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## JACK WEINSTEIN: JUDICIAL STRATEGIST

*Jeffrey B. Morris\**

Fifty years ago, one of the great students of the judicial process, Walter F. Murphy,<sup>1</sup> heir to Princeton University's great tradition of such scholars,<sup>2</sup> employed the papers of United States Supreme Court Justices to consider how any one of their number might go about exerting influence within and outside the Court. How, Murphy asked, could a justice most efficiently use her resources—official and personal—to achieve a set of policy objectives?<sup>3</sup> Murphy argued that there were strategic and tactical courses open for justices to increase their policy influence,<sup>4</sup> and that a policy-oriented justice must be prepared to consider the relative costs and benefits that might result from her formal decisions and informal efforts at influence.<sup>5</sup>

There were, Murphy argued, a wide variety of means by which a justice could express her preferences beyond merely voting and writing opinions.<sup>6</sup> A justice's strongest weapon is her vote and her signature on an opinion, but there are other means besides those available to her, including lobbying and bargaining with her colleagues.<sup>7</sup> To enhance her influence on an issue, a justice could use intellectual persuasion on the merits of an issue or appeal to a colleague's loyalty to the Court, the norm against separate opinions, or, in unusual cases, appeal to the nation's security.<sup>8</sup> She could bargain over an opinion's theory

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1. Walter Murphy lived from 1929 to 2010. He was the author of *WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* (2007); *WALTER F. MURPHY, CHARLES HERMAN PRITCHETT & LEE EPSTEIN, COURTS, JUDGES, AND POLITICS* (2005); *WALTER F. MURPHY, JOSEPH TANENHAUS & DANIEL L. KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS, ALTERNATIVE EXPLANATIONS* (1973); *WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW* (1972); and *WALTER F. MURPHY, CONGRESS AND THE COURT* (1962).

2. As Princeton's McCormick Professor of Jurisprudence, he was the successor of Woodrow Wilson, Edward Corwin, and Alpheus T. Mason.

3. *WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY* 3–4 (1964).

4. *Id.* at 5.

5. *Id.* at 35.

6. *Id.* at 199.

7. *Id.* at 57, 199.

8. *Id.* at 48–49. Murphy had in mind the Second World War Nazi saboteur case *Ex parte Quirin*, 317 U.S. 1 (1942).

or over particular language in the opinion.<sup>9</sup> She could accede to the majority in cases where she did not have the votes, or make concessions on unimportant issues.<sup>10</sup> She could threaten to dissent or to write a dissenting opinion, or even circulate such an opinion.<sup>11</sup> She could try to form a minority group of justices into a voting bloc, at least for purposes of one set of issues.<sup>12</sup> Further, a justice's influence is likely to be higher if her relationships with others had been marked with warmth.<sup>13</sup> Murphy calls this phenomenon "esteem."<sup>14</sup>

Murphy's theories were applicable to other appellate judges or appellate courts, but on first reading, it would seem that little would be applicable to the federal district courts. District judges sit alone except in the increasingly rare cases when a three-judge court is convened<sup>15</sup> or when, more often, a district judge is sitting by designation on a court of appeals.

This is the second of two essays considering the career of Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York. In the first, forthcoming in the *University of Miami Law Review*,<sup>16</sup> I argue that Judge Weinstein, possibly uniquely for a district judge, has acted as a judicial entrepreneur, "selling" his views on the use of class actions to deal with mass torts. It is the aim of this Article to consider how Judge Weinstein, consciously and unconsciously, has employed several of the tactics Walter Murphy described, to attain influence for his opinions and other ideas.

### I. A DISTRICT JUDGE'S CAPACITY FOR INFLUENCE

Federal district judges are hampered in wielding considerable influence on the law, with the exception of the impact they might have on the parties and attorneys before them in a particular case, or when they are handling structural lawsuits or class actions.<sup>17</sup> District judges are not able to initiate litigation.<sup>18</sup> They are generally closely limited

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9. MURPHY, *supra* note 3, at 63–68.

10. *Id.* at 53.

11. *Id.* at 56–68.

12. *Id.* at 78–82.

13. *Id.* at 49–54.

14. *Id.* at 91–92, 147–50.

15. 28 U.S.C. § 2284 (2012).

16. Jeffrey B. Morris, *Jack B. Weinstein: Judicial Entrepreneur*, 69 U. MIAMI L. REV. 393 (forthcoming Winter 2015).

17. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

18. *But see Ligon v. City of New York*, 538 Fed. Appx. 101, 103 (2d Cir. 2013) (assigning a different district judge on remand because the "impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's 'related case rule' . . . and

to the issues litigants before them raise in their papers,<sup>19</sup> as well as by what the parties can afford to spend on the litigation.<sup>20</sup> They may also be limited by the capacity of the court to devise practical remedies<sup>21</sup> and the fact that their decisions ordinarily only bind the parties to the case or government officials and their successors in office.

The attention a district judge can give to a case is also limited by the pressures of the rest of her docket, her interest in the case, and her expertise in its area of law. Finally, district court judges are limited because their decisions bind only the parties before them and any cases that later come before them raising the same issue.<sup>22</sup> Further, their decisions are subject to review by the court of appeals<sup>23</sup> and, less often, by the United States Supreme Court. The court of appeals may reverse<sup>24</sup> or remand, thereby limiting the trial judge's discretion, or even send the case back so a different judge is assigned to it.<sup>25</sup> While interlocutory appeals are disfavored, they do occur, and the court of appeals may also occasionally greatly limit the way a district judge is handling a case by issuing a writ of mandamus.<sup>26</sup>

Outside the courthouse, a trial judge's decisions are subject to criticism in the political arena<sup>27</sup> and may, in unusual cases, be stymied by public opinion. The judgment or decree in a case may also be subject to the inertia of a government bureaucracy.<sup>28</sup> It is rare, though, that a decision of a district judge arouses sufficient concern in Congress that legislation is passed to overturn or evade it, although Congress did pass several laws to impede the handling of a class action brought

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by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court").

19. *But see* Snell v. Suffolk Cnty., 611 F. Supp. 521 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094, 1102 (2d Cir. 1986) (affirming Judge Weinstein's holding that the plaintiff experienced an "atmosphere of racial harassment," despite the plaintiff's failure to allege the requisite cause of action in his complaint).

20. Jack W. Weinstein & Jeffrey B. Morris, Oral History of Judge Jack B. Weinstein 1842–43 (1993–2011) [hereinafter Weinstein Oral History]. Pagination is to the copy of the Oral History owned by the author of this article. A second copy, differently paginated, is at the Columbia University Office of Oral History.

21. *See, e.g.*, Hart v. Cmty. School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37 (2d Cir. 1975).

22. Again, structural litigation and class actions are exceptions.

23. In some situations, interlocutory appeals are possible. 28 U.S.C. § 1291 (2012).

24. *See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992).

25. *See, e.g.*, Ligon v. City of New York, 538 Fed. Appx. 101 (2d Cir. 2013).

26. *See, e.g.*, Debruyne v. Nat'l Semiconductor Corp., 35 F.3d 640 (2d Cir. 1994); *In re* Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993).

27. *See*, for example, the criticism of a criminal sentence entered by Judge Weinstein by then-Representative (later Mayor) Ed Koch. JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 141 (2011).

28. *See id.* at 142; *see also* Weinstein Oral History, *supra* note 20, at 115, 493.

against stores selling guns over which Judge Weinstein was presiding.<sup>29</sup>

Why then attempt to apply Professor Murphy's model to a district judge? The purpose is to test the proposition that district court judges, like justices, have goals, which they may seek to realize in ways that go beyond judgments and written opinions. Judge Jack B. Weinstein has been selected because he fits so well Murphy's description of a policy-oriented judge—a judge who is aware of the impact decisions can have on public policy and utilizes the leeway his office permits (and sometimes beyond that) to “push the envelope” with his audacious use of procedure, penchant for innovation, and creativity in shaping the law.<sup>30</sup>

## II. JUDGE JACK B. WEINSTEIN

### A. Judge Weinstein's Career

Born into a warm, loving, and supportive Jewish family, after living temporarily in Kansas, Jack Weinstein grew up in Brooklyn and attended Brooklyn College. After serving as a submarine officer during the Second World War, Judge Weinstein attended and graduated from Columbia Law School. In the less than two decades between his graduation and appointment to the bench, Judge Weinstein engaged in the private practice of law, clerked for distinguished New York Court of Appeals Judge Stanley Fuld, joined the faculty of Columbia Law School, where he would teach fulltime for over four decades, worked with Thurgood Marshall's team of attorneys on the brief for *Brown v. Board of Education*<sup>31</sup> and with others on reapportionment litigation, and served as an aide to Republican State Senator Seymour Halpern and as County Attorney of Nassau County in a Democratic administration.

During this period, Judge Weinstein was the central figure in the revision of the New York Civil Practice Law and Rules (CPLR),<sup>32</sup> and coauthored a seven-volume treatise on New York State practice<sup>33</sup> and a manual of New York civil procedure.<sup>34</sup> He also edited a casebook on civil procedure<sup>35</sup> and updated a casebook on evidence.<sup>36</sup> In this period between law school graduation and appointment to the

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29. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

30. Cf. MURPHY, *supra* note 3, at 3–5.

31. 347 U.S. 483 (1954).

32. N.Y. C.P.L.R. (McKinney 1962).

33. JACK B. WEINSTEIN ET AL., *NEW YORK CIVIL PRACTICE* (1963).

34. JACK B. WEINSTEIN ET AL., *MANUAL: CPLR* (1967).

35. MAURICE ROSENBERG & JACK B. WEINSTEIN, *ELEMENTS OF CIVIL PROCEDURE* (1962).

bench, Judge Weinstein also wrote a number of other books, as well as over three dozen law review articles, on such varied subjects as conflict of laws, hearsay, pretrial discovery, and legal assistance for the indigent. Thus, at the time of his appointment to the bench in 1967, Judge Weinstein had an unusually impressive record in teaching, scholarship, private practice (including pro bono work), and as a government lawyer, which provided him mastery of a number of fields of law. He also possessed experience in drafting legislation. Judge Weinstein brought to the bench an outstanding legal mind, self-confidence, virtually superhuman energy, intellectual curiosity, felicity with the written word, and the gift of deriving great pleasure from whatever he was doing.<sup>37</sup>

As a judge, Jack Weinstein has made important jurisprudential contributions to virtually all fields of federal law. He is very well-known for the brilliance and thoroughness of his opinions, his openness to innovation, his deep knowledge of both substantive and procedural law, his command of his courtroom, his ability to sustain extraordinarily high productivity, his capacity to shape and sometimes transform cases, his fierce independence, and for many contributions to a striking range of extrajudicial activities.

While Judge Weinstein is probably best known in two areas to be discussed later in this Essay—sentencing and class actions—in over forty-seven years as a full-time judge, he has handled too many important cases to list. They include a number involving New York City schools (including the unusually successful school desegregation case *Hart v. Community School Board*),<sup>38</sup> a highly politicized environmental case involving the closing of the Shoreham Nuclear Reactor,<sup>39</sup> and a suit involving New York City's Administration for Children's Services' (ACS) policy of immediately taking children away from battered mothers.<sup>40</sup>

Judge Weinstein has been a profound and effective friend to the First Amendment,<sup>41</sup> tried notable prosecutions of Mafia leaders—in-

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36. EDMUND M. MORGAN, JOHN M. MAGUIRE & JACK B. WEINSTEIN, *CASES AND MATERIALS ON EVIDENCE* (4th ed. 1957).

37. See MORRIS, *supra* note 27, at 71–72; see also *id. passim*.

38. 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, *Hart v. Cmty. Sch. Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975); see also MORRIS, *supra* note 27, at 145–52, 168–74.

39. *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1428 (E.D.N.Y. 1989).

