

## REFLECTIONS ON JUDGE WEINSTEIN'S *ETHICAL DILEMMAS IN MASS TORT LITIGATION*

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### I. JUDGE WEINSTEIN APPRECIATED

Jack Weinstein was one of my teachers at Columbia Law School. As a young professor he was already a master of his subject and was to become master teacher. About the time I graduated—in the same year that the Supreme Court published the legal watershed *Brown v. Board of Education*<sup>1</sup>—Jack became Chief Reporter for a New York State commission charged with comprehensively revising the rules of New York civil procedure. He performed the task superbly, given the constraints of the almost suffocatingly conservative New York bench, bar, and legislature. He was to become the authoritative expositor of the New York Civil Practice Act and Rules, always seeking to reconcile arcane technicalities with the larger purposes and values of procedural justice.

Jack later became County Counsel for Nassau County in a Democratic administration that temporarily relieved the monolithic patronage system maintained by the Republicans. As chief legal adviser to a large municipal corporation performing a broad range of public functions, he became conversant with the legal problems of government from the inside. He also acquired more than a journeyman's conversance with local politics and mastered the art of being an honest man of the law in a political bear pit.

Thereafter, as a result of his preeminent professorial and professional stature, his open and judicious temperament, his intimate knowledge of the law of civil procedure, his extraordinary intelligence and diligence, his experience in government and public law, his dedication to the public good—and his close acquaintance with the Democratic chief executive of Nassau County—Jack was appointed United States District Judge for the Eastern District of New York. In this position Judge Weinstein has handled every kind of judicial matter, from relatively routine personal injury litigation and criminal prosecutions to some of the most complex and politically charged matters that the courts are called on to address—including mass tort litigation.

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<sup>1</sup> 347 U.S. 483 (1954).

Jack subsequently became Chief Judge of the Eastern District. As Chief Judge he not only undertook the usual administrative responsibilities of a presiding judge but also broke new ground in using the authority of the office to strengthen the administration of the court, the interface with the prosecutor's office, and the court's relationships with counterpart state courts and with the bar.

Along the way he established himself as a master of the law of evidence. He is coauthor of the leading casebook on evidence and of the definitive treatise on federal evidence law. His preeminence in adjective law—the law of evidence and procedure—is significant in itself. Moreover, comprehending the law of evidence and procedure has required him to become familiar with every branch of substantive law. In addition, he has continually involved himself in a nonjudicial capacity in all manner of law reform endeavors. Judge Weinstein thus is a preeminent legal generalist in the classic sense.

Many of Jack's students, colleagues, and admirers, among which I am privileged to number, have pondered why he was never elevated to the Second Circuit, or indeed to the Supreme Court. Certainly it was not for want of qualifications, except perhaps an inability to close his mind to the ugly social realities that underlie the cases which find their way into the courts. We often harken to Tocqueville's observation that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."<sup>2</sup> Judge Weinstein could well respond: "Tell me about it." There is no judge at any level in any jurisdiction in this country who has engaged those questions more seriously, more conscientiously, more intelligently, and more imaginatively than Jack Weinstein.

## II. MASS TORTS

There are mass torts and mass torts. The most massive personal injury tort is the asbestos litigation. The asbestos cases, in which many other judges in addition to Judge Weinstein have been involved, number in the hundreds of thousands. The first claimants were industrial workers who were directly exposed to intensive concentrations of asbestos, particularly World War II shipyard workers who sprayed asbestos as a fire retardant inside ship hulls. Other claimants were construction workers who applied asbestos to the steel skeletons of buildings as a fire retardant, workers who installed plaster or insulation batting containing asbestos, and workers who fabricated or installed products in which asbestos was a component, such as rubber products in which asbestos was a binder. Others were workers whose exposure to asbestos was less intense or continuous.

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<sup>2</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248 (J.P. Mayer & Max Lerner eds., 1966).

The number of claimants in the asbestos cases is large and the condition and extent of their exposure various. The number and heterogeneity of those called upon to answer for asbestos claims also has been large. Defendants include the manufacturers of asbestos itself; manufacturers of asbestos products and products containing asbestos; and companies that fabricated, installed, or used products containing asbestos. Also sued were companies that might have engaged in such activities, because claimants' attorneys often lacked definite information about their clients' actual exposure and had to anticipate that any specific defendant might point to someone else as responsible. Also involved was virtually every casualty and liability insurer doing business in the United States, whom the courts came to hold liable for broadly extended coverages.

