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Judge Jack Weinstein and the Construction of Tort Law in America: An Intellectual History

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JUDGE JACK WEINSTEIN AND THE CONSTRUCTION OF TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY

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Traditionally, the tort law and lawyers have been devoted to dealing with individuals and their problems on a retail basis. Modern disasters affecting large numbers of people make that approach impossible except at unacceptable transactional costs and inefficiencies that would prevent vindication of most people's rights. Yet, we want to retain the sense of individual justice . . . . In the field of mass torts, the courts have made pragmatic choices in devising procedures and remedies in an attempt to preserve the essence of our prior conceptual approach to the law while devising effective remedies for the injured.[1]

INTRODUCTION

This Article explores the intersection between the judicial and scholarly work of Judge Jack Weinstein, particularly as related to mass tort litigation and the development of legal theory and tort law in America. The primary focus will be on Judge Weinstein's handling of the *Agent Orange* litigation.[2] Judge Weinstein's tenure on the federal bench began in 1967. Some seven years earlier, Ronald Coase published his *The Problem of Social Costs*, a monumental moment in American legal theory and tort law policy.[3] Three years later, Guido Calabresi published his path-breaking text, *The Costs of Accidents*.[4] These two texts are representative of the law and neoclassical economics movement, which would indelibly shape tort law theory in America during Judge Weinstein's years as a judge.[5]

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

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

3. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

4. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

5. I refer to contemporary law and economics as law and neoclassical economics to make clear its methodological commitments to neoclassical economics as opposed to other schools of eco-

Law and neoclassical economics is most often discussed as a methodology for analyzing tort law on the basis of efficiency. However, it also exemplifies a broader approach to law that goes beyond efficiency analysis and can be found in much of contemporary legal theory. This broader approach focuses its analysis on the social good as opposed to prioritizing individual rights. It is through the lens of these two features of twentieth-century legal theory (efficiency and the social good), particularly as they apply to tort law, that this Article will examine the *Agent Orange* litigation.

The *Agent Orange* litigation is a landmark in American history. It involved hundreds of lawsuits, thousands of claimants (15,000 by one estimate), and seven corporate defendants.[6] Aside from its scope, the issues surrounding *Agent Orange* are particularly worthy of attention because they exemplify the problems associated with resolving mass tort cases. An intriguing aspect of Judge Weinstein's worldview, which is reflected in the disposition of the *Agent Orange* litigation, is that he champions efficiency and the social good while placing a premium on recognizing individual suffering as an existential reality.[7]

Of course, the *Agent Orange* litigation is also circumscribed by the specter of the Vietnam War, which makes it an even more compelling site of inquiry.[8] The *Agent Orange* litigation and Judge Weinstein's legendary handling of it provides us with a unique opportunity to consider tort law in the context of not only legal theory, but one of America's most searing historical moments, the Vietnam War.

II. American Legal Theory and Tort Law

A very useful lens through which to consider the evolution of tort law theory in relationship to issues at the heart of the *Agent Orange* litigation is Robert Rabin's thoughtful essay on the history of enterprise liability, *Some Thoughts on the Ideology of Enterprise Liability*.[9] Rabin argues that the history of tort law in America is marked by the movement away from a corrective justice view of torts to an enterprise

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nomic thought. *See generally* James R. Hackney, Jr., Under Cover of Science: American Legal-Economic Theory and the Quest for Objectivity (2006).

6. Jeffrey B. Morris, Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein 324 (2011).

7. *See In re Agent Orange*, 597 F. Supp. 740.

8. *See generally* Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986).

9. Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 Md. L. Rev. 1190 (1996).

liability view.[10] Corrective justice is concerned with individual rights and how the law either defends rights or mediates conflicting rights. Enterprise liability is based on a concern for the social consequences of wrongs. According to Rabin, in tort law, enterprise liability places an emphasis on the twin policy concerns of risk spreading and deterrence.[11] The relationship between enterprise liability and law and neoclassical economics is readily apparent.

Law and neoclassical economics came of age in the 1980s. This Article discusses Ronald Coase's *The Problem of Social Costs* and Guido Calabresi's *The Costs of Accidents* as early exemplars of law and neoclassical economics, highlighting the contrast with the corrective justice view of the world. The beginning of the law and neoclassical economics movement can be traced to *The Problem of Social Costs*.[12] In *The Problem of Social Costs*, Coase took the famous, if very simple, example of a farmer and rancher with conflicting land rights and articulated the essential premises of law and neoclassical economics.[13] This is not the place for a detailed study of *The Problem of Social Costs*.[14] Instead, this Article focuses on its salient features as related to its thesis.