40. *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), *questions certified sub nom. Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003), *certified questions answered*, 820 N.E.2d 840 (N.Y. 2004), *vacated and remanded*, 116 Fed. Appx. 313 (2d Cir. 2004).

41. See, e.g., *U.S. Labor Party v. Codd*, 391 F. Supp. 920 (E.D.N.Y. 1975); *Birnbaum v. United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978); *N. Shore Right to Life Comm. v. Manhasset Am. Legion Post No. 304*, 452 F. Supp. 834

cluding those of Anthony Colombo,<sup>42</sup> Joey Gallo,<sup>43</sup> and Vincent “Chin” Gigante<sup>44</sup>—and made important contributions with opinions in such areas as jurisdiction,<sup>45</sup> Social Security disability,<sup>46</sup> and “mega”-criminal cases.<sup>47</sup> One of Judge Weinstein’s most extraordinary achievements was clearing a high percentage of the backlog of habeas corpus petitions of the Eastern District by volunteering at the age of eighty-two to take the cases from his colleagues’ dockets. He handled 500 of the District Court’s close to 800 cases.<sup>48</sup>

If the foregoing describes some of the contributions of Judge Weinstein on the bench, it does not take account of his contributions outside the courtroom, including two books—one on rule making,<sup>49</sup> the other on mass tort class actions<sup>50</sup>—and several hundred law review articles on a great variety of subjects with the greatest impact in the areas of evidence and mass torts.

Judge Weinstein was a major figure in the drafting of the Federal Rules of Evidence. When the preliminary draft of the Rules of Evidence was published and the final rules approved, he made a series of speeches preparing the way for their acceptance.<sup>51</sup> After that, with his former law clerk Margaret Berger (who became a professor at Brooklyn Law School), he produced a seven-volume treatise on evidence.<sup>52</sup> Together with Berger, he updated the treatise several times and produced annual supplements.<sup>53</sup> During his first decade on the bench,

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(E.D.N.Y. 1978); *Troyer v. Town of Babylon*, 483 F. Supp. 1135 (E.D.N.Y.), *aff’d*, 628 F.2d 1346 (2d Cir.), *aff’d sub nom. Town of Southampton v. Troyer*, 449 U.S. 988 (1980) (unpublished table decision); *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980). *But see* *Gordon v. Griffith*, 88 F. Supp. 2d 38 (E.D.N.Y. 2000) (holding that a legislator did not violate a political aide’s First Amendment rights when the legislator terminated the aide for public comments she made in the legislator’s district).

42. *United States v. Colombo*, 616 F. Supp. 780 (E.D.N.Y.), *rev’d*, 777 F.2d 96 (2d Cir. 1985).

43. *United States v. Gallo*, 671 F. Supp. 124 (E.D.N.Y. 1987).

44. *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997).

45. *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981).

46. *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984).

47. *United States v. Mosquera*, 813 F. Supp. 962 (E.D.N.Y. 1993); *see also* *United States v. Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993).

48. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303 (E.D.N.Y. 2003) (memorandum report on the disposition of 500 habeas corpus cases), *aff’d in part sub nom. Murden v. Artuz*, 497 F.3d 178 (2d Cir. 2007); *see also* William Glaberson, *Unbelievable Stories (Just Ask the Judge)*, N.Y. TIMES, July 30, 2003, at B1.

49. JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977).

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

51. MORRIS, *supra* note 27, at 104.

52. JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* (1975) (published in seven volumes from 1975 to 1979 with annual supplements).

53. Judge Weinstein also undertook a major updating of Edward R. Morgan’s *Basic Problems of State and Federal Evidence* for its fifth edition (1976), and with John M. Maguire, James H.

Judge Weinstein wrote a number of law review articles, which were mini treatises on various evidentiary problems.<sup>54</sup>

Judge Weinstein has had a hard-to-define impact as a role model who emboldens younger, less experienced judges,<sup>55</sup> has won the admiration of many law professors, and has become an icon for public-interest attorneys.

Judge Weinstein's achievements have certainly been recognized. In 2003, he received the federal judiciary's highest award, the Edward J. Devitt Award.<sup>56</sup> He has received seven honorary degrees, including those of Columbia and Yale. In 1993, the *National Law Journal* named him "Lawyer of the Year."<sup>57</sup> The *Columbia Law Review* honored him with a special issue.<sup>58</sup> Three other law schools—Brooklyn, the University of Miami, and now DePaul—have held symposia in his honor.

### B. Some Reasons for Judge Weinstein's Influence

One should begin at the beginning: Judge Weinstein has a brilliant mind, and his brilliance is not limited to the law. His intellectual curiosity continues to be enormous at the age of ninety-three. His mind is quick and creative, with the capacity to absorb large quantities of material. He is an omnivorous reader and a quick study—a great advantage for overcoming the difficulty trial judges face in dealing with the wide range of problems that come before them. In particular, he has a remarkable grasp of science, mathematics, and philosophy.<sup>59</sup>

His legal mind is extraordinary. He seems to have mastered every field of law he has encountered. He can see connections between apparently disparate matters that others miss and, as Dean Martha Minow of Harvard Law School has written, is able "to explore innovative substantive norms."<sup>60</sup> He has the capacity to take a very ordinary case and make it very important; he has the analytical vision to recast mundane issues brought to him by lawyers into important issues that

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Chadbourne, and John H. Mansfield, edited the sixth edition (1973) of *Cases and Materials on Evidence*.

54. See, e.g., Jack B. Weinstein & Margaret A. Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43 (1969).

55. See Symposium, *Judge Jack B. Weinstein, Tort Litigation, and the Public Good: A Roundtable Discussion To Honor One of America's Great Trial Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL'Y 149, 162 (2003) [hereinafter *80th Birthday Roundtable*].

56. *Weinstein Receives Devitt Award*, THIRD BRANCH, Feb. 1994, at 3.

57. *Lawyer of the Year*, NAT'L L.J., Dec. 27, 1993–Jan. 3, 1994, at S3.

58. 97 COLUM. L. REV. 1947 (1997) ("A Special Issue Dedicated to Judge Jack B. Weinstein").

59. See MORRIS, *supra* note 27, at 57, 90–91.

60. Martha Minow, *Judge for the Situation: Judge Jack Weinstein: Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2018 (1997).



somehow others did not see. He has demonstrated the ability over and over again to shape, develop, and transform cases before him, greatly enlarging their importance and leading to new solutions to difficult problems. As a judge, he takes the initiative in shaping the litigation because he will have considered matters two steps ahead of anybody else.<sup>61</sup> Above all, Judge Weinstein has given considerable thought to the direction the law should be headed, which makes him ready when the right case comes along.<sup>62</sup>

Judge Weinstein's influence has been definitely enhanced by prose that often is either elegant or catchy, and sometimes both. He learned how to carefully shape the facts in his opinions from Judge Stanley Fuld.<sup>63</sup> Judge Fuld is also the role model for the thoroughness that characterizes all of Judge Weinstein's work. As a blog posting put it: "A briefing order that reads like a law review article can only emanate from the chambers of [Judge] Jack B. Weinstein."<sup>64</sup>

Finally, Judge Weinstein's entire career has been marked by innovation: in methods of managing cases, techniques used in the courtroom, in the application of procedural rules, and in the development of the substantive law.<sup>65</sup>

Among the Judge's other salient characteristics are indefatigable energy and ability to sustain extraordinarily hard work, both coupled with lifelong good health. It is this energy that makes Judge Weinstein's extensive involvements in extrajudicial activities possible. These activities have included teaching, writing, speaking, activity in judicial administration, and involvement in both legal and nonlegal organizations. During his first few years on the bench, he continued teaching two courses per semester at Columbia, took an active role in drafting the Federal Rules of Evidence, completed his evidence treatise, updated a casebook, and wrote twenty-eight law review articles. At ninety-three, he still gets up in the middle of the night to tinker with drafts of speeches or opinions, and then rises for the day before 5:30.<sup>66</sup>

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61. *See id.*; *see also, e.g.*, *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); *David v. Heckler*, 591 F. Supp. 1033 (E.D.N.Y. 1984).

62. *See, e.g.*, *Ashley v. Abbott Labs. (In re DES Cases)*, 789 F. Supp. 552 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993); *Hall v. E.I. du Pont de Nemours & Co.*, 312 F. Supp. 358 (E.D.N.Y. 1970).

63. Weinstein Oral History, *supra* note 20, at 1176.

64. JaneAnne Murray, *EDNY Judge Sets Stage for Notable Decision on Restitution and Forfeiture*, N.Y. FED. CRIM. PRAC. (Feb. 8, 2008, 4:05 PM), <http://www.nyfederalcriminalpractice.com/2008/02/edny-judge-sets-stage-for-nota.html>.

65. MORRIS, *supra* note 27, at 105.

66. Weinstein Oral History, *supra* note 20, at 812, 900, 1615; *see also* Joan G. Wexler, *In Praise of Jack B. Weinstein*, 97 COLUM. L. REV. 1968, 1969 (1997).

Accompanying these abilities are personal qualities that have added to his impact. He has a positive approach to life that must make his inexhaustible flow of energy possible. Although he can be quite self-critical, his insecurities are few and his self-confidence considerable.<sup>67</sup> Another significant aspect of Judge Weinstein's personality is his fierce independence—primarily as a judge, but also in personal matters. For Judge Weinstein, judicial independence means that judges are placed in their offices to take risks, whether the risk is reversal by a higher court or sharp criticism from the press or the public. Judge Weinstein has never been deterred by public criticism from his “judicial superiors,” and has even avoided close social relations with the judges of the court of appeals so to better maintain his independence.<sup>68</sup> As will be discussed at greater length later, Judge Weinstein feels a greater need to speak out than most judges.

Finally, Judge Jack Weinstein likes to be active. He is, in many respects, a man of action. With Judge Weinstein, it can sometimes be difficult to distinguish between a hyperactive personality and an “activist” judge, though there can be a difference. One might place in the former category Judge Weinstein's reliance on site visits to better understand the cases before him, even if they may include crawling inside a nuclear reactor or visiting a federal institution almost 200 miles away to find an alternative to prison for a young man who had been convicted of possessing child pornography,<sup>69</sup> or his willingness to handle the habeas corpus backlog of his colleagues.<sup>70</sup> But, there are surely dollops of judicial activism in Judge Weinstein's striking use of the powers of equity<sup>71</sup> or his decision to risk reversal in a case “because the law was wrong.” Speaking of that case,<sup>72</sup> Judge Weinstein put it this way, “I was more interested in moving the law into what I considered the more modern and useful areas of tort law.”<sup>73</sup> Judicial activist or not, Judge Weinstein is a man who actively shapes his environment, rather than allowing himself to be molded by it, and who seeks out, or even creates, opportunities for action.<sup>74</sup>

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67. Weinstein Oral History, *supra* note 20, at 58.

68. *Id.* at 100–03.

69. *United States v. C.R.*, 792 F. Supp. 2d 343, 476, app. at 521–24 (E.D.N.Y. 2011).

70. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303 (E.D.N.Y. 2003).

71. See *In re Joint E & S. Dist. Asbestos Litig.*, No. CV 93-2129, 1993 WL 604077 (E.D.N.Y. & S.D.N.Y. July 1, 1993), *rev'd*, 14 F.3d 726 (2d Cir. 1993).

72. *Bushey & Sons v. United States*, 276 F. Supp. 518 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968).

73. Weinstein Oral History, *supra* note 20, at 53.

74. Cf. JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER* 267 (4th ed. 1992) (writing about Presidents such as F.D.R.); see also *id. passim*.