Conspicuous for its absence among those subjected to legal responsibility was the United States government, although the government had been in a position to avoid or mitigate much of the suffering.

Less massive but still very large was the Agent Orange litigation, the major part of which came before Judge Weinstein. This litigation involved claims on behalf of Vietnam veterans and their families for damage to health resulting from exposure to a defoliant used by our military to strip the jungle in which the soldiers had been called to fight. Like the asbestos litigation, the Agent Orange cases involved heterogeneous claimants with widely varying exposure, different manifestations, and uneven latency. The Agent Orange litigation was less difficult than the asbestos cases because it involved far fewer claimants. However, the Agent Orange litigation was even more difficult than the asbestos cases because of the dimension known in science as etiology and in law as proximate cause: whether or not the maladies of the claimants, or some of them, were actually caused by Agent Orange. By 1980 it had become legally indisputable that many asbestos claimants were victims of asbestos. This has not yet become clear for the Agent Orange claimants. The Agent Orange litigation was also more difficult because it directly questioned the fairness and consideration with which the government dealt with those who gave service to the common good.

As in the asbestos cases, the United States government was conspicuous for its absence among those subjected to legal responsibility for the Agent Orange claims. Its absence is particularly ironic because the government itself was responsible for the Vietnam War and for the means by which it was fought.

Mass torts of lesser scale include various kinds of drug and prosthesis cases—Bendectin, DES, Dalkon Shield, breast implants, and heart valves. Each set of cases has specific characteristics in the number of claimants, the nature and variety of the injuries asserted, the relative uncertainty of the causal antecedent of injury, and the identity and number of those charged with legal responsibility. Some cases are fairly simple in one or more of these characteristics, involving a definite number of vic-

tims with a definite causal chain to one or a few defendants. However, compared with most multiparty litigation the drug and prosthesis cases are still extremely complicated, if for no other reason than the problems in measurement of damages.

Still less complicated, or usually so, are the “single event” mass torts such as air crash cases, the Hyatt Skywalk case, the MGM Grand and DuPont Plaza hotel fire cases, the construction site disaster in Bridgeport, Connecticut, and the civil litigation emerging from the World Trade Center bombing.

Mass tort cases involve anywhere from dozens to thousands of claimants, with more or less corresponding numbers of plaintiffs’ lawyers; multiple defendants and third-party respondents; legal and factual theories designed to maximize contributions to the recovery fund; myriad depositions, documents disclosure, and expert testimony; multiple insurers and reinsurers charged with secondary liability; multijudge administration involving magistrates, special masters, and settlement mediators; and coordination by committees among plaintiffs’ lawyers, defense lawyers, judges, parajudicial officers, and delegations representing claimants and respondents and interested third parties (such as indemnitors).

There is another common feature in these mass torts. They involve claims for money—big money for plaintiffs’ lawyers and for many of the claimants themselves, big monetary obligations for the defendants and their insurers, and relatively good and steady money for defense lawyers. Monetary measure determines who will be plaintiffs and defendants and also the contours of the proceedings. Accordingly, new types of financial interests have evolved. On one side, the contingent fee agreement has become a kind of “futures” contract in which lawyers have an exclusive right to trade. On the other side, the long term income flows accruing from the business operations of the respondents—defendants and their insurers—are subject to a new kind of entitlement claim, competing with those of shareholders and traditional creditors. Money is thus both the compelling object of this kind of litigation and the means by which it has taken its distinctive form.

### III. MASS TORTS OF A DIFFERENT KIND

It is noteworthy that in analyzing mass tort litigation Judge Weinstein makes passing reference to the *Mark Twain* school case.<sup>3</sup> That case strongly resembles the asbestos and Agent Orange cases in ways beyond those addressed by Judge Weinstein’s Article.

The *Mark Twain* school case<sup>4</sup> was Judge Weinstein’s engagement with *Brown v. Board of Education* and, more generally, the civil rights/

<sup>3</sup> Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 473-74, 489, 540, 542 (1994).