The title *The Problem of Social Costs* (as opposed to "The Problem of Rights," perhaps) reflects the transformation from a concern with individual rights to an emphasis on the social good. Coase structures the problem as minimizing social costs as opposed to defending individual rights.[15] At issue is the proper liability rule for settling a dispute involving a rancher's cattle encroaching on a farmer's property and destroying corn crops.[16] A rights perspective on this issue would call for there to be some form of remedy for the farmer—after all, his right to use the property has been infringed—or a determination that the right of the rancher to raise cattle trumps that of the farmer. However, Coase argues that the real issue is maximizing social gain or, the corollary, minimizing social loss.[17]

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10. *Id.* at 1194–99. In discussing the *Agent Orange* litigation, Schuck constrasts the taxonomy of the traditional tort approach (individualistic in nature), SCHUCK, *supra* note 8, at 262–68, with the public law tort approach (collective purpose—including economic efficiency), *id.* at 268–69. According to Schuck, Judge Weinstein cited to David Rosenberg, an advocate for the "public law vision of the tort system," in the *Agent Orange* litigation. *Id.* at 268, 270.

11. Rabin, *supra* note 9, at 1192–93.

12. Coase, *supra* note 3.

13. *Id.* at 2–8.

14. For a detailed discussion of *The Problem of Social Costs*, see HACKNEY, *supra* note 5.

15. Coase, *supra* note 3, at 43–44.

16. *See id.* at 2.

17. *Id.* at 43–44.

Our intuition might lead us to say that "of course" the farmer deserves compensation. We have a commonsense understanding that the cattle "caused" damage to the farmer's corn and thus the farmer deserves to be compensated. Coase, by eliding the individual rights perspective and framing this as a problem of "social costs," calls into question our intuitive understanding of causation. If we look at this problem from a social perspective, it is a problem of "reciprocal causation." That is to say, if the rancher is prevented from raising an additional cow due to the property rights of the farmer, the farmer will have effectively "caused" harm to the rancher. This harm (cost) to the rancher is just as real as the harm to the farmer. Framed along these lines, taking a social perspective, the problem becomes one of minimizing the harm (in the form of damaged corn or decreased cattle production).

While Coase crystallized the problem of social costs in its analytic form, the idea of foregoing a rights perspective for a social one had currency in American law even in the nineteenth century when the corrective justice view was clearly dominant. In *Losee v. Buchanan*,[18] a famous torts case decided in 1873, the court refused to apply strict liability in the case of an unintentional explosion at a paper factory that damaged adjacent property.[19] The court stated that in "civilized society," we are compelled to give up our "natural rights" in exchange for the good of the "exigencies of the social state."[20] *Losee* is noteworthy because, as Rabin points out, even the pockets of strict liability pre-twentieth century, which were principally found in ultra-hazardous activity cases such as demolition with blasting caps, were predominantly based on the notion that the wrongdoer had violated the individual rights of the plaintiff.[21] In *Losee*, we have a case arguing for the negligence doctrine on the basis of the "social state."[22] Historically, pre-twentieth century, the negligence doctrine was supported on individualistic grounds.[23]

We see the negligence doctrine famously being defined on social grounds in the twentieth century by Judge Learned Hand in *United States v. Caroll Towing*.[24] Judge Hand articulated the formula for determining negligence in *Caroll Towing* as B<PL, meaning that a defendant's conduct would be deemed negligent if the burden of

18. 51 N.Y. 476 (1873).
19. *Id.* at 479.
20. *Id.* at 484.
21. Rabin, *supra* note 9, at 1195 & n.30.
22. *Losee*, 51 N.Y. at 484.
23. *See, e.g.*, Sullivan v. Dunham, 55 N.E. 923 (N.Y. 1900).
24. 159 F.2d 169 (2d Cir. 1947).

prevention (B) was less than the expected loss (probability of loss, P, multiplied by the size of the loss, L) of an accident.[25] Judge Hand thus formulated negligence as a cost–benefit analysis based on minimizing the cost of accidents to society. Conceptually, the "Hand formula" bases negligence not on a moral assessment of the plaintiff's individual behavior nor on the misfortune to the defendant. Negligence is determined by the social good—weighing the risk, harm, and cost of prevention.

