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## EMPATHY AND ARTICLE III: JUDGE WEINSTEIN, CASES AND CONTROVERSIES

*Susan A. Bandes\**

*It seems to me that every person appearing before the judge is a human being and entitled to be treated with dignity, and that often requires that we speak face-to-face and try to . . . appreciate that we have a human being before us.<sup>1</sup>*

*The aspect of humanity, of the human spirit, and of the empathy we feel for our fellow men and women . . . is the gate to justice that gives life and reason to our work as lawyers and judges.<sup>2</sup>*

*The purpose of rules is to enable judges to resist the emotionally engaging temptation to relieve the plight of those they can see and empathize with, even when doing so would be unfair to those they cannot see.<sup>3</sup>*

This celebration of the life and achievements of Judge Weinstein presents an ideal opportunity to investigate a question that has generated substantial controversy lately: the role of empathy in judging. It also presents an ideal opportunity to productively focus and narrow the empathy debate. Problematically, the empathy debate generally treats judging as a monolithic concept. To debate whether empathy is a desirable attribute of judges as a general matter is to overlook important distinctions between trial, appellate, and Supreme Court jurists, and between federal and state courts. Using Judge Weinstein's approach to judging as a touchstone, I will explore the role of empathy for Article III judges, and for federal district court judges in particular.

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1. Kenneth P. Nolan, *Weinstein on the Courts*, LITIG., Spring 1992, at 24, 26 (quoting from an interview with Jack B. Weinstein); see also JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 101 (2011) (quoting the same).

2. MORRIS, *supra* note 1, at 311 (quoting Jack B. Weinstein, Speech at Temple Emanuel, Great Neck, N.Y.: Maimonides' Tempering of a Justice Too Rigid and Cruel for Humanity 6 (Aug. 6, 1999)).

3. John Hasnas, *The "Unseen" Deserve Empathy, Too*, WALL ST. J., May 29, 2009, at A15.

## I. CASES, CONTROVERSIES, AND JUDICIAL EMPATHY

The question of whether judges ought to be empathetic has been hotly debated in recent years.<sup>4</sup> This debate arises mainly from a broader controversy about the proper nature of the judicial role, but it is complicated by a lack of shared understanding of the meaning of the term “empathy.”<sup>5</sup> I will address this definitional problem at the outset. I will then turn to the underlying jurisprudential issue of whether empathy is a desirable attribute for judges, and for federal district court judges in particular. There is no better focus for such an inquiry than Judge Weinstein.

The term “empathy” is something of a moving target—it has been used variously to mean cognitive understanding, affective engagement, compassion, and moral imagination.<sup>6</sup> Empathy, in each of these incarnations, is a cornerstone of Judge Weinstein’s judging.<sup>7</sup> But each of these meanings raises a complex set of questions about the proper scope and goals of Article III judicial power.

Judge Weinstein has a strong vision of the role of the federal courts—one that places primacy on realizing the postwar goal of equal access to justice. As I will discuss, he views exposing and righting injustice as a court’s affirmative duty rather than its passive role. His vision emphasizes not only access to courts, but also the importance of the appearance of justice. He talks often about the law’s human face—about communicating to litigants that they have the attention and understanding of the court. His judicial philosophy places great weight on the responsibility of the judge to seek out a broad understanding not only of the litigants’ situations, but also of the societal context in which their cases arise. He says quite movingly: “Were it possible, judges would want to crawl into the skin of society, acquiring all knowledge and understanding all feelings. . . . Judges cannot make accurate findings of fact or evaluate the effect of their decisions unless they have some understanding of society.”<sup>8</sup> As is well known, Judge

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4. For a discussion, see Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, available at <http://ssrn.com/abstract=1431230>.

5. Psychologist C. Daniel Batson observed: “The term *empathy* is currently applied to more than a half-dozen phenomena. . . . Opportunities for disagreement abound.” C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY* 3 (Jean Decety & William Ickes eds., 2009).

6. See *id.*; see also CANDACE CLARK, *MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE* 34 (1997).

7. See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination, and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 2004–06 (1997).

8. Jack B. Weinstein, *Learning, Speaking, and Acting: What Are the Limits for Judges?*, 77 JUDICATURE 322, 322–23 (1994).

Weinstein places great stock in site visits, remarking that he finds it “easier to understand what is at stake” when he can “see and hear the real people concerned in their own settings.”<sup>9</sup> Relatedly, his vision for the role of the federal district courts encompasses not just the parties before the court, but the best interests and general welfare of the larger community.

In this brief summary, one can identify the whole range of attributes I mentioned above: cognitive empathy, affective empathy, compassion, and moral imagination. Some or all of these judicial attributes are the subject of controversy, as are several aspects of Judge Weinstein’s approach. The first step is to establish working definitions of the psychological terms. The next step is to examine these attributes in light of the requisites of Article III.

## II. PINNING DOWN THE ELUSIVE NOTION OF “EMPATHY”

There is no agreed-upon definition of empathy. It is a term that has been assigned various meanings throughout history, and in different cultures, and across disciplines, and even within disciplines, and in reference to humans as opposed to other species.<sup>10</sup> C. Daniel Batson, a leading cognitive scientist studying empathy, recently identified eight distinct phenomena that are called “empathy” in his field alone.<sup>11</sup> The only way to conduct a coherent conversation about the role of empathy is to state one’s working definition at the outset.

My working definition of empathy is: the ability “to imagine oneself in the other’s situation and to experience, to some degree, the emotions that the other is experiencing.”<sup>12</sup> This definition centers on the effort to *understand* the internal state of another and leaves to one side, for the time being, the question of motivation to *respond* to the needs or desires of another. Empathy thus is a capacity, not an emotion. It is a capacity that does not necessarily lead to actions in favor of its object, and indeed it need not be exercised exclusively toward one person. At first blush, empathy so defined appears purely cognitive. But the definition of empathy as a cognitive capacity fails to capture some essential affective dimensions. One of these is the will to

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9. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 99 (1995).

10. *See, e.g.*, *THE ANTHROPOLOGY OF EMPATHY: EXPERIENCING THE LIVES OF OTHERS IN PACIFIC SOCIETIES* (Douglas W. Hollan and C. Jason Throop eds., 2011) (discussing variations in empathy among various Pacific societies). For a fuller discussion of the definitions of empathy, see Bandes, *supra* note 4.