Among Judge Weinstein's personal traits which come to bear under the tactic of "esteem" are great personal charm, puckish wit, and warmth.<sup>75</sup> It should also be noted that Judge Weinstein's brilliant career as a district judge is, in a sense, the result of the few setbacks he has suffered. Judge Weinstein was defeated in the Democratic primary for Chief Judge of the New York Court of Appeals in 1973, and was bypassed for appointment to the United States Court of Appeals for the Second Circuit in the late 1970s.<sup>76</sup> Had he been elected to New York's highest court, he would have to have retired at age seventy, cutting off what has now been an additional twenty-three years of his judging. He was fortunate to not have been appointed to either appellate court for, as an appellate judge, he would have been forced into bargaining and modification of the language of his opinions, which would have limited his independence.<sup>77</sup>

### C. Judge Weinstein's View of His Role as Judge

Judge Weinstein's view of his role as a judge differs quite considerably from that of most federal trial judges, and indeed from most federal judges, if one can trust the responses judges have given to interviews.<sup>78</sup> Employing the conception of "role" used by many political scientists, scholars have reported that, according to interviews, most federal judges view themselves as "law interpreters" who believe in a modest role for courts and accept the norms of judicial restraint and respect for precedent while looking unkindly upon innovative decisions.<sup>79</sup>

Judge Weinstein is an unabashed "lawmaker." Judges who identify themselves as lawmakers contend that they can and must make law some of the time, because appellate court precedents are often ambiguous, as is the language of statutes, and legislative intent is often im-

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75. The Weinstein Oral History is full of examples. See e.g., Weinstein Oral History, *supra* note 20, at 59.

76. See MORRIS, *supra* note 27, at 155–60, 202.

77. There are two other aspects of good fortune that Judge Weinstein has had: a happy family life and the lack of financial worries because of the success of his treatises and casebooks.

78. James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions*, in COURTS, LAW, AND JUDICIAL PROCESSES 150, 161–63 (S. Sidney Ulmer ed., 1981); see also G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 265–67 (4th ed. 2006); cf. Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439 (2011).

79. See ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 164 (2d ed. 1991); see also CHARLES H. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES 85–86 (1974).

possible to ascertain.<sup>80</sup> Judge Weinstein, though, has an even bolder view. He is concerned with “moving the law,” and believes that “[t]he concept that ‘judges don’t make law’ is a myth [equal to] recognizing that the naked emperor is wearing clothes.”<sup>81</sup>

Furthermore, Judge Weinstein differs from most district judges in the way he goes about decision making. Most district judges are “mechanists,” who view decision making as merely the process of applying correct and readily apparent answers to legal questions, or “formalists,” who believe that judges ought to arrive at their decisions through well-established procedures. Judge Weinstein finds more gaps in the law than other judges, looks for new issues, and “has far less compunction about departing from precedent.”<sup>82</sup>

This observer has argued that one other aspect of Judge Weinstein’s view of his role as a judge is that he also sees the judge as an “educator.”<sup>83</sup> The Judge once said to me, “I’ve never ignored an opportunity of a public forum to make a little substantive statement.”<sup>84</sup> The treatises, the casebooks, the books on rule making and mass torts, the abundant law review articles, the hundreds of speeches (many going through a number of drafts), teaching a full professorial load while on the bench, and, of course, the opinions themselves, bear witness to someone who simply must educate. Judge Weinstein used to bring his students down to the courthouse to see cases “much as you would do with grand rounds if you were a medical person to illuminate the problem.”<sup>85</sup>

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80. SHELDON, *supra* note 79, at 89; *see also* HENRY R. GLICK, SUPREME COURTS IN STATE POLITICS 50 (1971); Marc Galanter et al., *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699, 711 (1979).

81. Weinstein Oral History, *supra* note 20, at 312; *see also* Jack B. Weinstein, Speech to Law Clerks and Student Interns of the Eastern District of New York: Making Law in Mass Torts and Other Things 2–3 (July 16, 2009).

82. MORRIS, *supra* note 27, at 93–97. Judge Weinstein does, however, share with most judges the role of “case processor,” the goal of which is efficient management of his docket. *See* SHELDON, *supra* note 79, at 90; *see also* GLICK, *supra* note 80, at 31; WILLIAM I. KITCHIN, FEDERAL DISTRICT JUDGES: AN ANALYSIS OF ROLE PERCEPTIONS 39–41 (1978).

83. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL SYSTEM 133–34 (1981).

84. Weinstein Oral History, *supra* note 20, at 1091–92.

85. *Id.* at 468. He found one criminal case on his docket “a wonderful case from the point of evidence teaching.” Part of the opinion was used in the casebook, while Judge Weinstein had his students come down to the courthouse and see part of the trial. *Id.* at 801–02.

Professor Stephen Burbank has argued that Judge Weinstein’s conception of the judicial role has been greatly influenced by his career as a law professor, ascribing to that Judge Weinstein’s desire for intellectual autonomy and his lack of regard for institutional accountability. For Burbank, Judge Weinstein’s powerful belief in judicial independence comes from a desire to give free reign to his extraordinary intelligence and creativity, and yields behavior that is ideologically based. *See generally* Stephen B. Burbank, *The Courtroom as Classroom: Independence*,

As I have written elsewhere,<sup>86</sup> Judge Weinstein qualifies as an “entrepreneurial judge.” That is, “a judge alert to the opportunity for innovation, willing to invest the resources and assume the risks” to influence the adoption of a genuinely new legal concept;<sup>87</sup> a salesman for ideas. When a question is presented that falls within such a judge’s realm of special expertise and interests, it represents for her an opportunity for true intellectual engagement, something she might respond to with considerable enthusiasm. Such a judge has to commit a good deal of time, have a willingness to endure criticism and reversal, take a grand view of the law, and have the self-confidence to craft opinions that she thinks will help nudge it in that direction.<sup>88</sup>

Judge Weinstein is, of course, the quintessential entrepreneurial judge, although he has never limited himself to “selling” a single idea. With his strong sense of where the law should be headed, Judge Weinstein has been and continues to be engaged with many ideas and innovations which he has attempted to “peddle” to federal judges, United States prosecutors and defense attorneys, law professors, the class action bar, public interest lawyers, and law students.

We shall see that Judge Jack B. Weinstein, the inveterate and incorrigible educator, though formally limited to one district, has had a national impact with his jurisprudence and other contributions to the law.

#### D. Judge Weinstein’s Judicial Philosophy

The core of Judge Jack B. Weinstein’s judicial philosophy is his view that “to aid the weak and suffering delineates the primary duty of American law.”<sup>89</sup> Within that core, there are four principles. First, there is a profound need for attorneys to represent the poor and vulnerable.<sup>90</sup> Second, the gate-keeping doctrines that keep the poor out of court should be breached.<sup>91</sup> Third, where substantive decision making is involved, the law should be “protective of those who other-

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*Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1977). Judge Weinstein has said, “My problem may well be that I still haven’t decided whether I’m a professor or a judge . . . or [an] advocate.” Weinstein Oral History, *supra* note 20, at 519–20.

86. See MORRIS, *supra* note 16, at 377 (quoting WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 5 (1997)).

87. MORRIS, *supra* note 27, at 108.

88. See MCINTOSH & CATES, *supra* note 86, 4–7, 12–13; see also *id. passim*; MORRIS, *supra* note 27, at 376–77.

89. MORRIS, *supra* note 27, at 96–97.

90. See *id.* at 97.

91. See *id.* at 97–98.

wise would be without power to protect themselves.”<sup>92</sup> Fourth, “the judge should act in a compassionate human way to show that the law isn’t all that rigid and cruel.”<sup>93</sup>

As a judge, Judge Weinstein is aware of the burdens placed on the court when individuals without legal training represent themselves: “The inability of the unskilled litigant to prepare pleadings, conduct adequate investigation, work with the rules of evidence, research decisional law, or persuasively argue the case in court render fair and expeditious disposition of most civil litigation virtually impossible.”<sup>94</sup> When the Reagan Administration sought first to kill the Legal Services Corporation, and then to cripple it, Judge Weinstein, though by no means alone, gave a great deal of attention to the issue—opposing the support by giving speeches, writing articles, and taking practical steps as Chief Judge of the Eastern District.<sup>95</sup>

Previously, Judge Weinstein had done public battle with Chief Justice Warren Burger, Chief Judge Irving R. Kaufman, and others who were arguing that the federal courts were too busy and that a variety of lesser cases should be transferred to state courts. Judge Weinstein argued, “Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remain a mockery for the poor and oppressed.”<sup>96</sup> He also argued that

federal courts should not lightly abdicate their responsibility to provide a forum for the disposition of civil disputes presently within their jurisdiction merely because individual claims appear small or insignificant. Increased availability of the courts to those with grievances . . . [by] modifications of such doctrines as standing, mootness,

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92. Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, N.Y. TIMES, May 28, 1991, at B5.

93. Weinstein Oral History, *supra* note 20, at 1367–68.

94. MORRIS, *supra* note 27, at 196 (quoting Jack B. Weinstein, Speech to the New York City Bar: All People Are Entitled to the Assistance of Lawyers in Civil as well as Criminal Matters 3 (Mar. 30, 1976)).

95. MORRIS, *supra* note 27, at 195 & n.209 (discussing speeches given by Judge Weinstein including Jack B. Weinstein, Address, *The Poor’s Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 657 (1981) [hereinafter Weinstein, *Right to Equal Access*] (printing a speech Judge Weinstein gave at the University of Connecticut Law School on Apr. 22, 1981); Jack B. Weinstein, Speech at Columbia Law School Symposium, Reducing Costs of Litigation: Reforming the Poor out of Court (Mar. 28, 1981), *reprinted at* N.Y. L.J., Mar. 30, 1981; Jack B. Weinstein, Speech to the New York City Bar: The Court’s Stake in Lawyer’s Pro Bono Work 10–11 (Oct. 6, 1981); Jack B. Weinstein, Speech to the New York Law School: Justice and Mercy—Law and Equity (Apr. 13, 1983), *reprinted at* 28 N.Y.L. SCH. L. REV. 817 (1984), *excerpts in* NEWSDAY, June 2, 1982 (printing portions of the same speech, Individualization of Justice, given as a commencement address at the University of Connecticut Law School, May 21, 1983)).

96. Weinstein, *Right to Equal Access*, *supra* note 95, at 651, 655.

abstention and justiciability, have provided a valuable escape valve, preventing explosive reactions during a period of boiling social change.<sup>97</sup>

Where substantive decision making was involved, Judge Weinstein has said, “It *is* appropriate for a judge to ask, ‘Does my decision necessarily widen the gap between rich and poor, advantaged and disadvantaged?’”<sup>98</sup> At the age of eighty, he said this: “That’s in my background. I can’t escape it. What it leads to always in every one of the cases is the question: what can I do for the individual—the person, who is suffering, or may not be suffering, but thinks he or she is suffering?”<sup>99</sup>

Finally, Judge Weinstein is not only concerned that the courts offer succor to the poor and vulnerable as a group. He believes that anyone in the courts ought to be treated as an individual. Perhaps the most salient characteristic of “Weinstein-the-Judge” is his stress on the “human face of the law.” For Judge Weinstein, this means that the judge should, in a compassionate human way, show that the law is not all that rigid and cruel.<sup>100</sup> The judge should have the ability to put himself in the shoes of those before him. In court, the parties ought to have a feeling that the judge “has listened to me”;<sup>101</sup> the defendant should feel that she has been fairly treated, and that she has been heard. In sentencing, it means that “the individual who sentences must consider compassion to those being sentenced as well as their family members,”<sup>102</sup> and it means that the judge’s body language and visage must convey the message: “I respect you as a human being.”<sup>103</sup> In mass tort cases, it means avoiding the “rigidity of matrixes that treat people, not as if they were individuals [and] human beings,”<sup>104</sup> and “giv[ing] each individual who is hurt a sense that, yes, somebody has heard *me*, . . . somebody cares about me.”<sup>105</sup>

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97. Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 300 (1973) (“Excerpts from a Symposium before the Judicial Conference of the Fifth Circuit Judicial Circuit”).