In his 1972 essay *A Theory of Negligence*,[26] Judge Richard Posner interpreted American law as being about efficiency. He positioned the Hand formula as embodying the common law definition of negligence.[27] This, in effect, undercut the notion of individual rights as the basis for law. It marked the end of the individualistic conception that epitomized the origins of common law—torts in particular.[28] Tort law became firmly ensconced as a social problem, even though neoclassical economics theory was built on the assumption that satisfying individual preferences constituted the foundation for social theory.[29] Judge Posner's focus on individual preferences led to decidedly conservative implications for law. A more progressive conception, yet still based on individual preferences, would later be articulated by Guido Calabresi. It is Calabresi's appropriation of law and neoclassical economics that is most consonant with the way Judge Weinstein views the economic dimensions of tort law.

In 1970, Guido Calabresi synthesized tort law in economic terms, articulating his famous formulation that tort law should be structured so as to minimize the costs of accidents and accident prevention.[30] Calabresi put forth a three-part taxonomy of accident costs. The primary cost of accidents refers to the actual costs of accidents and preventing accidents.[31] This would be represented by B (prevention costs) and PL (expected loss) in the Learned Hand formula. A concern with primary cost avoidance thus mirrors, in large part, the cost–benefit approach that Richard Posner advocated. Secondary cost

25. *Id.* at 173.

26. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

27. *Id.* at 32–33.

28. This undercutting of rights as the basis of law sparked a heated critique by leading rights theorist Ronald Dworkin. *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

29. *See* James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 288–307 (1997) (discussing the individualistic conceptual foundation of neoclassical economics and how it was transformed into an analysis of social cost in tort law).

30. CALABRESI, *supra* note 4.

31. *Id.* at 26–27.

of accidents includes the economic consequences of concentrated losses on individuals impacted by accidents—that is, social dislocation costs.[32] In order to avoid these costs, Calabresi argued that loss spreading should be included as a policy objective in tort.[33] The third category, tertiary costs of accidents, takes into account administrative costs associated with the tort law system.[34] Calabresi noted that "once we have decided on a system of accident law, the administrative costs of that system cannot be ignored, as they must be borne by someone."[35] These administrative costs include legal fees and the cost of administering the judicial system. Some economists might refer to them as transaction costs.

Calabresi advocated for an economic approach to torts.[36] However, he recognized that in the end, justice is the principal function of law.[37] Justice trumps any efficiency goals that undercut our notion of justice, and justice guides our consideration of economic goals. However, Calabresi concedes that justice is difficult to define.[38] Indeed, we are often in a better position to identify injustice than we are to articulate what qualifies as justice. For Calabresi, justice in the end serves as a veto constraint on our striving to achieve the economic goals of primary, secondary, and tertiary cost minimization.[39] In *The Costs of Accidents*, Calabresi argues that we may delay our discussion of justice until we have fully considered economic consequences, and then determine whether the system we choose based on economic analysis strikes us as just.[40] In subsequent writings, Calabresi would have a lot more to say about justice, the substance of which will be taken up later in this Article. For the moment, as we transition to Judge Weinstein's handling of the *Agent Orange* litigation and broader views on mass torts, it is enough to say that as a judge, he had to squarely face the issues of justice. A discussion of how Judge Weinstein strove to promote justice while also, it will be argued, being fixated on the costs of accidents is where we turn next.

32. *Id.* at 27–28.
33. *Id.* at 43.
34. *Id.* at 28–29.
35. *Id.* at 226.
36. *See* CALABRESI, *supra* note 4, at 311–18.
37. *Id*. at 24–26.
38. *Id.*
39. *Id.* at 24.
40. *Id.* at 24–26.

III. JUDGE WEINSTEIN AND THE PROBLEM OF AGENT ORANGE

Judge Weinstein's approach to mass tort litigation and its impact on the *Agent Orange* litigation reflects some of the same intellectual forces that shaped American legal theory. He treats the problem of Agent Orange as a problem of social costs. Agent Orange is a defoliant that was used prevalently during the Vietnam War, exposing tens of thousands of soldiers (American, Australian, and Vietnamese) to its suspected carcinogenic effects.[41] The United States government and producers of Agent Orange did not internalize the social costs of the health consequences.[42] This is directly analogous to Coase's problem of the rancher not internalizing the cost of corn destruction (or the farmer not internalizing the cost of not having an additional cow).[43] It is the basic problem of tort. However, it is clearly more complex.