11. Batson, *supra* note 5.

12. Raymond S. Nickerson et al., *Empathy and Knowledge Projection*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY*, *supra* note 5, at 43.

exercise it. As discussed below, some empathy is virtually automatic, but much of it is effortful. It requires the humility to understand that one's own perspective is limited, and the curiosity and drive to understand the perspective of others. Additionally, the ability to understand the needs and desires of others can be a coldly clinical and purely instrumental capacity. Psychopaths may have this sort of insight, but it is unaccompanied by care or concern. Some psychologists call this "cognitive empathy" and distinguish it from the "emotional empathy" that psychopaths lack: a state in which one is motivated to understand and even share the feelings of others by concern, rather than simply cold or instrumental curiosity.<sup>13</sup>

Although empathy so defined has affective elements, it is important to distinguish it from sympathy or compassion. The line between affective empathy and sympathy is not always easy to draw, but the important distinguishing factor is that different capacities or emotions are associated with different tendencies toward action (or inaction). The recent empathy debates were clouded by a failure to make this distinction. For example, during the confirmation hearings of Justices Sotomayor and Kagan, several scholars and jurists expressed concern that empathetic judges could not remain unbiased and therefore could not uphold the rule of law.<sup>14</sup> This concern was grounded in confusion between empathy and sympathy or compassion. Sympathy and compassion are emotions; they entail feeling *for* someone, rather than simply understanding his or her feelings. Unlike empathy, sympathy and compassion are usually accompanied by an action tendency: a desire to act to relieve the object's suffering. Judge Weinstein has well articulated this distinction and its implications for judging. He observed, for example: "Sympathy for the poor or well-to-do must not affect substantive results. But empathy is not forbidden: it allows the court to better understand the positions of the parties."<sup>15</sup> Understanding what is at stake for the parties does not, without more, lead to sympathy for the parties, or to actions on behalf of one party or another. Conversely, sympathy and compassion can exist without empathy—these feelings may rest on misconceptions about the object's thoughts and desires.

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13. See R. J. R. Blair & Karina S. Blair, *Empathy, Morality, and Social Convention: Evidence from the Study of Psychopathy and Other Psychiatric Disorders*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY*, *supra* note 5, at 139, 142–44.

14. For a discussion, see Bandes, *supra* note 4.

15. Jack B. Weinstein, Essay, *The Roles of a Federal District Court Judge*, 76 *BROOK. L. REV.* 439, 440 (2011).

The other misconception that has misinformed the empathy debate is that judicial empathy is a quality that runs only toward marginalized or disadvantaged litigants.<sup>16</sup> There are several reasons why judicial empathy is so often erroneously viewed as an emotion aimed exclusively at the disadvantaged and the powerless. One is that it is conflated with compassion and sympathy, as discussed above. Compassion and sympathy are emotions that are commonly directed toward the less fortunate. Empathy, on the other hand, is an effort to stand in the shoes of another—wherever that other is situated.<sup>17</sup>

Another source of the confusion is that we mistake empathy for something that needs to be effortful and visible. In fact, our ability to understand the intentions and motivations of others is one of the most basic capacities of social life; it is pervasive and often not particularly noticeable. It comes easily and naturally when its objects share our assumptions, values, and life experiences. Without effort on our part, our empathy will tend to flow toward those like us.<sup>18</sup> Problematically, we are likely to be unaware of this bias because it seems so natural and effortless. Empathy for those from shared backgrounds, who hold shared values, is so ingrained in the fabric of the judiciary that it is misidentified as empathy-free judging, when it is in fact a selective empathy that tends to privilege the powerful. For the observer, the only noticeable judicial empathy may be the self-conscious imaginative effort to bridge divides—including divides of class, race, and ethnicity—in order to grasp the stakes for all the litigants. As Mary Anne Franks well put it,

Empathy forces us to imagine and to have concern for those who are radically different from, even threatening to, ourselves and our values. . . .

The primary value of empathy is that it tells us not to assume that we are right, or objective, or impartial. It opens up a window of humility that can help guide a decision-maker to the correct outcome.<sup>19</sup>

As Judge Alex Kozinski noted, “[N]o truly poor people are appointed as federal judges, or as state judges for that matter. . . . The everyday problems of people who live in poverty are not close to our hearts and

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16. See, e.g., Steven G. Calabresi, Opinion, *Obama’s “Redistribution” Constitution*, WALL ST. J., Oct. 28, 2008, at A17; Hasnas, *supra* note 3.

17. Indeed, studies show that in comparison to other groups, the privileged and powerful are quite sparing with their empathy for those in less favored circumstances. See, e.g., Daniel Goleman, *Rich People Just Care Less*, N.Y. TIMES, Oct. 6, 2013, at 12.

18. See Nickerson et al., *supra* note 12, at 44–45.

19. Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L.J. 61, 69 (2011).

minds because that's not how we and our friends live."<sup>20</sup> The misconception that empathy flows only toward marginalized or powerless litigants masks and insulates from scrutiny the sort of selective empathy for powerful corporate or governmental litigants that is so deeply ingrained in the halls of power—including courts—that it is nearly invisible.<sup>21</sup>

In the recent empathy contretemps, this hardy misconception can be traced in part to a misinterpretation of then-Presidential candidate Barack Obama's comment during a speech at Planned Parenthood that he wanted to appoint judges with "the heart [and] . . . the empathy to recognize what it's like to be a young teenage mom[,] . . . to understand what it's like to be poor or African-American or gay or disabled or old."<sup>22</sup> Although President Obama later backed away from this comment, it is important to consider it more carefully.

The firestorm elicited by this comment was fueled by the perception that President Obama was calling for judges to precommit to favoring certain categories of litigants in the cases before them.<sup>23</sup> In fact, there is an important distinction between exercising bias toward particular litigants or types of litigants, which is of course improper, and articulating a philosophy about the proper role of the federal courts. Viewing the President's remark in the context of the speech to Planned Parenthood, its import was clear. It was not a call to insert empathy where none had existed before. It was a declaration that the current Supreme Court was too one-sided in its empathy. More than that, it was an expression of a vision of the role of the federal courts—a vision different from the one guiding the current Court, and one very similar to Judge Weinstein's:

Part of the role of the Court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout. . . . If we can find people who have life experience and they understand what it means to be on the outside . . . that's the kind of person I want on the Supreme Court.<sup>24</sup>

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20. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting).