98. Jack B. Weinstein, *The Role of Judges in a Government of, by and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 33 (2008).

99. *Eightieth Birthday Roundtable*, *supra* note 55, at 149, 172.

100. Weinstein Oral History, *supra* note 20, at 1367–68.

101. WEINSTEIN, *supra* note 50, at 167.

102. *Id.* at 179.

103. *Id.* at 227; *see also id.* at 223–24.

104. *Eightieth Birthday Roundtable*, *supra* note 55, at 172.

105. MORRIS, *supra* note 27, at 98.

## III. THE WEAPONS OF A DISTRICT JUDGE

Having considered Judge Jack Weinstein's view of his role and judicial philosophy, it is necessary to consider the weapons he might use to reach his goals. I briefly preface that topic with a discussion of the weapons available to district judges in general.

A district judge works with both the tangible powers and the intangible prestige and legitimacy of her office. She is clothed with the cult of the robe—the widely shared view of the public that a judge is a kind of high priest of justice with special talents for elucidating “the law”—a kind of institutional charisma.<sup>106</sup> Ironically, Judge Weinstein works against this, in a way, by often meeting with attorneys in his cases without a robe and sitting down at a table with them rather than appearing on a raised platform.

While Judge Weinstein admits to being a “lawmaker,” he too benefits from the charisma and mystery that American judges—inheritors of the mantle of Chief Justice John Marshall—possess. Such charisma is nourished by the acceptance of the notion that judges *find* the law. Further, while elected officials often bristle about “judicial activists,” they are aware that they too benefit from judicial power. Judges not only have the power to strike down the actions of elected officials and bureaucrats, but they also possess the legitimizing authority necessary for the acts of those in public office.<sup>107</sup>

While most Americans rarely give a thought to district courts, judges of that tier profit from the diffuse support the public gives the Supreme Court. Further, district judges do have certain instruments of power, some of which may be more important unused but known. These powers include the power to issue injunctions and writs of mandamus, to fashion decrees, to issue declaratory judgments, and to punish contempt.<sup>108</sup>

When dealing with the attorneys before them, trial judges possess particularly strong powers. Not the least of these is aggressive case management, through which a judge can force lawyers to trial before they believe they will be ready. The federal judge's power is amplified by the fact that she has life tenure. Not only is the removal of a judge from a case a rare happening, but attorneys cannot but be aware that they may be practicing before the same judge for perhaps another thirty years.

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106. MURPHY, *supra* note 3, at 13.

107. *Id.* at 16–19.

108. *Id.* at 18–19.



Nevertheless, district judges cannot roam too freely. They are limited by Article III of the United States Constitution, appellate precedent, gate-keeping doctrines, and, of course, the fact that they cannot act if there is no case before them. They are limited by the kind of remedies they can order. Their nonconstitutional decisions can be overturned by the passage of a law by Congress, and they are subject to the pace of compliance by political officeholders and the government bureaucracy. Then, too, the court of appeals and the Supreme Court loom above.

In *Elements of Judicial Strategy*, Walter Murphy suggests the tactics available to a justice when she is trying to persuade a colleague on the merits of a policy choice.<sup>109</sup> They include efforts to capitalize on personal regard, to bargain, to threaten and, if possible, to have a voice in the selection of new personnel.<sup>110</sup> Murphy also indicates that when dealing with lower court judges, the Supreme Court also has the power to command. As we turn now to consider the manner in which three of the weapons Murphy discusses—command, persuasion, and esteem—have been employed by Judge Weinstein, one must remember that many of the ways any person enhances his influence on someone else come from unconscious manifestations of personality. A compliment on an opinion or a Christmas greeting may, in the mind of the actor, have nothing at all to do with deliberate efforts to convince someone of the rightness of his or her position in a given case or cases. The same can be said for an uncalculated expression of interest in, or concern for, someone else. They may, however, have the effect, over time, of making the respondent more susceptible to influence.

#### IV. JUDGE WEINSTEIN'S USE OF TACTICS DESCRIBED BY MURPHY

The generalized prestige of a federal judge is reinforced when he has won professional respect for his abilities.<sup>111</sup> In Judge Jack Weinstein's case, while he has often been reversed by the United States Court of Appeals for the Second Circuit, he is nevertheless an acknowledged titan in many fields of law, especially in two fields essential to trial work—evidence and procedure. Given that reputation and that for being extremely well-prepared at conferences and at trial—attorneys may well anticipate that he may push them to try a very different case than they expected to try and that the impact of the case may be greatly enlarged.

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109. *Id.* at 43.

110. *Id.*

111. *Id.* at 19.

*A. Command*

When dealing with attorneys prior to trial and in the courtroom, the trial judge has close to absolute power in dealing with such issues as the scheduling of dates and scope of discovery, as well as the granting of continuances. In such matters, the actions of district judges are essentially immune from external scrutiny. In the Eastern District, however, such decisions are usually made by the magistrate judge, even if an Article III judge is likely to try the case.<sup>112</sup> This does not, however, mean that the trial judge plays no substantive role during the pretrial phase in the Eastern District, only that the areas of command are limited.

Much more than most district judges, Judge Weinstein takes the initiative in shaping a lawsuit. Because of his ability to make connections between what seem to be disparate aspects of a case, the Judge has the capacity to transform cases by putting ingenious strategies into the minds of attorneys appearing before him. In doing so, sometimes he narrows the scope of the issues, and sometimes he widens them. Judge Weinstein may also increase the visibility and significance of the dispute by asking the United States to intervene, as well as by appointing or inviting the participation of *amicus curiae*. He aims for the involvement of a broad array of parties named in a suit because he believes that doing so produces good substantive outcomes, as well as a public dialogue that can strengthen the legitimacy of judicial decision making.<sup>113</sup>

When dealing with attorneys in the courtroom, a good trial judge must act decisively when she rules on motions, and command when necessary to keep order. Judge Weinstein has several techniques to prevent or limit interlocutory appeals in class actions. He provides attorneys with “tentative opinions,” which cannot be appealed, but provide the attorneys with the drift of his views. He also is stingy in granting certificates of appealability. Finally, as Professor Burt Neuborne of New York University School of Law, who has practiced before Judge Weinstein, has said, Judge Weinstein “imposes [on attorneys] the obligation of sitting down around a table and seeing if a solution can be resolved.”<sup>114</sup>

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112. See generally Christopher E. Smith, *From U.S. Magistrate to U.S. Magistrate Judge: Developments Affecting the Federal District Courts' Lower Tier of Judicial Officers*, 75 JUDICATURE 210, 214 (1992).

113. See Minow, *supra* note 60, at 2012, 2018; see also MORRIS, *supra* note 27, at 6.

114. *Eightieth Birthday Roundtable*, *supra* note 55, at 186.

*B. Persuasion in Jurisprudential Matters*

Focusing on the Supreme Court, Walter Murphy looked at how a policy-oriented justice might go about winning the votes of colleagues for her position. He began with the most traditional tactic—a memorandum massing precedent and history. But Murphy argued that there were other ways to persuade. A justice might suggest a particular need for unanimity in a case because of its sensitivity, the significance of the decision, or because of potential ramifications that might harm the Court. Both the persuading justice and the target of the persuasion might also be aware that the tactics being used in one case might affect the future meaningful exchange of views. Concessions by the author of the opinion on minor points, for example, might place a justice in a better position to win reluctant votes from colleagues on other matters.<sup>115</sup>

Generally, the *individual district judge* does not need to persuade her colleagues in the district, but may well be interested in persuading other audiences. The major tool for this, of course, is the opinion. Professor Lawrence Baum, a distinguished political scientist at the Ohio State University, has suggested that judicial opinions are aimed at audiences that are important to the judge.<sup>116</sup> While most published opinions are aimed at attorneys and other judges, there are also other possible audiences, including legal academics, those in other branches of government, policy groups and the news media, as well as the families, friends, and acquaintances of the judge.<sup>117</sup>

Judge Jack B. Weinstein writes a great number of opinions. The “Weinstein Opinion” is formidable—long, utterly thorough, and graced with literary felicity.<sup>118</sup> Often, the opinion may be preceded by a table of contents and followed by appendices.<sup>119</sup> This can be “Weinstein-the-Educator” in full bloom.

Judge Weinstein aims his opinions at different audiences. Some are written just for the parties and their attorneys; most of these are not published. Opinions that are essentially findings of fact—something a district judge must do—are written to illuminate the case or to persuade the court of appeals. Sometimes, Judge Weinstein writes with the court of appeals in mind, but for a different reason. Such a case

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115. MURPHY, *supra* note 3, at 43–54.

116. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 4 (2006).

117. *Id.* at 21; *see also id. passim.*

118. Judge Weinstein’s opinions do not have footnotes (unlike his heavily footnoted law review articles). Citations are placed in the text.

119. MORRIS, *supra* note 27, at 91.

was *Manufacturas International Ltda v. Manufacturers Hanover Trust Co.*<sup>120</sup> That was a forfeiture case involving issues raised by the Federal Reserve and Foreign Intelligence Surveillance Acts, but which also included a cause of action for conversion, a third-party beneficiary issue, negligence claims, and more.<sup>121</sup> Judge Weinstein said he wrote the long opinion because “[he] lacked confidence in the Court of Appeals’ understanding the technical details and [he] didn’t want to get reversed on it and have to try it again.”<sup>122</sup>

There have also been times, usually when Judge Weinstein has been reversed by the court of appeals, when he has written an opinion responding to the reversal and making clear his differences with the appellate court. Such opinions are not so much aimed at the court of appeals, but rather are his attempt to create, at the district court level, the equivalent of an appellate dissent aimed at the future.<sup>123</sup>

Sometimes, Judge Weinstein writes an opinion with the general public in mind. One such instance involved the closing of the Shoreham Nuclear Reactor after a prolonged and bitter public dispute. He used the opinion approving the \$400 million class action settlement to explain the controversy and the settlement.<sup>124</sup>

While Judge Weinstein does not send his opinions to other judges, on some occasions he delves deeply into a case in order to provide illumination for judges and magistrates facing the same or similar issues. One such opinion dealt with discovery of the records of police officers sued for violations of civil rights and whether state law or federal law governed in § 1983 cases.<sup>125</sup> In order to bring consistency to the rulings of magistrates in the district, Judge Weinstein set out a procedure for all magistrates to follow.<sup>126</sup> At trial, Judge Weinstein made another consequential ruling—whether it was appropriate

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120. 792 F. Supp. 180 (E.D.N.Y. 1992), *aff’d sub nom.* United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993). For what happened on remand, see *Organizacion JD Ltda. v. U.S. Dep’t of Justice*, No. CV-92-3690, 1996 WL 162271 (E.D.N.Y. Apr. 2, 1996), *aff’d*, 124 F.3d 354 (2d Cir. 1997).

121. *Manufacturas Int’l Ltda*, 792 F. Supp. at 183–87.

122. Weinstein Oral History, *supra* note 20, at 1163–64.

123. See Judge Weinstein’s discussion of this in an unpublished oral history interview (video taping) with Gordon Mehler. Interview by Gordon Mehler with Jack B. Weinstein, for the Federal Bar Council (Oct. 10, 2006) (video copy in possession of the author).

124. *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1428 (E.D.N.Y. 1989); *see also* MORRIS, *supra* note 27, at 239.

125. *Id.* at 186–88.