Before delving into Judge Weinstein's handling of the *Agent Orange* litigation, it is helpful to consider his basic approach to mass tort litigation. This is explicitly articulated in Judge Weinstein's *Individual Justice in Mass Tort Litigation* (*Mass Tort Litigation*).[44] The title speaks to the fundamental tension in tort between our historic concern with individual justice and a society that increasingly requires that we fashion social conceptions of justice. Judge Weinstein put this tension in context with his observation that "huge growth in population, in complex technology, and in the number of court cases makes it increasingly difficult to provide individuals with equal access to the court system."[45]

The problem Judge Weinstein chooses to focus on first in *Mass Tort Litigation* is "transactional costs and inefficiencies that would prevent vindication of most people's rights."[46] He states that "[e]fficiency is a worthy goal" and focuses on administrative costs ("ameliorating the burdens these enormous cases present for the parties, attorneys, and courts").[47] This emphasis by Judge Weinstein is consistent both with his role as a judge—an administrator of justice—and the general concern regarding litigation costs that pervaded his time on the bench.[48]

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41. SCHUCK, *supra* note 8, at 16–18.

42. *See id.* at 23–26.

43. *See supra* notes 15–17 and accompanying discussion.

44. WEINSTEIN, *supra* note 1.

45. *Id.* at 1.

46. *Id.*

47. *Id.* at 4. Judge Weinstein's continuing concern with issues of judicial efficiency is reflected in his contribution to this Symposium. Jack B. Weinstein, Address, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251 (2015).

48. *See generally* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1859–68 (2014).

It is useful to analyze Judge Weinstein's approach through the prism of *The Costs of Accidents*. He clearly takes the costs of accidents (efficiency) seriously—particularly tertiary or administrative costs. The basic question is whether the system of torts is able to be both efficient and just. A focus on reducing administrative costs drives Judge Weinstein to the conclusion that, at least in situations involving mass torts, "[n]onlitigation settlements giving effective hope to those who think they have been injured, without destroying those believed to be at fault, are the wave of the future."[49] In other words, the common law system of torts that dictates the parameters of litigation is found to be wanting along the economic and justice dimensions with which Judge Weinstein is concerned. This Article examines why.

It is no accident that Judge Weinstein frames mass torts as involving "those believed to be at fault." One of the qualities of many mass torts is that causation is difficult to prove. Indeed, a principal problem in the case of *Agent Orange* is that there was, in Judge Weinstein's view, very weak evidence of causation.[50] The injuries to the alleged victims were not specific to Agent Orange and there was debate at the time regarding whether the chemicals involved harmed humans.[51] A direct causal link could not be made[52]—unlike the simple case of the cow destroying the corn crop. Added to this, the latency period for injuries associated with Agent Orange created a temporal issue regarding proof.[53] In traditional tort cases, such as an automobile accident, the injury is immediate, so causation is not as complex. Moreover, the military mixed defoliant from multiple sources so it was impossible to trace harm from individual business enterprise to individual victim.[54]

In *Mass Tort Litigation*, Judge Weinstein lists a taxonomy of disaster types based on the complexity of causation issues inherent in them.[55] On one end of the spectrum is the cataclysmic and immediate single event, such as an airplane crash, that poses causation issues very similar to a standard automobile accident.[56] This sort of disaster fits well within the traditional analysis of causation in torts. On the other end of the spectrum are disaster cases with unclear causes, which are

49. WEINSTEIN, *supra* note 1, at 4.

50. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 775–99 (E.D.N.Y. 1984).

51. *Id.* at 787–95.

52. *See* MORRIS, *supra* note 6, at 328; *see also* SCHUCK, *supra* note 8, at 262 (nonspecific injury; temporal problem—latency period).

53. SCHUCK, *supra* note 8, at 262.

54. *In re Agent Orange*, 597 F. Supp. at 748.

55. WEINSTEIN, *supra* note 1, at 16–19.

56. *Id.* at 16–17.

remote in time, involve multiple producers, and have nonobvious victims.[57] *Agent Orange* clearly falls on the more complex end of the spectrum. This is a serious impediment to compensation in common law tort because the plaintiff is obligated to prove causation in court.

The requirement that causation be proved in tort is based on an individualized notion of justice. The justice that we seek is for the wrongdoer to make good on the harm caused to the victim. If this factual connection cannot be traced, then there is no basis for liability. Specifically, one cannot be made to pay damages simply because a risk of harm was created by him, her, or it (in the case of a business entity) without actual proof of harm to a particular victim due to the risk created. Judge Weinstein highlighted the tenuous nature of the causation evidence in the *Agent Orange* litigation.[58] He stated that the "critical problem for the plaintiffs is to establish that the relatively small quantities of dioxin to which the service persons were exposed to in Vietnam caused their present disabilities. Here adequate proof is lacking."[59] Judge Weinstein seems generally skeptical about resolving the causation dilemma in mass torts through probabilistic data and epidemiology:

> [E]pidemiological data, which is increasingly relied on in toxic tort cases where *individual causation* is unprovable, may be preliminary or unavailable at the time toxin-exposed victims begin to turn to the courts for redress. Even where available, epidemiological studies, by definition, often do not provide courts with legally sufficient proof that any given *individual's illness* was caused by a particular toxic agent.[60]