21. See Bandes, *supra* note 14, at 141.

22. William Safire, *Zombie Banks*, N.Y. TIMES, May 17, 2009, at 26 (quoting Senator Barack Obama, Campaign Speech to Planned Parenthood (July 17, 2007)); see also Bandes, *supra* note 14, at 135 (quoting the same).

23. See, e.g., Calabresi, *supra* note 16, at A17; Bandes, *supra* note 14, at 146–48.

24. Senator Barack Obama, Democratic Presidential Debate in Las Vegas, Nev. (Nov. 15, 2007), available at <http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html>; see also Bandes, *supra* note 14, at 146–48 (discussing then-Senator Barack Obama's statement about his criteria for making judicial appointments).

There are those who regard the notion of a judicial philosophy as itself improper, but this stance is fueled by the misconception that jurists who do not articulate a philosophy are operating in a neutral, ideology-free zone. Thus, for example, Judge Shira Scheindlin's neutrality was questioned when she called attention to the pro-government bias of many judges and stated that she was unafraid to rule against the government, while those judges who rule consistently but quietly for governmental and corporate interests are assumed to be neutral and nonideological.<sup>25</sup> As I have argued elsewhere, judicial candidates and judges have little incentive to acknowledge that they have interpretive leeway, and that this leeway permits value judgments.<sup>26</sup> Those who do acknowledge this reality<sup>27</sup> are labeled activist, partisan, and political, while those who claim law is mechanical and inexorable are regarded as neutral and nonpartisan.<sup>28</sup> It is no mystery what camp Judge Weinstein belongs in. As Jeffrey Morris observed, "Much of what has made [Judge] Weinstein so controversial is his unabashed willingness to admit that judges do make law and the ways he finds to do so."<sup>29</sup>

This willingness to admit the possibility of choice and change is a precondition for the final attribute of empathy: moral imagination. Certainly, there is no agreed-upon definition for this term, but it captures a set of qualities that are essential to understanding Judge Weinstein's jurisprudence. It describes an ability to understand the range of values at stake and the possibilities for change inherent in the situation. Moral imagination permits one to see that things might be ordered differently.<sup>30</sup> Paul Lederach describes it as a quality that "breaks out of what appear to be narrow, shortsighted, or structurally determined dead ends."<sup>31</sup>

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25. Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), <http://www.newyorker.com/news/news-desk/the-preposterous-removal-of-judge-scheindlin>; see also Bandes, *supra* note 14, at 139–41 (discussing the consistently pro-corporate and pro-government voting record of Chief Justice John Roberts).

26. Susan A. Bandes, *We Lost It at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOYOLA L.A. L. REV. 621 (2007).

27. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295–308 (2005) (critiquing the common misconception that district court judges do not make law); see also Jeremy Waldron, *How Judges Should Judge*, N.Y. REV. BOOKS, Aug. 10, 2006, at 54 (reviewing RONALD DWORKIN, *JUSTICE IN ROBES* (2006), and noting that even when applying precedent, judges must make value judgments).

28. Bandes, *supra* note 26, at 637–38.

29. MORRIS, *supra* note 1, at 114.

30. Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 24 (2011).

31. JOHN PAUL LEDERACH, *THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE* 27 (2005).



The question, then, is to what extent these attributes, all so central to Judge Weinstein's jurisprudence, are in harmony with the goals and limits of Article III district court judging. A logical starting place for this inquiry is to consider this question: what tools and attributes do Article III judges need in order to adjudicate effectively and justly?

### III. CASES OF A "JUDICIARY NATURE"

Modern justiciability doctrine seeks to delineate the reach of the federal courts by demanding that cases possess certain requisites: a distinct and palpable injury that the court is able to remedy, concrete facts to inform the court of the real consequences of its decision, and adverse parties who will define the issues sharply and argue them zealously.<sup>32</sup> These purportedly neutral principles cannot be applied in an ideological vacuum. They are instrumental attributes, meant to ensure that the courts can perform their role—and thus, applying these criteria requires a vision of the role of the federal courts.<sup>33</sup> The core debate about the role of the federal courts is usually described as a tension between a "private rights" approach in which the court's role is simply to adjudicate the claims of the litigants who seek its jurisdiction, and a "public rights" approach in which the court plays a more active role in policing the political branches and creating norms that reach well beyond the litigants to affect absentees and communities.<sup>34</sup>

There is rich and voluminous scholarly literature on this general topic,<sup>35</sup> but it suffers from a serious though unsurprising omission. Justiciability doctrine purports to be about what judges need in order to decide cases, and thus it appears to be, in part, a claim about the requisites of good decision making. Yet the highly abstract discourse about justiciability never focuses on the actual dynamics of decision making. It says nothing about how actual judges discover what is at stake for actual litigants (or for others who stand to be affected by judicial action). For example, the black letter doctrine tells us that zealous, adverse litigants with a personal stake in the controversy are the best guarantee of a well-presented case.<sup>36</sup> That is, these are instrumental criteria, meant to ensure that judges are within their zone of competence and have the tools for good decision making.

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32. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992).

33. See Susan A. Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

34. See *infra* Part V (discussing the interests of absentees).

35. See, e.g., Bandes, *supra* note 33; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980).

36. *Allen v. Wright*, 468 U.S. 737, 770 (1984) (Brennan, J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

For a person unschooled in the arid formalism of federal courts doctrine, these criteria might appear to have an affective dimension. Why the requirement for zealous and adverse advocates? Is the assumption that the litigants' emotional investment in their claims will assist the judge's understanding? That it will lead to an enthusiasm that helps sharpen and clarify the issues? These criteria almost hint at a curiosity about the motivations and states of mind of litigants, and the cognitive and affective dynamics of judging. But in fact, Article III doctrine regards concreteness, adversity, zealousness, and personal stake as "bare bones" criteria that can be evaluated from the pleadings—a telling term for a set of disembodied characteristics. Article III scholarship proceeds largely along the same bloodless lines.

The lack of attention to the actual requisites of decision making to delineate the realm of competency of federal courts becomes even more problematic when one considers the special role of federal district courts. Federal district courts provide the primary, or perhaps the sole, opportunity for personal interaction between federal litigants and the judges who will decide their cases. Empathetic engagement in this context plays an essential role: it both informs the judge and reassures the litigant.