126. *Id.* at 189–92.

under the Federal Rules of Evidence to admit part of a report of the State Investigation Commission on police abuse in Suffolk County.<sup>127</sup>

Finally, Judge Weinstein has written opinions aimed at courts far beyond the Eastern District with the idea of “moving the law.”<sup>128</sup> One such opinion occurred in a case involving New York City’s Administration for Children’s Services’.<sup>129</sup> At issue was ACS’ policy of automatically taking children from their mother and placing them in foster care when the mother was the victim of battering.<sup>130</sup>

Nicholson sued, seeking a class action, which Judge Weinstein certified.<sup>131</sup> Judge Weinstein raised the visibility of the case by asking the Juvenile Rights Division of the Legal Aid Society to act as a friend of the court, and other amici were attracted from all across the country. The evidence indicated that ACS’s practice resulted from benign indifference, bureaucratic inefficiency, and outmoded institutional biases. Ultimately, the litigation was dealt with both by the Court of Appeals for the Second Circuit<sup>132</sup> and the New York Court of Appeals.<sup>133</sup> As a result of the litigation, New York City completely reorganized the handling of this class of cases.<sup>134</sup> The effects of the litigation were felt throughout the nation.

### C. Persuasion: Treatises and Casebooks

It is difficult to connect Judge Weinstein’s treatises,<sup>135</sup> casebooks,<sup>136</sup> and supplements to particular jurisprudential results in his cases. This work deepened his knowledge of the areas, and familiarized him with

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127. *Gentile v. Cnty. of Suffolk*, 129 F.R.D. 435 (E.D.N.Y. 1990); see also Weinstein Oral History, *supra* note 20, at 900–04.

128. *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), *questions certified sub nom. Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003), *certified questions answered by* 820 N.E.2d 840 (N.Y. 2004), *vacated and remanded by* 116 Fed. Appx. 313 (2d Cir. 2004); see also *Hall v. E.I. du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). Judge Weinstein has also written opinions aimed at middle-level governmental officials, such as managers and educators. Weinstein Oral History, *supra* note 20, at 888. Among other opinions are those written for teaching purposes or for the casebook. Weinstein Oral History, *supra* note 20, at 888, 1234. *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968), was a hearsay opinion that Judge Weinstein admitted was for the former purpose, Weinstein Oral History, *supra* note 20, at 87, and *United States v. Hing Shair Chan*, 680 F. Supp. 521 (E.D.N.Y. 1988), on the admission of contemporaneous documents, was intended for the latter process, although ultimately vetoed by co-editor Margaret Berger. Weinstein Oral History, *supra* note 20, at 888.

129. *Williams*, 203 F. Supp. 2d at 160.

130. *Id.* at 179–83.

131. *Id.* at 164–65.

132. *Scopetta*, 344 F.3d 54.

133. *Scopetta*, 820 N.E.2d 840.

134. Leslie Kaufman, *Abuse Victims and the City Settle Lawsuit*, N.Y. TIMES, Dec. 18, 2004, at B1.

135. WEINSTEIN, *supra* note 52.

new thinking. Beyond this, awareness of this work by judges, attorneys, and three generations of law students certainly has further bolstered his reputation.<sup>137</sup>

#### D. Persuasion: Scholarship

Judge Weinstein has written two books and hundreds of law review articles while on the bench. Some of this work deals with jurisprudential problems he has faced as a judge. Much, however, has dealt with the administration of justice. Judge Weinstein has given an immense amount of time to writing on matters affecting the legal system that are not strictly related to specific cases. Many articles have proposed innovations in judicial administration that have been adopted.

The first of the two books Judge Weinstein has written while on the bench is *Reform of Court Rule-Making Procedures*.<sup>138</sup> The book grew at least in part out of Judge Weinstein's experience with the drafting of the Federal Rules of Evidence and from the process by which a rule on speedy trials adopted by the Eastern District was rejected by the Second Circuit.<sup>139</sup> Judge Weinstein dealt with the subject in lectures at the law schools of the Ohio State University, the University of Connecticut, and Columbia University, and then published them in a book.<sup>140</sup> In the book, Judge Weinstein proposed that the Supreme Court get out of the rule-making business, that Congress confine itself to substantive privileges, and that all rules would require approval of the United States Judicial Conference's Standing Committee on Rules of Procedure of the Judicial Process. He argued as well that the rule-making process in the federal courts, generally and in local districts, be more representative, public, and open.

Judge Weinstein's other book, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions and Other Multiparty Devices*,<sup>141</sup>

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136. MORGAN ET AL., *supra* note 36; *see also* ROSENBERG & WEINSTEIN, *supra* note 35. His treatise on New York Civil Procedure, in seven volumes as revised, continues to be in use almost fifty years after first publication. WEINSTEIN ET AL., *supra* note 34.

137. It is not unheard of in Judge Weinstein's courtroom that an attorney will object to the admission of evidence and, in response to Judge Weinstein's query for authority, say (as Judge Weinstein relates it), "Well, it just seems wrong judge, I'm not sure why, but you're the expert." Weinstein Oral History, *supra* note 20, at 561. Occasionally, though rarely, the court of appeals will reverse an evidentiary ruling of Judge Weinstein. *See, e.g.*, *United States v. Jamal*, 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd*, 707 F.2d 638 (2d Cir. 1983). Even in reversing his decision, though, the court of appeals cited to Judge Weinstein's evidence treatise. *Id.* at 642.

138. WEINSTEIN, *supra* note 49.

139. James L. Oakes, Book Review, 78 COLUM. L. REV. 205 (1978) (reviewing WEINSTEIN, *supra* note 49).

140. WEINSTEIN, *supra* note 49.

141. WEINSTEIN, *supra* note 50.

dealt with the role of courts in mass disasters. Arguing that individual justice must be provided in a mass society, he outlined the steps that could be taken by sensitive, imaginative, independent judges, and lawyers to establish an empathetic relationship with those seeking justice.<sup>142</sup>

Judge Weinstein has written a number of law review articles in which he offers his perspective after having been intensely involved with cases in a particular area. Among these are articles, which are among his finest, on Social Security disability cases,<sup>143</sup> structural lawsuits,<sup>144</sup> cases involving public schools,<sup>145</sup> and class actions.<sup>146</sup> A number deal with evidentiary problems,<sup>147</sup> and others with sentencing.<sup>148</sup> There are many articles supporting particular innovations.<sup>149</sup> The range of subjects Judge Weinstein has written on is remarkable. He has written on the use of interns in the courts,<sup>150</sup> the disqualification of judges,<sup>151</sup> the teaching of legal ethics,<sup>152</sup> the availability of judicial opinions,<sup>153</sup> secrecy in civil trials,<sup>154</sup> the environment,<sup>155</sup> and the teaching of evidence.<sup>156</sup>

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142. WEINSTEIN, *supra* note 50, at 2–3.

143. Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897 (1984).

144. Jack B. Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation*, 13 U.C. DAVIS L. REV. 231 (1980).

145. *See, e.g.*, Jack B. Weinstein, *Equality, Liberty and the Public Schools: The Role of State Courts*, 1 CARDOZO L. REV. 343 (1979); Jack B. Weinstein, *Equality, Liberty, and the Public Schools*, 48 U. CIN. L. REV. 203 (1979).

146. *See, e.g.*, Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985).

147. *See, e.g.*, Jack B. Weinstein, *The Examination of Witnesses*, in 2 A.L.L.-A.B.A., THE PRACTICAL LAWYER'S MANUAL OF TRIAL & APPELLATE PRACTICE 91 (1979).

148. *See, e.g.*, Jack B. Weinstein, *Lecture, A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987).

149. *See, e.g.*, Jack B. Weinstein, *Proper and Improper Interactions Between Bench and Law School: Law Student Practice, Law Student Clerkships, and Rules for Admission to the Federal Bar*, 50 ST. JOHN'S L. REV. 441 (1976).

150. *Id.*

151. *See, e.g.*, Ass'n of the Bar of the City of New York, Panel Discussion, *Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063 (1993) (including Jack B. Weinstein among the participants).

152. *See, e.g.*, Jack B. Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452 (1972).

153. *See, e.g.*, Jack B. Weinstein, Symposium, *Factors in Determining the Degree of Public Availability of Judicial Opinions*, 2 N.Y.U. ENVTL. L.J. 244 (1993).

154. *See, e.g.*, Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53 (2000).

155. *See, e.g.*, Jack B. Weinstein, *Why Protect the Environment for Others?*, 77 ST. JOHN'S L. REV. 217 (2003).

156. Jack B. Weinstein, *Is There Scholarship After Death or Are Evidence Teachers Needed After the Federal Rules?*, 41 MD. L. REV. 209 (1982).

*E. Persuasion: Speeches*

Judge Weinstein has said: “I’ve never ignored the opportunity of a public forum to make a little substantive statement,” and he has spoken of stages or podiums as “a kind of bully pulpit available to judges.”<sup>157</sup> Certainly, during his eight years as Chief Judge of the Eastern District, he represented his court and spoke on many occasions. But over his forty-seven years on the bench, he has given hundreds of speeches: commencement addresses, speeches both presenting awards and accepting them, eulogies and speeches at memorials, and reflections on his own experiences. He has spoken throughout the New York Metropolitan area, at dozens of law schools and bar associations throughout the country, and in Toronto, London, Belfast, Geneva, Jerusalem, and other cities abroad. He even gives an annual sermon at Temple Emanuel in Great Neck, New York. Some of the speeches have, with small modifications, been used more than once, and some have then been revised and published in the books on rule making and class actions, in law reviews, and as op-ed pieces. Some have been short and relatively light, but many engage with substantive problems.

What audiences has Judge Weinstein tried to reach with his speeches? Professor Baum suggests that the lawyers who practice before trial judges are an important reference group or audience, stating that: “A judge’s reputation in the legal community as a whole and in the broader community is based largely on the judgments of lawyers who practice in the judge’s court.”<sup>158</sup> But Baum also states that judges may aim their opinions at fellow judges in the same courthouse, former clerks, former colleagues, and for seminars that train judges.<sup>159</sup> Judge Weinstein has spoken to all these audiences.

Certainly, attorneys are a group that Judge Weinstein has tried to reach—sometimes to educate, and sometimes to ask for help. Bar associations have offered an important podium. Both with the New York CPLR and Federal Rules of Evidence, Judge Weinstein used the platforms of bar associations to explain reforms he had been involved with and to attempt to influence the way they would be used. He also did this when the Eastern District adopted new rules of practice.<sup>160</sup>

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157. Weinstein Oral History, *supra* note 20, at 1091–92.

158. BAUM, *supra* note 117, at 99.

159. *Id.* at 103.

160. Jack B. Weinstein, Panel on Modern Federal Discovery Practice in the Southern and Eastern District of New York: Reform or Conflict? (Oct. 1, 1984) (copy of cover of program on file with author). Judge Weinstein also has used bar association platforms to encourage more pro bono work by attorneys.



Another very important audience for Judge Weinstein to reach has been the "legal academy." After all, for about three decades of his judgeship, Judge Weinstein remained a full-time professor. As a Columbia Law School professor, he was in frequent contact with his colleagues, and he employed them in his judicial work. Louis Lusky, for example, was appointed by Judge Weinstein to represent Vietnam War evaders living in Canada.<sup>161</sup> Curtis Berger acted as Special Master in the Coney Island desegregation case.<sup>162</sup> Harold Korn was a strong booster of Judge Weinstein's views on jurisdiction,<sup>163</sup> while the Judge continued to discuss legal questions with the nation's outstanding scholar on conflict of laws, Willis Reese.<sup>164</sup> The Judge appointed Gerard Lynch to evaluate his experiment in appointing coordinating counsel in a mega-criminal case.<sup>165</sup> Judge Weinstein also team-taught courses at Columbia with Kent Greenawalt and Jack Greenberg, among others, and was in close touch with members of the Brooklyn Law School faculty, whose offices were only a couple of blocks away.