Not only are the traditional methods of evidentiary proof (eyewitness testimony, forensic evidence from the scene of the accident, etc.) rendered useless in the mass tort context, but the use of probabilistic evidence is also called into question by Judge Weinstein. This makes sustaining claims under the traditional common law tort system virtually impossible. The cases are literally untriable under the traditional system. We see this clearly in the *Agent Orange* litigation. Ultimately, for those plaintiffs who opted out of the *Agent Orange* settlement and chose to pursue their individual torts claims, Judge Weinstein granted

57. *Id.* at 18–19.
58. *In re Agent Orange*, 597 F. Supp. at 782–83; *see also* MORRIS, *supra* note 6, at 327.
59. *In re Agent Orange*, 597 F. Supp. at 782.
60. WEINSTEIN, *supra* note 1, at 151 (emphasis added) (footnote omitted).

summary judgment in favor of the defendants based on the government contractor defense and failure to prove causation.[61]

For plaintiffs choosing to participate in the *Agent Orange* litigation, Judge Weinstein embraced a social conception of justice that animates his handling of mass tort cases. He adopted the position that "resources should be distributed as equitably as possible, causing the least possible economic disruption."[62] This position parallels Guido Calabresi's concern with secondary costs.[63] The basic idea is that loss-spreading is an attractive goal in tort because it helps mitigate the economic consequences of misfortune.[64] The loss-spreading concept also helps explain the reason why Judge Weinstein insisted that the federal government be involved in the *Agent Orange* litigation, even though it was not formally a party to the suit.[65] Is there a better loss spreader than our national government?

Shifting losses from "victims" to the entities that create the risk of harm also promotes the deterrence function of tort law. Again, this is motivated by a social conception of tort as opposed to an individual conception. Deterrence is based on general risk created, as opposed to harm to the individual. Judge Weinstein dealt with an earlier case raising similar causation issues, *Hall v. E.I. du Pont*.[66] *Hall* involved defective blasting caps that injured children.[67] There was a causation issue due to the fact that there were multiple manufacturers involved.[68] Judge Weinstein introduced a market share liability approach to solve the causal uncertainty issue.[69] The same market share liability approach was adopted in Diethylstylbestrol (DES) cases, in which it was very difficult to prove causation.[70] Judge Weinstein was

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61. *In re Agent Orange*, 597 F. Supp. at 753. Judge Weinstein's bias against litigation reflects a general trend against litigation (argued for by both liberals and conservatives). Subrin & Main, *supra* note 48, at 1866.

62. MORRIS, *supra* note 6, at 320 (citing Helen E. Freedman & Kenneth R. Feinberg, *Managing Mass Torts*, 80 JUDICATURE 44 (1996) (reviewing WEINSTEIN, *supra* note 1)).

63. CALABRESI, *supra* note 4, at 198.

64. *Id.* at 283–84.

65. *See* SCHUCK, *supra* note 8, at 114–15 (discussing Judge Weinstein's treatment of the United States government as a participant in the *Agent Orange* litigation). The 102nd United States Congress passed the Agent Orange Act, and it was enacted into law by President Bush in 1991. The Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified as amended in scattered sections of 38 U.S.C.). The Act authorizes treatment and compensation for veterans exposed to Agent Orange (as well as their dependents and survivors) to be distributed through the U.S. Department of Veterans Affairs. *Id.*

66. Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

67. *Id.* at 358.

68. *Id.* at 378–80.

69. *Id.* at 376–78; *see also* MORRIS, *supra* note 6, at 323.

70. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

instrumental in implementing the landmark DES market share approach put forward by the New York Court of Appeals in *Hymowitz v. Eli Lilly & Co*.[71]

In addressing jurisdictional issues in *Ashley v. Abbott Laboratories*,[72] a DES case that had made its way to his court, Judge Weinstein was expansive in asserting jurisdiction over manufacturers of the drug based on the theory that "the United States constitutes a common economic pond that knows no state boundaries. A substantial interjection of products at any point of the national market has ripple effects in all parts of the market."[73] This view of society constituting a "common economic pond" is core to Judge Weinstein's basic notion that in cases of mass torts, there is an "injury in some sense to the community . . . . Payment should have been made under these circumstances, money utilized in some community care [sic] way that would permit those who might have been injured to benefit."[74] The basis for the obligation to pay the community is the risk associated with the activity on an enterprise liability basis.

