senatorial questioners back in 1967. He had no such agenda; he was not withholding information about his plans. Unlike our hypothetical alternative nominee, he could be confirmed. Also unlike this alternative nominee, Judge Weinstein was able to achieve the ends that have occupied this Article.

Over the decades of an extraordinary judicial career, feminist jurisprudence for this judge has amounted to doing the right thing. Judge Weinstein serves the individuals who come before him in his court while at the same time upholding the rule of law. His words are worth quoting again: "The ideology? The ideology is the individual without the capacity to get her rights gets her due."<sup>218</sup> From this simple starting point, feminist jurisprudence has followed.

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218. *See supra* note 12.