That legal academics were an important reference group for Judge Weinstein may be suggested by the many occasions he addressed legal educators or spoke (and wrote) about legal education.<sup>166</sup> Judge Weinstein believes deeply in the need for cooperation between the courts, the bar, and the law schools. As Chief Judge, he encouraged the creation of a course at Brooklyn Law School to evaluate the impact of the 1983 amendments to the Federal Rules of Civil Procedure and the Eastern District's new standing orders on discovery practice, while at the same time, students were taught how to conduct discovery without abuse.<sup>167</sup>

As Judge Weinstein settled in on the bench, his work began to evoke considerable interest and admiration from law school professors all over the country. Law professors whose specialties included

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161. MORRIS, *supra* note 27, at 126.

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

163. See Harold L. Korn, Essay, *Rethinking Personal Jurisdiction and Choice of Law in Mass Torts*, 97 COLUM. L. REV. 2183 (1997).

164. Weinstein Oral History, *supra* note 20, at 199, 214-15, 1129.

165. *Id.* at 217.

166. See, e.g., Jack B. Weinstein, Remarks at the Dedication of the Courthouse on the Hofstra Campus, Uniondale, N.Y.: The Teaching Court 2 (Apr. 5, 1982); Jack B. Weinstein, Address at AALS Workshop on the Teaching of Evidence (Oct. 17, 1981); Jack B. Weinstein, Address at the First Annual Meeting of the Society of American Law Teachers in San Francisco: Some Questions About the Role of Law Professors (Dec. 29, 1974). Copies of all three speeches are on file with the author.

167. Jack B. Weinstein, Remarks at the Benjamin N. Cardozo Law Review Reception for Alumni: Legal Education: A Partnership Among Law Schools, Law Firms and Courts 21-22 (Mar. 31, 1985) (on file with author).

torts, procedure, and evidence began to follow his work carefully. Like other strong-minded judges who sought acceptance of their views—justices such as Hugo Black and Felix Frankfurter, and judges such as David L. Bazelon—acolytes burgeoned in the legal academy. Some were former clerks—such as John Goldberg of Harvard Law School and Margaret Berger and Anita Bernstein of Brooklyn Law School—but there were many other admirers, including Burt Neuborne of New York University School of Law, David Luban of Georgetown, and Peter Tillers, now a retired Cardozo Law School professor.

#### *F. Persuasion: Correspondence*

Judge Weinstein keeps family and professional and personal friends abreast of his work by sending out copies of his opinions, speeches, articles, and op-ed pieces. Heavy brown envelopes from Judge Weinstein used to arrive at my home once or twice a week, though they now have given way at least partially to attachments to email. Further, Judge Weinstein writes about a thousand or more notes a year to acquaintances, and he reads and responds to those who send him their scholarship.

In addition, he has engaged in a great deal of professional correspondence. Much of this is with law professors, but public officials are also included. Judge Weinstein wrote a series of letters between February 19 and March 7, 2003 to then-United States Attorney Roslyn R. Mauskopf (now his colleague on the bench) on such matters as the medical care for detainees at Brooklyn Metropolitan Detention Center and the warnings in appropriate languages to ensure air passengers were aware that they had to report the amount of currency they were carrying out of the country over \$10,000.<sup>168</sup>

Much of Judge Weinstein's correspondence with law school professors results from his reading of their articles, commenting, and asking serious questions. To choose just one day: on July 13, 1981, Judge Weinstein wrote Professors James Vorenberg<sup>169</sup> and Charles R. Nesson of the Harvard Law School<sup>170</sup> and Professor Charles David Phil-

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168. Letters from Jack B. Weinstein, to Roslyn R. Mauskopf (Feb. 19, Feb. 20 & Mar. 7, 2003) (on file with author).

169. Letter from Jack B. Weinstein, to James Vorenberg, Law Professor and Dean, Harvard Law School (July 13, 1981) (on file with author).

170. Letter from Jack B. Weinstein, to Charles R. Nesson, Law Professor, Harvard Law School (July 13, 1981) (on file with author).

lips of the School of Law at the University of North Carolina<sup>171</sup> responding to their writings on sentencing and evidence.

G. *Persuasion: Ability To Get Attention for His Views*

Essential to Judge Weinstein's successes in persuasion has been his ability to attract attention for his decisions, ideas, and activities far beyond the Eastern District of New York. This is no small matter. Even the Chief Justice of the United States releases his annual year-end report on the state of the judiciary just before or on New Year's Day, a very slow news period, in order to attract media attention.<sup>172</sup>

Somehow, Judge Weinstein's cases seem to get more attention than those of most other judges. Asked why his cases involving the New York City schools received so much more attention than those of his colleagues, Judge Weinstein offered this reason:

I think what happened was that they blew up under me. That is, when I got them I ran with them and they therefore became bigger than they might otherwise have been. I guess I could have decided this case on much narrower grounds and so without this enormous set of hearings and discussions; the same thing was true of *Lora* and true of a number of other cases. I was interested in the case. Don't forget that I had been involved in the *Brown* [v. *Board of Education*] case.<sup>173</sup>

Another time, when asked about the visibility of his cases, he said, "I got them, and when I did get them, I ran with them."<sup>174</sup>

Putting casebooks aside, there is probably more material written about Judge Weinstein than about any other federal lower court judge, save possibly, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. There are an unusual number of interviews and articles about him. Judge Weinstein may be the only sitting federal district judge who has been the subject of profiles in both the *New Yorker*<sup>175</sup> and *New York Magazine*.<sup>176</sup> Judge Weinstein's decisions often are front-page news in the *New York Times*.<sup>177</sup>

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171. Letter from Jack B. Weinstein, to Charles David Phillips, Law Professor, University of North Carolina (July 13, 1981) (on file with author).

172. See *Chief Justice's Year-End Reports on the Federal Judiciary*, SUP. CT. U.S. (Jan. 16, 2015), <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

173. Weinstein Oral History, *supra* note 20, at 454.

174. *Id.* at 294.

175. Jeffrey Toobin, *Benchmark*, NEW YORKER, May 3, 1993, at 35-36.

176. Robert Kolker, *High Caliber Justice*, N.Y. MAG., Apr. 5, 1999, at 32-37.

177. See, e.g., A. G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 22, 2010, at A1 (reporting on *United States v. Polouizzi*, 687 F. Supp. 2d 133 (E.D.N.Y. 2010)); Philip S. Gutis, *Lilco Is Reported in Pact To Settle Racketeering Suit*, N.Y. TIMES, Feb. 14, 1989, at A1 (reporting on *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989)).

Furthermore, his opinions reach the New York bar often because they consistently appear on the front page of the *New York Law Journal*.<sup>178</sup> His op-ed contributions have often appeared in the *New York Times*,<sup>179</sup> thus reaching opinion makers throughout the country.

What some believe to be an unjudicial courting of publicity arises from Judge Weinstein's belief that, in matters of public importance, the court serves as a kind of forum: "It helps," he has said, "to make the issue known to the public, both the general public, if the press picks it up, but, even more important, the narrower public, the administrators, the middle level people, the people [who] make day to day decisions."<sup>180</sup>

Judge Weinstein routinely sends copies of his opinions and speeches to reporters assigned to the Brooklyn courthouse.<sup>181</sup> From time to time, he has met with individual members of the press, at their request, to explain the background of cases. His opinions are often quotable, and his visits to the sites of cases make good copy.

Yet, compared to what elected officials do, Judge Weinstein's involvement with the media has been rather tame and traditional—making opinions more readable, preparing synopses, notifying the press when hearings take place, and seeing to it that copies of documents are consistently available. If the number of interviews he has given and the number of profiles that have appeared in newspapers and magazines are considerably greater than those of other federal judges, it is because many have appeared in specialized magazines (such as alumni publications), and their content is fairly circumspect.<sup>182</sup>

This can be said as well for Judge Weinstein's relationship to television. While he has been a strong supporter of televising court proceedings, has allowed coverage of hearings in his own court, and has been willing to participate in Fred Friendly's seminars about the media and the courts, he has not been directly interviewed on television. When all is said and done, his "persuasiveness" has largely been due

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178. See e.g., Andrew Keshner, *Judge Who Guided Pro Se Plaintiff Recuses Himself Sua Sponte*, N.Y.L.J., Jan 14, 2015, at 1; Mark Hamblett, *U.S. Judge Orders Cuomo To Call Special Election*, N.Y.L.J., Feb. 18, 2015, at 1.

179. See, e.g., Jack B. Weinstein, *Bombs Believed Outlawed*, N.Y. TIMES, Apr. 4, 1954, at E8; Jack B. Weinstein, *The War on Drugs Is Self-Defeating*, N.Y. TIMES, July 8, 1993, at A19.

180. Weinstein Oral History, *supra* note 20, at 478; see also *id.* at 997.

181. *Id.* at 263.

182. See, however, the very interesting interview of Judge Weinstein on the *Agent Orange* litigation that appeared in JOEL COHEN, *BLINDFOLDS OFF: JUDGES ON HOW THEY DECIDE* 284–94 (2014).

to his opinions, law review articles, speeches before professional groups, and participation in professional conferences.

*H. Other Areas of Persuasion: Employment of Magistrate Judges and Special Masters*

One perfectly legitimate way for a federal judge to enhance his influence in a particular case, most usually in structural law suits and class actions, is to employ United States magistrate judges and special masters to deal with matters that may need to be done but might not be accomplished because of lack of time, or which might be inappropriate for an Article III judge to do, or which should be done but need not be done by an Article III judge. Judge Weinstein believes strongly in the value of United States magistrate judges. As the workload of the Eastern District became greater when Judge Weinstein became Chief Judge, he increased his personal use of magistrate judges, and when new standing orders were adopted by the court, magistrate judges began to handle most of discovery.<sup>183</sup> The use of magistrate judges in the Eastern District of New York has been pathbreaking, and Judge Weinstein has been an important influence on it.

The use of a magistrate judge as a special master was essential to Judge Weinstein's credibility in the *Agent Orange* case. When he took over the class action as a result of a colleague's elevation to the Second Circuit, Judge Weinstein told the attorneys that he expected to go to trial in six months. He appointed then-Magistrate Judge Shira Scheindlin<sup>184</sup> as Special Master and directed her to take the lawyers on a "forced march" to trial.<sup>185</sup> Devoting practically full time to the case, Magistrate Judge Scheindlin oversaw a process whereby three years of normal discovery were telescoped into three months. She held daily, nightly, and Sunday meetings with the attorneys.<sup>186</sup>

While Judge Weinstein is by no means the originator of the use of special masters, he has employed them creatively and effectively to supervise and control discovery; for fact-finding, negotiation, and mediation; as experts to advise him; to clarify problem areas; to get information to the parties and from the parties to him; to reach out to different groups in the community; as a political buffer; and to implement decrees. He has used them in sensitive public school disciplinary

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183. Weinstein Oral History, *supra* note 20, at 99–100, 1425, 1611–12, 1724.

184. Now judge of the Southern District of New York.

185. PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 122 (1986).

186. MORRIS, *supra* note 27, at 327–28. Judge Weinstein strongly favors the greater integration of the magistrate judges into the court. Weinstein Oral History, *supra* note 20, at 1425, 1724.

matters, as settlement masters, to explain the court's role to the public, and to build consensus for a solution.<sup>187</sup> Special masters, as now-Judge Scheindlin has pointed out, conduct *ex parte* contacts with parties and attorneys and deal with experts outside the presence of parties or attorneys.<sup>188</sup> Thus, special masters can act as a buffer, for the judge as well as add to his persuasive abilities by representing his views strongly.