In discussing what he refers to as "modern innovations" in tort law that deal with the issues related to mass torts, Judge Weinstein argues that deterrence, punishment of wrongdoers, foreseeability, and a search for fault can no longer be touchstones of our tort law system.[75] Instead, judges and juries should concentrate on (1) who should pay for the greater risk associated with an increasingly complicated and technological society; (2) the size of damage awards; (3) who should be compensated; and (4) how compensation should be distributed.[76] It is all about deterrence, compensation, and loss spreading. Judge Weinstein notes that the irrelevance of fault in the mass torts context has its historical antecedent in the move to strict liability in products liability cases.[77] He also attributes the historical shift to strict products liability to the need to reduce the administrative cost of trials.[78]

We get a sense of how broad Judge Weinstein's affinity for loss spreading is in *Mass Tort Litigation*. He makes the case that the opti-

71. *Id.* at 1078.

72. Ashley v. Abbott Labs. (*In re* DES Cases), 789 F. Supp. 552 (E.D.N.Y. 1992).

73. *Id.* at 576.

74. MORRIS, *supra* note 6, at 326 (alterations in original) (quoting 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 164, 176–77 (2003)).

75. WEINSTEIN, *supra* note 1, at 148.

76. *Id.*

77. *Id.* at 148–49.

78. *Id.* at 149.

mal regime to deal with mass torts is a national health care system (or, in its absence, a federal fund) so that all who are injured will be compensated.[79] In discussing the implications of focusing solely on secondary costs, Calabresi noted that the logical conclusion would be a social insurance scheme.[80] Of course, a national health care system has the benefit of spreading losses on a national level. However, this would undercut the goal of deterrence because individual wrongdoers would not be held liable for injury and thus not incentivized to reduce accidents—a point also made in *The Costs of Accidents*.[81] Therefore, there must be some other form of deterrence. Judge Weinstein argues for what Calabresi would label "specific deterrence," or regulatory control over activities that might lead to large-scale harm.[82]

Judge Weinstein combines this deep communitarian sense of justice with a very real concern for the need to satisfy the quest for justice on the individual level. One of the most fascinating aspects of Judge Weinstein's approach to the *Agent Orange* litigation is that while he had an expansive notion of the social dimensions of the case with regard to the economic consequences, he also attempted to deal with the existential dimensions of the litigation and the need to have victims express themselves in court. He believes that a judge must "expose himself or herself to the emotional and other needs of the litigants."[83] Judge Weinstein did this in the form of fairness hearings that took place once a settlement was agreed to. He listened to veterans and their loved ones. By one estimate, he listened to five hundred people and received hundreds of telephonic and written communications.[84] The *Agent Orange* litigation was emotionally charged. Tellingly, Judge Weinstein received death threats for his involvement in the case.[85]

In reflecting on mass torts generally, Judge Weinstein emphasized the general need to do individual justice and pointed specifically to

79. *Id.* at 4–5.

80. CALABRESI, *supra* note 4, at 43–44.

81. *Id.* at 124–25.

82. *See* WEINSTEIN, *supra* note 1, at 5; *see also* CALABRESI, *supra* note 4, at 95 (juxtaposing specific deterrence with the market deterrence epitomized by the tort system that attempts to influence behavior by influencing prices).

83. MORRIS, *supra* note 6, at 322 (quoting WEINSTEIN, *supra* note 1, at 50). It is evident from Judge Weinstein's contribution to this Symposium that he is still very committed to the notion of individual justice in the context of aggregate claims. Weinstein, *supra* note 47. David Marcus in this Symposium notes that Judge Weinstein embraces a community conception of justice (the "community member mode"), while balancing "individual human dignity." David Marcus, *Two Models of the Civil Litigant*, 64 DEPAUL L. REV. 537 (2015).

84. MORRIS, *supra* note 6, at 331.

85. *Id.* at 332.

the steps he had taken to connect with victims in the *Agent Orange* litigation.[86] This is consistent with his view that the greater the "hurt" to the victim, the greater the obligation of the judge to "expose himself or herself on a person-to-person basis to the emotional and other needs of the litigants."[87] Of course, one criticism of this approach is that the need to be heard is not fully satisfied in a circumstance in which the ultimate decision regarding remedy has already been reached. There is a real difference between being allowed to make arguments that can influence an outcome and reacting or expressing opinions related to an outcome.[88]