District courts (and juries) are uniquely charged with evaluating the actual litigants' demeanor and behavior, as well as the demeanor and behavior of witnesses.<sup>37</sup> They are uniquely positioned to distill facts from context. They are uniquely afforded the opportunity to observe and talk to the litigants themselves. They alone offer the curious judge an opportunity to "see and hear the real people concerned in their own setting[ ]"<sup>38</sup> via site visits or other fact-finding vehicles. In short, district courts offer unique opportunities for empathetic engagement by judges, imposing unique responsibilities on them. As Judge Weinstein observes: "The psychological and emotional distance between the judge and those who are in court must not be allowed to become too great."<sup>39</sup> This is, quite obviously, not a description of purely cognitive empathy. As is often true, one cannot improve on Judge Weinstein's own words. As he put it, this is the kind of empathy that helps to "open the gate between the head of the law and the hearts of those who seek justice from us."<sup>40</sup>

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37. Although it is beyond the scope of this Article, there is increasing evidence that eye contact and the ability to read facial expression aid in empathetic engagement. See, e.g., Jonathan Cole, *Empathy Needs a Face*, 8 J. CONSCIOUSNESS STUD., nos. 5–7, 2001, at 51.

38. WEINSTEIN, *supra* note 9, at 99.

39. 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, 226 (2008).

40. MORRIS, *supra* note 1, at 311 (quoting Weinstein, *supra* note 2, at 6).

Interestingly, the standard discourse on judicial empathy centers exclusively on whether empathy is a useful attribute for judges. It misses the other dimension of empathy: its effect on the person to whom it is directed. Empathy is not merely an exercise in understanding for the person who exercises it. It is a means of communicating interest and concern to the recipient. The district courts are, as Judge Weinstein has observed, the “human face”<sup>41</sup> of the law for the litigants. In Justice Breyer’s words: “A federal courtroom . . . is a public office in which a citizen meets face-to-face a high government official appointed by the President, ready to devote the time and effort needed to solve his or her particular legal problem.”<sup>42</sup> When Judge Weinstein says that “every person appearing before the judge is a human being and entitled to be treated with dignity, and that often requires that we speak face-to-face and try to . . . appreciate that we have a human being before us,”<sup>43</sup> he is emphasizing the importance of judicial empathy not just for the judge, but for the litigant as well.

Assuming that empathy consists of a concern for others and a desire to understand their perspectives, coupled with humility about one’s own limited perspective, judicial empathy toward litigants appears to fit squarely within even the narrowest conception of the role of Article III judges. Judge Weinstein’s legendary struggles with the federal sentencing guidelines<sup>44</sup> highlight the use of judicial empathy while raising some difficult questions about the limits of the judicial role. His sentencing hearings reflect a desire for concrete facts to aid his understanding of the range of consequences for the individual defendants who stand before him. The hearings reflect his awareness that it is in the district court that the defendant’s humanity is most salient. As he observed,

The defendant’s words, his facial expressions and body language, the severity of an infirmity, the depth of his family’s reliance, or the feebleness of his build cannot be accurately conveyed by a cold record. Many defendants are ill educated and inarticulate. They do not have the intellectual capacity to articulate, as might a great novelist, what is in their hearts. They are, after all, mere people.<sup>45</sup>

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41. *Id.* at 97.

42. Stephen Breyer, *Tribute to the Honorable Jack Weinstein*, 97 COLUM. L. REV. 1947, 1948 (1997).

43. Nolan, *supra* note 1, at 26.

44. *See, e.g.*, MORRIS, *supra* note 1, at 243–80.

45. *In re Sentencing*, 219 F.R.D. 262, 264 (E.D.N.Y. 2004).

The recent case of *United States v. Reingold*<sup>46</sup> offers an excellent example of the steps Judge Weinstein takes to grasp the concrete context and the possible consequences of his decisions. In that case, he authorized a downward departure from the federal sentencing guidelines for a defendant who pled guilty to distributing child pornography as an adolescent.<sup>47</sup> In determining the appropriate sentence, he heard from experts on the pathology at issue and the range and efficacy of available treatments.<sup>48</sup> He considered the defendant's actions while awaiting sentence, as well as expert testimony on his likelihood of recidivism.<sup>49</sup> Most notably, Judge Weinstein conducted a site visit to a facility for the treatment of individuals who had viewed child pornography in order to determine the optimal length of a stay.<sup>50</sup>

In one sense, the judge's obligation to sentence reflects the most traditional, core conception of the trial court's role. As Judge Weinstein observed, "An important duty of an Article III district judge is to prevent injustices by the government in individual cases."<sup>51</sup> Sentencing requires a narrow determination grounded in concrete facts, and an awareness of the consequences for both the defendant and the larger community in which his crime took place—and to which he will return. Yet each sentence unfolds in a broader administrative context, in which consistency, predictability, proportionality, and other values are at stake. The federal sentencing guidelines put these values front and center in a way that Judge Weinstein and many of his colleagues believe interferes with their core judicial duty to individual defendants.<sup>52</sup> Sometimes this conflict led the Judge to hand down sentences that violated the guidelines, accompanied by opinions articulately expressing his grounds for objection to the guidelines.<sup>53</sup> This strategy will be discussed below in the section on moral imagination.

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46. *United States v. C.R.*, 792 F. Supp. 2d 343 (E.D.N.Y. 2011), *vacated and remanded sub nom. United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013). In the case, Judge Weinstein refers to the defendant Reingold, who was a juvenile at the time of the offense, as "C.R." *C.R.*, 792 F. Supp. at 347.

47. *Id.* at 507.

48. *Id.* at 419.

49. *Id.* at 419–20.

50. *Id.* at 349.

51. *United States v. C.R.*, 972 F. Supp. 2d 457, 458 (E.D.N.Y. 2013) (memorandum and order in response to the Second Circuit's opinion reversing Judge Weinstein's imposed sentence and remanding for resentencing).

52. See Jack B. Weinstein, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV 251, at 255–56 (2015) (arguing that sentencing guidelines for judges to impose unfair rules, leading to judicial responsibility to expose injustice, and interpret law with humanity).