Judge Weinstein has made particular use of the talented and ubiquitous Kenneth Feinberg. In *Agent Orange*, Feinberg was one of three special masters who developed the plan for the settlement and its distribution, which he oversaw.<sup>189</sup> In the case involving the Shoreham Nuclear Reactor, Feinberg acted as a mediator, as well as a communications link, to Governor Mario Cuomo, whose support for the settlement was essential.<sup>190</sup> Feinberg was also one of four settlement masters for parts of the *Zyprexa* litigation, where he was employed for both his political contacts and for the handling of claims.<sup>191</sup> He was also jointly appointed by Judge Weinstein and New York State Judge Helen Freedman in some of the asbestos cases.<sup>192</sup>

### I. Persuasion: Federal Judicial Administration

Judge Weinstein's major contributions to federal judicial administration have been his role in drafting the Federal Rules of Evidence<sup>193</sup> and his work in the field of class actions, both discussed later. Judge Weinstein has not left a large mark on federal judicial administration,

187. *Id.* at 1675, 1736, 1596, 1658.

188. See *80th Birthday Roundtable*, *supra* note 55, at 168.

189. MORRIS, *supra* note 27, at 330–31, 335. Feinberg's career as mediator and implementer for the distribution of claims took off after Judge Weinstein employed him in *Agent Orange*. He has since played important roles in the distribution of funds created to compensate victims of a number of disasters including the September 11th Victims Compensation Fund, the fund set up for victims of the Boston Marathon terrorist attack, and the British Petroleum Oil Spill. Elise Amendola, *Meet Kenneth Feinberg: The Man Who Puts a Price on Pain*, NBC NEWS (May 14, 2013, 12:57 AM), [http://usnews.nbcnews.com/\\_news/2013/05/14/18107596-meet-kenneth-feinberg-the-man-who-puts-a-price-on-pain?](http://usnews.nbcnews.com/_news/2013/05/14/18107596-meet-kenneth-feinberg-the-man-who-puts-a-price-on-pain?)

190. MORRIS, *supra* note 27, at 87, 204.

191. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 268 (E.D.N.Y. 2006) (order requiring settling plaintiffs to submit claims to special settlement masters); see also *In re Zyprexa Prods. Liab. Litig.*, No. MDL-1596, 2006 WL 898105 (E.D.N.Y. Apr. 6, 2006) (order appointing a special master for discovery); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596 (JBW), 2005 WL 3117302 (E.D.N.Y. Nov. 22, 2005) (order approving a final settlement); MORRIS, *supra* note 27, at 366; Weinstein Oral History, *supra* note 20, at 1935–36.

192. Weinstein Oral History, *supra* note 20, at 1754.

193. Judge Weinstein did use his influence to see that Margaret Berger became the reporter of the new Judicial Conference committee on evidence rules. Weinstein Oral History, *supra* note 20, at 358–59.

the way, for example, Chief Judge Irving Kaufman of the Second Circuit tried to do.<sup>194</sup>

However, in his eight years as Chief Judge of the Eastern District,<sup>195</sup> Judge Weinstein did have significant accomplishments. He considered his major efforts: (1) setting in motion the process for modifying the Court's rules for handling criminal and civil cases, emphasizing practicality and civility during pretrial proceedings; (2) assisting the poor in civil cases by way of creating a special panel of attorneys to handle their civil suits pro bono;<sup>196</sup> (3) introducing a program of using magistrates to oversee all discovery in civil cases;<sup>197</sup> (4) defending the judges against interference or threats to their independence, such as "encroachments" in the administrative sphere by the Circuit Council; (5) sparing his colleagues the "junky bureaucratic stuff";<sup>198</sup> (6) maintaining close relationships with the bar; (7) seeing the court as a bridge to the law schools, the poor, and the community; (8) fighting off efforts to split the District;<sup>199</sup> and (9) quashing all lawyer disciplinary matters.<sup>200</sup> As Chief Judge, Judge Weinstein was also a gadfly, opposing the proposals of Chief Justice Warren Burger and Chief Judge Irving Kaufman for the certification of trial advocates and opposing their opposition to the use of television in the courts.<sup>201</sup>

### *J. Persuasion: Extrajudicial Organizations*

It is beyond the scope of this article to describe the role Judge Jack Weinstein has played in extrajudicial organizations. Judge Weinstein has been heavily involved with organizations relating directly to jurisprudence, especially with the American Law Institute. There, he is particularly influential in the areas of complex litigation and mass torts, while also contributing in other fields.<sup>202</sup> He has also been in-

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194. *See infra* Part V.

195. Judge Weinstein served as the Chief Judge of the Eastern District from 1980 to 1988.

196. *See* MORRIS, *supra* note 27, at 87.

197. WEINSTEIN, *supra* note 47, at 130.

198. Weinstein Oral History, *supra* note 20, at 1297.

199. *See* MORRIS, *supra* note 27, at 202-05, 207.

200. Weinstein Oral History, *supra* note 20, at 624.

201. Elected for a three-year term to the U.S. Judicial Conference, Judge Weinstein stoutly objected to its certification of Harry Claiborne, a Nevada district judge, for impeachment, believing that the impeachment of judges was entirely a matter for the Congress. Judge Weinstein was also a member of the Subcommittee on Federal Jurisdiction of the Judicial Conference Committee on Court Administration (1969-75) and a member of the Special Advisory Group to the Chief Justice on Problems Related to Federal Civil Litigation (1971). Judge Weinstein does not seem to have played an important role in the Second Circuit Judicial Conference.

202. *See also, e.g.*, WEINSTEIN, *supra* note 50, at 9; *see, e.g.*, Letter from Jack B. Weinstein to Telford Taylor, Professor of Law, Columbia Law School (May 24, 1971) (discussing tentative Draft No. 4 of the Model Code of Pre-Arrestment Procedure) (on file with author).

involved with organizations which are relevant to his judicial and personal interests in science, medicine, technology, and statistics. Judge Weinstein has traveled abroad for human rights inspections in Peru, Russia, and other former Soviet republics. He has also been involved with a number of organizations concerned with Jewish matters, perhaps most importantly serving as Chairman of the United Jewish Appeal's Committee on Rescue of Soviet Jews.

### *K. Persuasion: Miscellany*

While probably not within Walter Murphy's conception of the use of persuasion, there are two other areas related to Judge Weinstein's persuasive influence—the “related case” phenomenon and Judge Weinstein's personal endowments to his court—which deserve brief mention.

Judge Weinstein has been criticized for the unusual number of prominent class actions and aggregated cases that have ended up before him. To some, it appears that there have been so many that it does not seem credible that they came directly off the “wheel.” Indeed, plaintiffs' attorneys, aware of Judge Weinstein's abilities and sympathies, have guided cases to him by employing the Eastern District's “related case” rule. Under that rule, when a plaintiff's attorney files a case, he or she may indicate that the case is “related” to another case that has already been decided (or at least assigned) to a particular judge.<sup>203</sup> Then, the new case will be assigned to that judge.<sup>204</sup> For example, the class actions involving light cigarettes went to Judge Weinstein because the Johns Manville Trust was suing the tobacco industry and Judge Weinstein already had Manville Trust cases involving personal injury cases that resulted from asbestos exposure. A second way Judge Weinstein has received high-profile class actions and aggregated cases, such as those involving Zyprexa, has been by assignment by the MDL Panel (Panel).<sup>205</sup> However, making allowance for the cases sent by the Panel, it still cannot be denied that because of the successful forum shopping of plaintiffs' lawyers, Judge Weinstein became the central decision maker of litigation over mass tort actions against the tobacco and firearms industries, even though the alleged harms were nationwide and no major manufacturer in either industry was located in the Eastern District.<sup>206</sup>

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203. E.D.N.Y. R. 13.

204. *Id.*

205. *See, e.g., In re Zyprexa*, 433 F. Supp. 2d 268 (E.D.N.Y. 2006).

206. Judge Jose Cabranes of the Court of Appeals for the Second Circuit called attention to this phenomenon. Joseph Goldstein, *Judge Lands at Center of a New York Legal Mystery*, N.Y.



Judge Weinstein, who became independently wealthy from his treatises and casebooks, has personally endowed and urged others to donate funds to the District Court for the Eastern District for services aimed at trying to redress the limitations of the poor in civil litigation. When he was Chief Judge, Judge Weinstein created the Eastern District Litigation Fund to reimburse pro bono counsel and social workers for moneys spent on behalf of defendants and their families. He also created and funded the Bessie Brodach Weinstein Library and an emergency assistance fund for persons needing help when they are in the courthouse.<sup>207</sup>

#### V. BRIEF CASE STUDIES IN PERSUASION: JUDGE WEINSTEIN ON SENTENCING AND CLASS ACTIONS IN MASS TORTS

The Federal Sentencing Guidelines (Guidelines), composed by a sentencing commission created by Congress in 1984, came to be bitterly opposed by many district judges for their harshness and rigidity. After a battle lasting two decades, the effects of the Guidelines were greatly limited by decisions of the Supreme Court.<sup>208</sup> Judge Weinstein was by no means alone in the struggle, but he was on the front lines.

The Guidelines limited judicial discretion, generally an unattractive proposition for judges. They were also very harsh. For Judge Weinstein, they were particularly offensive because they banished humanity from the sentencing process. Judge Weinstein devised ingenious ways to circumvent the Guidelines in his sentences, but his opposition did not stop there. Judge Weinstein employed law review articles, op-ed pieces, speeches at meetings of judges, and even a well-publicized refusal<sup>209</sup> to handle the sentencing of drug couriers in order to rally opposition to the Guidelines. He attempted to educate judges appointed after Guideline sentencing had begun, to teach defense lawyers, to sensitize Assistant United States Attorneys, and to put words into the mouths of defendants to try to reduce what he saw as great cruelty. Over and over, he reminded his audiences that those being sentenced were not *numbers*, but real people: pregnant Ghanaian

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SUN (Dec. 3, 2007), <http://www.nysun.com/new-york/judge-lands-at-center-of-a-new-york-legal-mystery/67380/>.

207. As County Attorney for Nassau County fifty years ago, Judge Weinstein was responsible for the creation of what now is known as Nassau/Suffolk Legal Services. Weinstein Oral History, *supra* note 20, at 368.

208. See *Gall v. United States*, 552 U.S. 38 (2007); see also *Kimbrough v. United States*, 552 U.S. 85 (2007).

209. Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1.

women, battered Colombian wives, Pakistani restaurateurs, and struggling immigrant mothers from the Dominican Republic.<sup>210</sup>

Judge Weinstein's early reaction to the Guidelines had not been hostile, although he expressed concerns about them.<sup>211</sup> But by the time he spoke at the Sentencing Institute for the Second and Eighth Circuits in 1992, he was finding the Guidelines harsh, inflexible, and expensive in their effect. But, he also said, at the time, that he was not having very much trouble working with the Guidelines—he had not yet been forced to impose a sentence that he found offensive.<sup>212</sup> He could, he explained, capitalize on circumstances, such as a drug courier's pregnancy at the time of arrest, to avoid the Guideline sentence.<sup>213</sup>

However, by 1992, he was actively searching for ways to depart from the Guidelines.<sup>214</sup> Sometimes he would manipulate the facts of a case.<sup>215</sup> Sometimes he would “lead” the defendant at the sentencing hearing to set up a reason to depart.<sup>216</sup> One of his most important efforts to limit the effect of the Guidelines was by importing into sentencing traditional principles of *mens rea*.<sup>217</sup> This ultimately proved futile.<sup>218</sup>

In a case involving fifty-five welfare-cheating Dominican mothers, Judge Weinstein interpreted three statutory sections in a way that minimized their influence so that their children would not be left without a mother at home.<sup>219</sup> In those cases, he was able to sentence the defendants to community service, home detention, and supervised release, along with fines, restitution, or both.<sup>220</sup> But, while the sentences of the Dominican mothers survived, Judge Weinstein's attempt, in a

210. See e.g., *United States v. Pokuaa*, 782 F. Supp. 747 (1992).

211. See Weinstein, *supra* note 148.

212. Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, FED. SENT'G REP., July–Aug. 1992, at 6, 6–7.