Judge Weinstein recognizes that there is evidence that victims do indeed value the legal process of trial even if they get less in the form of monetary compensation.[89] However, he does not believe that settlement and dignity are inconsistent. The key for Judge Weinstein seems to be that allowing victims to have voice, even with the limitations inherent in settlement, acts as an existential salve. This is a powerful argument. However, it should also be recognized that Judge Weinstein's remedy in *Agent Orange* may not fully address existential angst. One benefit of trial is the ability to not only be heard but to force others to answer to accusations directly. The need for existential healing was heightened given the intermingling of the already complicated tort issues in *Agent Orange* with the social context of the Vietnam War.[90]

Peter Schuck has suggested that for many Vietnam veterans the *Agent Orange* litigation was "a morality play performed on a stage—the court. From that stage they hoped to express their deepest aspirations for justice, retribution, fraternity[,] and social (or perhaps even cosmic) coherence."[91] The litigation was part of the process of Vietnam veterans "coming home" and the accounting for the physical, economic, and spiritual wounds of war. Judge Ralph Winter of the

86. WEINSTEIN, *supra* note 1, at 3.

87. *Id.* at 9.

88. This tension in Judge Weinstein's mass tort jurisprudence and emphasis on judicial efficiency is well stated in Linda Mullenix's contribution to this Symposium. Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015). It is also reflected in Tom Tyler's insightful commentary in this Symposium on the importance of meaningful voice (input prior to judges rendering a decision) for litigants in maintaining judicial legitimacy. Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711 (2015).

89. WEINSTEIN, *supra* note 1, at 10 ("The recent research by Rand and others indicates that . . . satisfaction or dissatisfaction of litigants with the justice system is based on their expectations that they will participate in a litigation.").

90. *See* SCHUCK, *supra* note 8, at 3–4.

91. *Id.* at 255.

Second Circuit, while stating that the court must apply "the law" in reviewing an opinion written by Judge Weinstein in the *Agent Orange* litigation, noted "the nationwide interest in this litigation and the strong emotions these proceedings have generated among Vietnam veterans and their families."[92] The focus on Vietnam veterans and their loved ones as a group is echoed by Judge Weinstein. He stressed that settlement in the *Agent Orange* litigation "was utilized . . . fairly effectively to help a very large portion of the veterans' community."[93]

The harm in the *Agent Orange* context included not only the economic toll "caused" by Agent Orange, but also the political and spiritual wounds to both veterans as a group and our nation following the Vietnam War. It is a "common wound." Despite—or perhaps due to—its communal nature, it is a wound that also requires an extra layer of attention to the needs of individuals according to Judge Weinstein.[94] He in fact argues that the *Agent Orange* litigation is on the end of the spectrum where the emotional trauma associated with the case requires special attention to the individual, particularly the ways in which courts provide an emotional salve to victims.[95]

IV. CONCLUSION

The work of Judge Weinstein reflects contemporary American law, but also legal theory and culture. It also reflects our future. The overarching philosophical position shaping American legal theory today is one of philosophical pragmatism.[96] Judge Weinstein's work embodies a pragmatist approach to law. In *Mass Tort Litigation*, Judge Weinstein acknowledges the canonical figures in the liberal political philosophy that underpins American law (Kant, Bentham, Rawls, and Nozick), but argues that "[o]ur pragmatic judicial system has an eclec-

92. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 148 (2d Cir. 1987).

93. MORRIS, *supra* note 6, at 336 (alteration in original) (quoting Jack B. Weinstein & Jeffrey B. Morris, Oral History of Judge Jack B.Weinstein 128 (1993–2011)).

94. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 746–47 (E.D.N.Y. 1984). Susan Bandes in this Symposium identifies this need to identify with the victim as empathy and discusses its complications within the context of Judge Weinstein's jurisprudence and Article III judging generally. Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317 (2015).

95. WEINSTEIN, *supra* note 1, at 8–9. On the other end are commercial law cases—where individuals frequently suffer small losses, though the aggregate loss to consumers may be large—that do not have the same emotional charge. *Id.* at 8.

96. *See* JAMES R. HACKNEY, JR., LEGAL INTELLECTUALS IN COVERSATION: REFLECTIONS ON THE CONSTRUCTION OF CONTEMPORARY AMERICAN LEGAL THEORY (2012) (relating interviews with Bruce Ackerman, Jules Coleman, Drucilla Cornell, Charles Fried, Morton Horwitz, Duncan Kennedy, Catharine MacKinnon, Richard Posner, Austin Sarat, and Patricia Williams).

tic view of philosophy."[97] He suggests that we adopt a contemporary neo-Aristotelian position as articulated by Seyla Benhabib.[98] Benhabib lays out three bases for dialogue amongst those impacted by judicial decisions: (1) neoconservative social diagnosis; (2) a politics of community; and (3) a philosophical ethics of a historically informed practical reason.[99] It is clear that this philosophical pragmatist view appeals to Judge Weinstein, and his scholarship and judicial work reflect it.[100] In fact, he explicitly states that "[t]hese three strands assist in judicial analysis."[101]