53. See, e.g., *C.R.*, 792 F. Supp. 2d 343.

## IV. EMPATHY FOR THE “UNSEEN”

If empathy for the litigants enables the court to understand and care about the stakes for those who seek its help, what is the objection to empathy? Let us return to the anti-empathy argument quoted above.<sup>54</sup> John Hasnas argues, “The purpose of the rules is to enable judges to resist the emotionally engaging temptation to relieve the plight of those they can see and empathize with, even when doing so would be unfair to those they cannot see.”<sup>55</sup> To use the shorthand employed by Hasnas, empathy for litigants is problematic because it may preclude or disfavor “empathy for the unseen.”<sup>56</sup> Hasnas says,

One can feel for unfortunate homeowners about to lose their homes through foreclosure. One cannot feel for unknown individuals who may not be able to afford a home in the future if the compassionate and empathetic protection of current homeowners increases the cost of a mortgage.

In general, one can feel compassion for or empathize with individual plaintiffs in a lawsuit who are facing hardship. They are visible. One cannot feel compassion for or empathize with impersonal corporate defendants who . . . will pass the costs on to consumers . . . .<sup>57</sup>

In light of the observations above about the importance of face-to-face interactions and of psychological and emotional engagement between the judge and the litigants in the courtroom, this concern deserves serious consideration. Is the downside of judicial empathy the fact that it disadvantages absentees?

Before reaching this question, two problems with Hasnas’ formulation of the question must be addressed. First, as discussed, it conflates compassion (which is likely to flow toward the displaced homeowner rather than the bank) with empathy. Second, and partly as a result of the conflation of empathy and compassion, Hasnas also blurs another distinction important to the discussion of Judge Weinstein’s jurisprudence—the distinction between corporate litigants and absentees. Corporate or governmental defendants may elicit less compassion than individuals, but corporate or governmental litigants are not “unseen.” They are not invisible or unknown. The question of how courts come to understand the concerns of a corporate or governmental defendant is separate from the question of how judicial empathy squares with the court’s duty to nonlitigants or the public at large. So

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54. See *supra* note 3 and accompanying text.

55. Hasnas, *supra* note 3, at A15.

56. *Id.*

57. *Id.*

before turning to the question of absentees, let us consider the connection between empathy and corporate defendants.

In his invaluable book about Judge Weinstein, Jeffrey Morris describes Judge Weinstein's approach in a number of cases involving corporate defendants, including situations involving multiple stakeholders.<sup>58</sup> For example, he describes the litigation over the Shoreham Nuclear Reactor.<sup>59</sup> He draws from Judge Weinstein's oral history a vivid account of his site visit to the plant in order to determine its safety. During this visit, Judge Weinstein, several jurors, and a court reporter—all wearing hard hats—crawled through numerous cramped spaces including boilers, diesel rooms, and safety hatches.<sup>60</sup> Weinstein also took his usual steps to make the harms to the other stakeholders concrete, including ordering reports on the amount the defendant could afford to pay to settle, certifying a class of ratepayers, and keeping the political context of the entire dispute well in mind.<sup>61</sup> Another example can be found in an unfair competition suit between Bulova Watch Co. and K. Hattori & Co.,<sup>62</sup> also described by Morris,<sup>63</sup> one of Judge Weinstein's central tasks was to translate the abstract multinational corporation Hattori into concrete terms by inquiring deeply into its operations and organizational structure.<sup>64</sup> Thus, the abstract defendant can be made concrete. Its concerns and priorities can be understood.

If the lack of compassion corporate defendants garner is sometimes a disadvantage, there is a flip side to this concern. The complex, disembodied, and “impersonal” nature of the corporate or governmental defendant may also have the opposite effect—it may help insulate the defendant from liability for wrongful acts.<sup>65</sup> As I have argued elsewhere,<sup>66</sup> complex organizational defendants are often protected by their very complexity and their abstract nature. Just as identifiable people are more likely to elicit sympathy and compassion than are abstract entities, abstract entities are less likely to elicit blame. This is

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58. MORRIS, *supra* note 1, at 341–69.

59. *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1487 (E.D.N.Y. 1989), *aff'd in part, rev'd in part*, 907 F.2d 1295 (2d Cir. 1990).

60. MORRIS, *supra* note 1, at 234–35.

61. *Id.* at 230–39.

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

63. MORRIS, *supra* note 1, at 185.

64. *Id.* at 185–86.

65. See Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275 (1999) [hereinafter Bandes, *Police Brutality*]; see also Susan A. Bandes, *Not Enough Blame To Go Around: Reflections on Requiring Purposeful Government Misconduct*, 68 *BROOK. L. REV.* 1195 (2003) [hereinafter Bandes, *Not Enough Blame*].

66. Bandes, *Not Enough Blame*, *supra* note 65, at 1197–99.

a function of our proclivity for tying the concept of blame to humans with a “soul to damn and a body to kick.”<sup>67</sup> We tend to feel more comfortable casting blame on people with ascertainable bad motives, rather than locating the responsibility for organizational wrongdoing that arises from the complex web of actions and inactions of a number of people. We prefer to affix blame in situations involving clear links between wrongdoing and individual, intentional behavior and are uncomfortable with identifying wrongdoing in situations where responsibility is distributed and diffused.<sup>68</sup>

The *Agent Orange* litigation<sup>69</sup> was a perfect candidate for this sort of diffusion of defendant responsibility. The defendants were indeterminate.<sup>70</sup> “Because the armed forces mixed defoliants produced by different companies together before they used them, it was impossible to attribute a particular injury to a specific company’s product.”<sup>71</sup> Moreover, the case involved multiple occurrences of related harm separated by both time and space.<sup>72</sup> The key here is the term *related*. The incentive to disaggregate defendant harms and overlook complex causal connections is strong. It is the kind of impulse that can lead to treating an issue like the harm from Agent Orange as just “a product liability case multiplied many times over.”<sup>73</sup> Judge Weinstein’s insistence on viewing the defendants’ actions holistically, rather than as a series of separate acts by individual actors, permitted the harm to be addressed.<sup>74</sup> He viewed the case through a “wide lens” that enabled him to address a major social problem afflicting a broad community. But here is the point that should not be overlooked: the more common “narrow lens”—the impulse to disaggregate both victims and wrongdoers and thus obscure and insulate broad social ills—is also grounded in ideological assumptions about the role of the courts in society, and about the natural order of things more generally.