213. *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992); see also *United States v. Gaviria*, 804 F. Supp. 476, 481 (E.D.N.Y. 1992); *United States v. Concepcion*, 795 F. Supp. 1262, 1270 (E.D.N.Y. 1992).

214. Weinstein Oral History, *supra* note 20, at 1107.

215. See, e.g., *United States v. Jonas*, 842 F. Supp. 1533, 1533–34 (E.D.N.Y. 1994).

216. See, e.g., Sentencing Transcript, *United States v. Rodriguez*, No. 1:95-cr-00401 (E.D.N.Y. Dec. 27, 1995) (on file with author).

217. See, e.g., *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993).

218. *United States v. Ekwunoh*, 813 F. Supp. 168 (E.D.N.Y.), *rev'd*, 12 F.3d 368 (2d Cir. 1993), *on remand* 888 F. Supp. 364 (E.D.N.Y. 1994). Ekwunoh would ultimately be spared a possible ten-to forty-year sentence by the passage of legislation.

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

220. *Concepcion*, 795 F. Supp. at 1262. Judge Weinstein saw the women as “very good mothers” who were stealing “to give the children something better.” Weinstein Oral History, *supra* note 20, at 1150.

scandal involving the bribing of taxicab inspectors, to punish the “little guys” less than the “big fish,” who had cooperated with the government, was only a partial success.<sup>221</sup>

By 1995, Judge Weinstein was strongly attacking the Guidelines in articles<sup>222</sup> and speeches.<sup>223</sup> In some of them, he implied that the judge sentencing under the Guidelines faced a moral dilemma reminiscent of those faced by lawyers and judges during the Third Reich and Vichy France.<sup>224</sup> However, the action Judge Weinstein took that attracted the most attention was his joining his old friend, Judge Whitman Knapp of the Southern District of New York, in a statement that they would no longer hear drug cases. The statement and Judge Weinstein’s speech about it at Cardozo Law School received a good deal of attention from the press throughout the nation.<sup>225</sup>

In the mid-1990s, tensions between Judge Weinstein and the court of appeals over sentencing grew.<sup>226</sup> There was a public brouhaha over Judge Weinstein’s light sentence of a drug courier so that he and his wife could be able to conceive a child.<sup>227</sup> The court of appeals set

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221. *United States v. DeRiggi*, 45 F.3d 713 (2d Cir.), *on remand* 893 F. Supp. 171 (E.D.N.Y.), *aff’d*, 72 F.3d 7 (2d Cir. 1995) (per curiam).

222. *See, e.g.*, Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, FED. SENT’G REP., NOV.–DEC. 1994; Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169 (1996); Jack B. Weinstein & Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumventions*, FED. SENT’G REP., MAY–JUNE 1997.

223. *See, e.g.*, Jack B. Weinstein, Speech at the Lewis and Clark Law School: The Trial Judge’s Dual Obligations to Act Independently and with Humanity (Feb. 21, 1996); Jack B. Weinstein, Remarks at Sentencing Seminar at New York University School of Law: Avoiding Cruelty at Sentencing While Protecting the Public: A View from the Federal Bench (Apr. 8, 1998); Jack B. Weinstein, Jamie Lehmann Memorial Lecture at Fifth Avenue Synagogue in New York City: Does Religion Have a Role in Criminal Sentencing? (June 4, 2007). Copies of all speeches are on file with the author.

224. *See, e.g.*, Jack B. Weinstein, Symposium, *Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1122 (1995); Jack B. Weinstein, *Every Day Is a Good Day for a Judge To Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131 (2004); Jack B. Weinstein, Speech at the Court of Military Appeals: When Should Judges Let Their Conscience Speak (May 18, 2005) (on file with author).

225. MORRIS, *supra* note 27, at 269 (discussing articles and editorials from 1993, including those that appeared in the *New York Law Journal* on Apr. 15 and Apr. 17, *The Washington Post* on May 1, *The San Francisco Chronicle* on July 18, and *The Florida Sun* on Aug. 15, 1993); *see also* Jack B. Weinstein, *Why I Won’t Try Any More Drug Cases*, LEGAL TIMES, Apr. 26, 1993, at 14. Judge Weinstein did eventually go back to handling drug cases. Weinstein Oral History, *supra* note 20, at 1494–95.

226. Not all of the cases involved reversals of Judge Weinstein for being too lenient. *See, e.g.*, *United States v. Tropiano*, 50 F.3d 157 (2d Cir. 1995).

227. *United States v. Londono*, 76 F.3d 33 (2d Cir. 1996) (holding that Judge Weinstein erred in downwardly departing from the Sentencing Guidelines).

aside the sentence and ordered the matter assigned to a different judge.<sup>228</sup>

Nevertheless, during the last decade of “mandatory” sentencing under the Guidelines, Judge Weinstein consistently searched for loopholes with which to ameliorate harsh results. In *United States v. Liu*,<sup>229</sup> he employed the defendant’s pathological addiction to gambling.<sup>230</sup> In *United States v. Hammond*,<sup>231</sup> he held that HIV-positive status could be considered as a basis for leniency.<sup>232</sup> Judge Weinstein also employed a technique of delaying sentencing to allow the defendant to make a record of rehabilitation.<sup>233</sup> When Congress authorized the courts of appeals to resentence defendants de novo where a downward departure by a district judge was not justified, Judge Weinstein’s response was to videotape all of his sentencings. Although he offered a generalization for doing it—to “assist the [appellate] judges in their new onerous task”<sup>234</sup>—his real reason was to humanize the defendant. He wanted the appellate court to see the defendant’s facial expressions and body language, the severity of the defendant’s infirmity, and the depth of the defendant’s family’s reliance.<sup>235</sup>

Judge Jack Weinstein was one of the fiercest and most eloquent voices battling the Guidelines’ regime. He employed his ingenuity to avoid results he thought cruel and harsh, while through opinions, articles, and speeches, he attempted to educate less senior colleagues throughout the nation, defense lawyers, assistant United States attorneys, and the court of appeals.

Judge Weinstein has made even greater efforts at persuasion in the field of mass tort class actions.<sup>236</sup> The *Agent Orange* litigation greatly spurred the use of class actions for mass torts.<sup>237</sup> During the three decades since then, Judge Weinstein has been heavily involved in a number of other important mass tort class actions in which he has written many dozens of published opinions. He also wrote a book dealing with how the United States legal system deals with disas-

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228. *United States v. Londino*, 100 F.3d 236 (2d Cir. 1996) (“Judge Weinstein’s handling of this case makes an exorbitant claim on appellate resources. Accordingly, we direct that further proceedings be assigned to a different judge . . .”); see also MORRIS, *supra* note 27, at 274–75.

229. 267 F. Supp. 2d 371 (E.D.N.Y. 2003).

230. *Id.* at 376–77.

231. 37 F. Supp. 2d 204 (E.D.N.Y. 1999).

232. *Id.* at 207–210.

233. *United States v. Flowers*, 983 F. Supp. 159 (E.D.N.Y. 1997).

234. *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004).

235. *Id.* at 264.

236. See Morris, *supra* note 16.

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

ters,<sup>238</sup> as well as law review articles and speeches on a whole range of problems, from the definition of classes and subclasses to jurisdiction, choice of law, excessive jury awards, lawyers' ethics, attorneys' fees, the use of statistics, and how a judge should handle the scientific testimony of expert witnesses. Professor Linda Mullenix stated in her Article for this Symposium that there has probably been no judge more identified with the aggregate litigation movement of the late-twentieth century than Judge Weinstein, who has earned the title "King of Mass Torts."<sup>239</sup>

## VI. ESTEEM

Walter Murphy identified another tactic that could be used to enhance influence, "esteem."<sup>240</sup> Murphy argues that in disposing one actor to respond positively to another's attempt at influence are likeability and thoughtful gestures, which could merge with professional esteem—respect for judgment, knowledge, or skills of another.<sup>241</sup> This is one of the reasons often given for Chief Justice John Marshall's imprint on the Supreme Court. In dealing with sophisticated people, the use of esteem must ordinarily occur naturally or unconsciously, because flattery is usually easy to see through.<sup>242</sup>

It is certainly possible to make too much of this, especially for a district judge who needs no one's support<sup>243</sup> to give a judgment, render a decree, or author an opinion. Yet, its relevance to Judge Weinstein's effectiveness in many areas, whether it be the acceptance by others of his innovations, acceptance of his views in extrajudicial organizations, or his ability to sit jointly with state judges<sup>244</sup> cannot be gainsaid.

"Some people," Murphy wrote, "are blessed with a warmth and a sincerity that immediately attract other human beings."<sup>245</sup> He continued: "It is improbable that even a sophisticated version of a Dale Carnegie course, whether or not self-taught, could build up anything approaching the personal magnetism that such people have by na-

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238. WEINSTEIN, *supra* note 50.

239. Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601.

240. MURPHY, *supra* note 3, at 38.

241. *Id.* at 38–43.

242. It has been argued that it may be a reason for Felix Frankfurter's inefficacy, because his attempts to win votes by flattery were seen by many of his colleagues as insincere manipulation.

243. Save that of his staff.

244. *See, e.g., 80th Birthday Roundtable*, *supra* note 55, at 199 (New York State Judge Helen Freedman's comment).

245. MURPHY, *supra* note 3, at 49.

ture.”<sup>246</sup> Murphy may have had Chief Justice John Marshall in mind, or possibly Chief Justice William Howard Taft, but his words are applicable to the effect Judge Weinstein has on most people. Loving his job and possessing a generous view of people, as well as great personal charm, warmth, and wit, Judge Weinstein is an unusually attractive personality.

There are many tales of Judge Weinstein’s thoughtfulness and concern for others. Just one example: During a gale-driven storm that occurred while he was Chief Judge, he invited demonstrators protesting President Ronald Reagan’s economic policies to spend the night in the lobby of the United States Courthouse. He was quoted as saying: “I don’t know who they are or what they stand for. I would have done it for anyone.”<sup>247</sup> There are also the thousands of personal notes Judge Weinstein writes a year, the periodic telephone calls to friends he hasn’t heard from, and the Christmas visits to each of his colleagues. With his extraordinary energy and reading speed, Judge Weinstein reads a large number of law review articles, and often writes a warm note to each of the authors. His letters in support of candidates for tenure are lengthy and positive.<sup>248</sup> Repeating what he tells his clerks, Judge Weinstein explained, “If we can ever cite an article by a friend, we should. So, if my clerks have ever written anything, I’d put them in an opinion at one point or another. . . . It’s a sign of affection.”<sup>249</sup>

## VII. CONCLUSION

This Article has attempted to describe how an unusually able judge has used, consciously and unconsciously, the tactics of command, persuasion, and esteem to attain influence for his opinions and other ideas. Judge Weinstein, naturally attracted to innovations, has attempted to convince others “to move” the law substantively and to adopt a number of innovations in judicial administration, while also using his influence to oppose a number of trends in the law. How efficacious Judge Weinstein has been is left for evaluation in still another article. What can be said here, though, is that in an extraordinarily rich career in which he has made a variety of important

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246. *Id.*

247. Wolfgang Saxon, *Storm Delivers Gust of Winter to New Yorkers*, N.Y. TIMES, Oct. 26, 1982, at B3; see also MORRIS, *supra* note 27, at 65.

248. See, for example, Judge Weinstein’s two-and-one-half page, single-spaced letter to Dean Jesse Choper reviewing an article by a candidate for tenure, closing “I look forward to reading much of his first rate materials in future years.” Letter from Jack B. Weinstein, to Jesse H. Choper (Feb. 23, 1986) (on file with author).

249. Weinstein Oral History, *supra* note 20, at 255.

contributions, both in deciding cases and in matters affecting the administration of justice, Judge Weinstein has made ample use of the tactics discussed by Walter Murphy.