Pragmatism can serve as a rationalization for political positioning. Judge Richard Posner has famously taken up the mantle of pragmatism.[102] However, he has managed to still maintain his conservative political stance and justify it on pragmatist grounds.[103] Just as a case can be made that Judge Richard Posner takes on the mantle of pragmatism in the service of his conservative politics, the same may be said of progressives.[104]

Judge Weinstein's politics clearly lean toward favoring a welfare state—with a progressive expansion of government services. This is reflected in the *Agent Orange* settlement, which in part is administered through social agencies. Also, in addition to compensation being based on proof of injury and service in the military at a location contaminated by herbicides, the settlement was structured to benefit the neediest veterans more quickly.[105] Some might question whether Judge Weinstein's judicial pragmatism, as reflected in the *Agent Orange* settlement, is a cover for his personal politics. Both conservative

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97. WEINSTEIN, *supra* note 1, at 6.

98. *Id.* at 6–7 (citing Seyla Benhabib, *Communicative Ethics and Contemporary Controversies in Practical Philosophy*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 330 (Seyla Benhabib & Fred Dallmayr eds., 1990)).

99. Benhabib, *supra* note 98, at 333.

100. WEINSTEIN, *supra* note 1, at 6–7.

101. *Id.* at 7.

102. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); RICHARD A. POSNER, OVERCOMING LAW (1995); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).

103. See RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010), in which Judge Posner acknowledges the failures of capitalism demonstrated by the financial crisis of 2008, yet is skeptical of calls for increased regulation.

104. Liberal legal academics who have taken on the mantle of pragmatism include Cass Sunstein, Guido Calabresi, and Margaret Radin. *See, e.g.*, GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 115–17 (1985); Brian E. Butler, *Cass Sunstein, John Dewey and Pragmatist Cost–Benefit State*, 97 SOUNDINGS 95 (2010); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

105. WEINSTEIN, *supra* note 1, at 158.

and liberal judges face this criticism.[106] Yet, as judges, they have no choice but to judge and dispense justice.

The power of Judge Weinstein's influence on American law lies not in abstract theory or political philosophy, but in his pursuit of justice in concrete situations. It was a major accomplishment of the law and the neoclassical economics movement to articulate the goals of tort in an analytical form—deterrence, compensation, and loss spreading—but how we achieve these goals in the real world is not always clear and calls for *judgment*. We do not live in a world of abstract ranchers and farmers. Our world is far more complicated. It involves chemical manufacturers who fulfill contracts based on government specifications, have employees who depend on their company as a source of income, and stockholders (not all of whom are wealthy) who expect a return on their investment as part of their dreams for retirement. It involves veterans who have served their country nobly and suffer the wounds of war. It involves attorneys who have personal stakes in litigation.

In *The Costs of Accidents*, Calabresi's discussion of justice was very abstract. However, in later writings, he argued that we must consider justice along pragmatist lines.[107] In doing so, Calabresi has focused on the need to think concretely about justice and gauge our moral and political intuition about what constitutes the best outcome under the circumstances.[108] This is precisely what we see in Judge Weinstein's handling of the *Agent Orange* litigation and overall conceptualization of mass tort litigation—a judge making decisions under complex circumstances doing his best to achieve justice.

Is it perfect justice? Of course not. Perhaps Calabresi had it right when he observed in *The Costs of Accidents* that we are better equipped to identify injustice than to define what is just.[109] Surely the plight of Vietnam veterans impacted by war constituted an injustice. Judge Weinstein's efforts to remedy this injustice are commendable. However, there are many who would chafe at Judge Weinstein's world in which the starting point for determining compensation is "a grid using bureaucratic models" and the quest for causal connection (truth) is abandoned.[110] Part of our pragmatist resolution is to make peace with the fact that our decisions are provisional and imperfect.

106. *See* Cass R. Sunstein, Review, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1741–42 (noting that Justice Breyer's pragmatism cannot elide normative judgment).

107. *See* CALABRESI, *supra* note 104, at 115–17.

108. *Id.*

109. CALABRESI, *surpa* note 4, at 24–25.

110. WEINSTEIN, *supra* note 1, at 8.

The law is not a tool for perfection or subject to absolutist conceptions of rights. Nevertheless, it can perform the noble task of moving us forward, however imperfectly, toward a more just society. Judge Weinstein's work on the bench is an exemplary example of this pursuit, and for that we all owe him a deep expression of our gratitude.