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67. Edward, First Baron Thurlow, 1731–1806, *quoted in* John C. Coffee Jr., “*No Soul To Damn: No Body To Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

68. See Bandes, *Not Enough Blame*, *supra* note 65; see also RICHARD A. POSNER, REFLECTIONS ON JUDGING 92–93 (2013) (discussing the challenges for judges of apprehending complexity, including interlocking systems and modern technology).

69. *In re* “Agent Orange” Prod. Liab. Litig., 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

70. MORRIS, *supra* note 1, at 324.

71. *Id.*

72. *Id.*

73. *Id.* at 326.

74. Judge Weinstein’s hard-fought preference would have been to view the harm as caused by the government’s passivity as well as the private actors’ wrongdoing. *Id.*

## V. EMPATHY AND ABSENTEES

I now turn to the critique of judicial empathy based on its disadvantage to the interests of nonlitigants—both absentees and those affected more broadly. One immediate observation about this critique is that the question of who counts as an absentee and who comes within the court’s official ambit is, in many respects, within the court’s own discretion. A related observation is that the question of who should be a party to a federal case very much depends on one’s vision of the role of the federal courts. I made this point earlier in regard to justiciability doctrine.<sup>75</sup> It is equally applicable in regard to the many means judges have at their disposal for widening or narrowing the scope of a case, including class certification, intervention, joinder, case consolidation, and others. The interpretation of these doctrines is affected by whether one regards a case as a vehicle solely for resolving binary disputes or a vehicle for articulating norms and resolving important issues presented by the litigation.<sup>76</sup>

In addition, Judge Weinstein’s approach is a vivid lesson in the court’s ability to widen the circle of those who have a say about the consequences of a ruling. The hallmark of Judge Weinstein’s jurisprudence is his insistence on empathizing with the litigants he can “see,” as well as those beyond the narrow ambit of the courtroom. Indeed, one might say he ensures he can see—and thus empathize—far more widely than the usual district court judge. He takes extraordinary steps to understand the consequences of his rulings for non litigants and absentees through extensive use of experts, questionnaires, community-wide hearings, and other “technologies and techniques”<sup>77</sup> that promote extensive participation and debate. As Martha Minow observed, his complex cases sometimes take the shape of administrative agencies with a temporary, collapsible structure.<sup>78</sup> These efforts are animated by Judge Weinstein’s underlying philosophy, which includes a commitment to broad access to the courts and an insistence on considering legal problems in their broader social context. This sort of judicial empathy toward nonlitigants and the public at large leads us directly to the question of what federal judges are meant to accomplish when they decide a case.

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75. See *supra* Part III.

76. See Bades, *supra* note 33.

77. Weinstein, *supra* note 52, at 29.

78. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2015 (1997).



The question Justice Marshall so adroitly finessed in *Marbury v. Madison*<sup>79</sup> is why the unelected, countermajoritarian federal courts should have the power to exercise judicial review over the actions of the democratically elected political branches. His response was that this broader power was simply a necessary byproduct of the narrow and uncontroversial power to adjudicate claims of legal rights between litigants in the court's jurisdiction.<sup>80</sup> This narrow conception of federal adjudication is premised on the centrality of the claims of the parties before the court. As Martin Redish nicely put it, the private rights model treats the adjudication of delicate and important questions of constitutional law as if it were no different from the adjudication of garden-variety contract claims. The private rights framework "allows the judiciary to maintain the appearance of non-politicization" by casting judicial review as a byproduct of the courts' traditional function as "resolvers of disputes among individuals."<sup>81</sup> In this conception, the judge is charged with understanding the stakes for the parties. Of course, the notion of empathy never crops up in descriptions of the private law model, because garden-variety contract and property claims for material stakes seem to require no inquiry into individual motivations or desires.

This conception has long existed in tension with a competing public rights model premised on the federal courts' "distinct capacity to explicate and declare public values—norms that transcend individual controversies."<sup>82</sup> But that broader conception does not erase the court's obligation to the individual litigants; it simply views the litigants as the appropriate vehicle for presenting claims whose significance often transcend the individual dispute.<sup>83</sup>

Twentieth-century developments—such as the broad expansion of constitutional protections and the rise of a complex bureaucratic state—made it increasingly difficult to separate the federal courts' narrow case-deciding function from their broader norm-creating function.<sup>84</sup> The increasing anxiety that unelected judges would use the courts as a forum for imposing their own policy preferences was influ-

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79. 5 U.S. (1 Cranch) 137 (1803).

80. *Id.* at 146–47.

81. MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 92–93 (1991).

82. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 68 (5th ed. 2003).

83. *Id.* at 70–71.

84. As Judge Weinstein discusses in his remarks, these challenges to the narrow case-deciding function have become increasingly complex in current times in the face of national and global economies, mass disasters, and other developments that require court intervention yet defy traditional jurisdictional boundaries. Weinstein, *supra* note 52, at xxx-xx.

entially addressed by Lea Brilmayer.<sup>85</sup> Brilmayer expressed concern about “ideological plaintiffs” who would push the courts toward “recognizing community interests apart from the needs of particular people” and “exert pressure to participate for the sake of ‘some undefinable, elusive common good.’”<sup>86</sup> She also expressed concern that absentees and the public would be bound by broad ideological rulings generated by cases in which they had no chance to participate.<sup>87</sup> For Brilmayer, the way to avoid these outcomes is to interpret standing to require a material rather than an ideological interest.<sup>88</sup> This approach assumes that as long as each individual is permitted to pursue her own material ends—that is, no general agreement on personal preferences or values—no “enforced orthodoxy” is required.<sup>89</sup> Material interests are assumed to be the best means of motivating litigants to advocate strenuously and present sharply defined issues capable of judicial resolution. Moreover, the emphasis on material interests is assumed to be the best means of keeping judges focused on the litigants in the dispute before them, rather than wandering into the thicket of policy making, which will affect absentees and the general populace.

In short, the private rights framework regards concern for the interests of absentees as outside the boundaries of Article III decision making. It also regards broad ideological rulings as an incursion on the future rights of absentees to litigate their own cases. In this account, absentee interests are safeguarded by keeping cases narrowly focused on the litigants at bar. The private rights model is therefore a strange bedfellow to the ascendant model of—as Robin West recently called it—“scientific judging.” As West describes,

There has been a transformation of that on which judges should rely in reaching their decisions, from rules laid down in the past to present understandings of future well-being, from precedent to social policy, from reliance on analogical reasoning based on past cases to economic or sociological reasoning based on welfare baselines.<sup>90</sup>

The irony is that the private rights approach described by Brilmayer is premised on the primacy of the litigant, while the scientific judging

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85. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979).

86. Bandes, *supra* note 33, at 286 (quoting Brilmayer, *supra* note 85, at 313).

87. R. L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807, 823–24 (1977).

88. *Id.* at 824; see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1739 (1975), discussed in Bandes, *supra* note 33, at 286 n.404.

89. Stewart, *supra* note 88, at 1739, discussed in Bandes, *supra* note 33, at 286 n.404.

90. Robin West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS* 243, 250 (James E. Fleming ed., 2013).

approach is premised on the importance of promoting the general welfare. But both models share the conviction that a focus on tangible, material stakes safeguards against the dangers of permitting unelected judges to impose their own ideologies. As West explains,

If we take seriously the inability to intersubjectively compare utilities, then it directly follows that *empathy* is both *inadequate* to the task of learning enough of the subjective well-being of another so as to increase social welfare . . . and *unnecessary*. Revealed preferences are what we need to know . . . .<sup>91</sup>

This is because “[t]he individual’s preferences are best revealed through his choices, and his choices are fully discoverable through the empirical methods of the social sciences.”<sup>92</sup>

The anti-empathic turn that West describes is a turn toward a court that takes absentees and the public at large into account, but it does so using revealed preferences as a substitute for inquiry into actual stakes and goals. The private rights model also rejects inquiry into individual hopes and aspirations. It assumes that limiting jurisdiction to those seeking to protect tangible assets is a way out of evaluating subjective goals and values. Both approaches assume, ultimately, that the goals of individuals are unknowable, and they therefore assume away a whole range of individual hopes and aspirations. Both approaches are premised on an unsupported assumption that empathic understanding is too subjective and unruly to be attempted, and that revealed preferences are objectively ascertainable. These are, of course, value choices about the role of the federal courts and about the goals of the general welfare, masquerading as neutral jurisdictional principles.

The assumption that litigants in federal court are uniformly motivated by the pursuit of material gain has led to all sorts of unfortunate contortions and wrong turns in federal courts doctrine, and it has been extensively and appropriately debunked.<sup>93</sup> Judge Weinstein demonstrates that a judge armed with empathy, concern, and curiosity can learn quite a bit about litigants’ actual motivations—and that these are often complicated and nuanced. In the Franklin Lane High School class action suit against the Board of Education on behalf of students dismissed for disciplinary infractions,<sup>94</sup> Judge Weinstein arranged for a questionnaire to be mailed to class members so he could

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91. *Id.* at 277.

92. *Id.*

93. There is voluminous literature on this point. See, e.g., Sunstein, *supra* note 35; Tushnet, *supra* note 35.

94. *Knight v. Bd. of Ed.*, 48 F.R.D. 108 (E.D.N.Y. 1969), discussed in MORRIS, *supra* note 1, at 144–45.

learn their concerns.<sup>95</sup> He wanted to know how many class members genuinely wanted to continue their educations.<sup>96</sup> He also listened carefully to the concerns of parents, teachers, and the principal, and to the findings of a panel of educational experts.<sup>97</sup> He learned that the problem was complicated, and issued a remedy that reflected this complexity.<sup>98</sup>

One of the best-known examples of Judge Weinstein's empathy is his understanding of the stakes for the *Agent Orange* plaintiffs. He talked of his meetings with the members of the class and the "concerns that had repeatedly been voiced . . . including the need for information on possible genetic damage to veterans and their children, and the need for improvement of the Veteran's Administration and its hospitals."<sup>99</sup> He wrote,

Vietnam veterans and their families desperately want this suit to demonstrate how they have been mistreated by the country they love. They want it to give them the respect they have earned. They want it to protect the public against future harm . . . . They want a jury "once-and-for all" to demonstrate the connection between Agent Orange and the physical, mental and emotional problems from which many of them clearly do suffer.<sup>100</sup>

In short, he apprehended a complex blend of motives and goals, most of them not reducible to material gain.

## VI. MORAL IMAGINATION AND THE SCOPE OF THE ARTICLE III CASE

Moral imagination is a term that does not lend itself to easy definition. As used here, it shares some qualities with empathy. The philosopher Mark Johnson describes moral imagination as involving self-knowledge, including knowledge of our own limitations and blind spots; knowledge of others, including others who do not share one's traditions; and the "ability to imagine and enact transformations in our moral understanding."<sup>101</sup> The understanding of one's own limited perspective and the openness to other perspectives are qualities I have discussed above.<sup>102</sup> It is the last attribute—the ability to imagine and enact transformation—that points toward moral imagination as it ap-

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95. MORRIS, *supra* note 1, at 144.

96. *Id.*

97. *Id.* at 145.

98. *See id.* at 144–45.

99. *Id.* at 332.

100. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

101. MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS 187 (1993).

102. *See supra* Part II.

plies here. I earlier quoted Lederach's view that moral imagination is a quality that "breaks out of what appear to be narrow, shortsighted, or structurally determined dead ends."<sup>103</sup> In a lovely essay on moral imagination in judging, Judge Leland Anderson describes a "different sphere of understanding . . . where solutions other than the most apparent emerge. This sphere invites acts of imagination, creativity, and risk."<sup>104</sup>

The use of creativity and imagination to "break out of structurally determined dead ends" and the willingness to take risks to ensure that justice is done are at the core of Judge Weinstein's jurisprudence and his legacy. Risk-taking and creativity are never free of controversy, and particularly not for a district court judge working in a profession that views change with suspicion and in a role that is circumscribed by reviewing courts, the political branches, and other constraints too numerous to mention.

To conclude, I want to make two points about judging with moral imagination. The first is that although such an approach to Article III judging is highly visible and controversial, playing it safe and flying below the radar is also an interpretive and ideological choice. The second is that moral imagination is not an inherently desirable attribute. That is, whether pushing or sometimes crossing boundaries is a moral good depends on the moral vision underlying the acts—and in the judicial context, on the moral qualities one brings to the bench.

As to the first point, it is a commonplace that Judge Weinstein tends to test boundaries. Justice, for him, is an affirmative moral command. Thus he has little patience for gatekeeping doctrines,<sup>105</sup> or for many of the other time-honored means of shifting, delaying, or disclaiming responsibility. As I mentioned above, the acknowledgement of choice is a precondition for moral imagination.<sup>106</sup> Judges—particularly district court judges—can reassure themselves that they do not have the power to "make law." As Morris observes, Judge Weinstein finds more gaps and ambiguities in law than other judges.<sup>107</sup> As Alexander Bickel observed long ago, there is quite a bit of play in the gatekeeping doctrines for those who wish to take advantage of it.<sup>108</sup> Whatever one thinks of Bickel's praise of judicial passivity, his practical message

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103. See *supra* note 31 and accompanying text.

104. Leland P. Anderson, Essay, *A "More Excellent Way": Moral Imagination & the Art of Judging*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 416–17 (2008).

105. MORRIS, *supra* note 1, at 112.

106. See *supra* notes 30–31 and accompanying text.

107. *Id.* at 96.

108. See, e.g., Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

is important: using gatekeeping doctrines to duck the issues is generally a choice, rather than a duty.<sup>109</sup> Judge Weinstein's commitment to seeking out injustice in order to fix it is a different kind of choice.

The doctrine of separation of powers can be viewed as imposing a duty not to act when the role is relegated to the political branches, or as imposing the converse duty to ensure that the Constitution and federal law are obeyed when the political branches abdicate this task. One influential theory about the scope of Article III power assumes that the political branches are best positioned to address widely shared injuries.<sup>110</sup> In situations where this turns out not to be the case, reliance on formalist notions of the relative competence of the branches can leave serious injustices unaddressed—issues that lifetime judges may be in the best position to tackle. One ideological tack is to declare and adhere to the formal boundaries of the tripartite system, irrespective of the actual workings of the political branches. If injustice falls through the cracks, it is purely a function of adherence to the separation of powers.<sup>111</sup> Cases such as the Mark Twain school desegregation case,<sup>112</sup> the Accu-Tek case on gun manufacturer liability,<sup>113</sup> and, of course, the *Agent Orange* litigation<sup>114</sup> all concern politically delicate and potentially explosive situations in which the political branches failed to step up. Judge Weinstein adopts a more flexible approach that takes into account whether the harms are in fact being addressed. He views “the judge’s role [as] a stopgap in the absence of legislative action.”<sup>115</sup> From his perspective, “it’s been an abdication of legislative responsibility that has forced judges to take an active substantive and procedural role in these matters.”<sup>116</sup>

In short, Judge Weinstein’s approach is to acknowledge the possibility of choice and to choose to act affirmatively. As he points out, “[B]enign neglect is as illegal as malign intent. Both are unconstitutional.”<sup>117</sup> The mistake that is often made is to confuse inaction with

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109. *Id.* at 79.

110. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

111. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

112. *Hart v. Cmty. School Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974).

113. *Hamilton v. Accu-Tek*, 47 F. Supp. 2d 330 (E.D.N.Y. 1999).

114. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

115. WEINSTEIN, *supra* note 9, at 104.

116. David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2089 (1997) (quoting WEINSTEIN, *supra* note 9, at 104).

117. *Hart v. Cmty. School Bd.*, 383 F. Supp. 699, 755 (E.D.N.Y. 1974) (The Mark Twain Junior High School case).

ideological neutrality or with lack of interpretive choice. But as Martha Minow observed,

[L]aw, and judging, inevitably reveal and express the views of specific, real persons. . . . [C]onfining [judges] to established practices and routines[] may offer some reassurance that the imposition of force does not stem from only one person's views. Yet, practices and routines can work their own injustices, while still embodying the views of some people.<sup>118</sup>

As several commentators have observed, the willingness to push or transgress boundaries in service of a vision of justice are admirable qualities in Judge Weinstein, but may not translate so well to other jurists.<sup>119</sup> Other aspects of moral imagination mitigate the danger in cases like this—including respect for the dignity of others, the desire to understand the perspectives of others, and the humility to recognize one's own limitations. Even so, some of Judge Weinstein's more controversial actions have pushed the concept of interpretive leeway and the boundaries of the separation of powers, at least to their outward limit. To choose one small but clear example, in the child pornography case discussed earlier, the sentence Judge Weinstein imposed was below the mandatory minimum required by the federal sentencing guidelines.<sup>120</sup> In his response to the Second Circuit's reversal, he said that even if he had exceeded his power, "at least the matter has been brought to the government's and public's attention, so that in due course, in our caring democracy, future injustices of this kind will be avoided."<sup>121</sup> In the *Agent Orange* litigation, although Judge Weinstein determined that the science didn't support a viable cause of action, he said he could not for that reason ignore "those cries from the heart for justice."<sup>122</sup> Minow noted that what he accomplished via the settlement was to spread the cost through the community, and she queried whether this sort of use of the courts should be open to legislative debate.<sup>123</sup> As Stephen Burbank argued, these choices are least problematic when they are transparent and accompanied by reasons.<sup>124</sup> They are also least problematic when they are reviewable.

By testing the boundaries in such circumstances, federal district courts can incite and contribute to a reasoned debate about the rela-

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118. Minow, *supra* note 78, at 2029 (footnotes omitted).

119. See, e.g., Burbank, *supra* note 7, at 2007–09; Minow, *supra* note 78, at 2028.

120. *United States v. C.R.*, 972 F. Supp. 2d 457 (E.D.N.Y. 2013).

121. *Id.* at 458.

122. WEINSTEIN, *supra* note 9, at 11.

123. Minow, *supra* note 78, at 2022–23.

124. Burbank, *supra* note 7, at 1999.

tionship between the courts and justice.<sup>125</sup> District courts have a unique contribution to make to such debates. The district courts are often viewed as severely constrained in their ability to move the law forward. Yet this portrayal underplays the unique role of district courts. To say that district courts “find facts” and have the best opportunity to observe demeanor is to fail to fully capture the affective dimension of the proceeding. In district courts, the “emotional and psychological distance” between judge and litigants is at its minimum. Abstract notions about litigants’ goals and motivations, about the consequences of decision making, and about the role of the federal courts in a democratic system, can be tested against concrete observation. Empathy is essential to this endeavor, no matter how narrowly one conceives the role of the judge. Moral imagination is also necessary—it is an acknowledgment that judges make choices, and that these choices are rarely ideologically neutral. Whether moral imagination is desirable depends on whether one shares Judge Weinstein’s underlying vision of the role of the federal courts in a democratic society.

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125. *See id.* at 1982–84.