<sup>4</sup> *Hart v. District 21*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff’d*, 512 F.2d 37 (2d Cir. 1975).

discrimination/poverty litigation ensuing since *Brown*. The claim in the *Mark Twain* case was, among other things, that children of low income families in New York City's public schools were denied equal protection of law because the resources available for their educational needs were disproportionately low compared to the resources provided for other children. Such a claim, as we have come to realize, impinges on a locality's whole social fabric and involves not only complex legal issues but virtually all political, economic, fiscal, psychological, religious, and moral aspects of modern experience.

In responding to the plaintiffs' grievance in the *Mark Twain* case, Judge Weinstein eventually involved not only the parties and their lawyers but also New York's central school bureaucracy, parent groups, the teachers' union, the union of school administrators, and various private social service agencies, experts, consultants, and parajudicial assistants. He tried to fashion a decree that would make school a better place, children's education a better experience, and the social environment more supportive. As a judicial undertaking, Judge Weinstein's judgment in the *Mark Twain* case was an "institutional decree" on a grand scale.

However, the scale and scope of Judge Weinstein's decision was hardly more sweeping than the decision in a subsequent public school case, *Jenkins v. Missouri*.<sup>5</sup> In *Jenkins*, the judge did nothing less than reorganize a metropolitan school district and its system of finance, including state-level financial commitments. The judge concluded, quite reasonably, that no less drastic remedy would mitigate inequality in educational opportunity, particularly for blacks in racially balkanized cities. The decree in the *Jenkins* case has been sustained by the higher courts,<sup>6</sup> although it remains to be seen how long the reorganization will remain viable without continuing political participation by voter-taxpayers. Nevertheless, Judge Weinstein's counterpart disposition in the *Mark Twain* case, so far as it went beyond the school immediately involved, was held to go beyond appropriate judicial authority;<sup>7</sup> the New York City schools remain about as they were before *Mark Twain*, or worse. In any event, the decrees in the *Mark Twain* and Kansas City school cases involve procedural and structural departures from conventional adjudication that are as radical as those that have evolved in the mass tort personal injury cases.

Although Judge Weinstein does not quite call them such, school cases and other "institutional decree" litigation can be conceived as involving mass torts. Lack of equal opportunity for an effective education is certainly a personal injury in some sense of the term. So are suffering inhumane conditions in prisons and mental institutions, homelessness,

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<sup>5</sup> 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part*, 495 U.S. 33 (1990).

<sup>6</sup> *Missouri v. Jenkins*, 495 U.S. 33 (1990).

<sup>7</sup> See *Hart v. Community School Bd.*, 512 F.2d 37, 56 (2d Cir. 1975).

inadequate medical care, and racial discrimination in public housing. These mass tort poverty-discrimination cases have arisen in virtually every large community in the United States and in many smaller ones. Their genesis has been over the same period as the asbestos claims and other mass personal injury torts.

The litigation in the mass tort poverty-discrimination cases resembles the mass tort personal injury cases in yet other ways, including those discussed by Judge Weinstein: multiple party joinder of plaintiffs and respondents; use of the class suit device as the procedural structure; novel roles for counsel, court, parajudicial officers, experts, and community representatives; complex problems of causation and evidence, for example, differentiating the significance of race, class, and family structure on educational achievement and assessing the significance of "de facto" desegregation in the public schools; and problems of communication, community, participation, and individual dignity and autonomy.

Moreover, most of the ethical problems in the mass personal injury cases have direct analogues in the mass decree cases: attenuation of the relationship between claimants and their counsel; conflict of interest among claimants and between claimants and counsel; difficulty in identifying the responsible respondents; ambiguity and conflict in the relationship between the respondents and their counsel; substitution of settlement procedures in place of adjudication; and assumption by the judge of a "managerial" role. Indeed, the managerial role of judges in "institutional decree cases" following *Brown v. Board of Education* beggars that in the damages cases. It is singularly in the latter, however, that managerial judging has elicited criticism by advocates of individual rights.

#### IV. THE FORMS AND LIMITS OF ADJUDICATION

Around the time *Brown v. Board of Education* was decided, and before the mass tort personal injury cases began to appear, Professor Lon Fuller wrote and informally disseminated an article entitled *The Forms and Limits of Adjudication*. The article indeed may have been a veiled commentary on the *Brown* decision; perhaps that was the reason it was not formally published until much later.<sup>8</sup> At all events, because Professor Fuller was at Harvard Law School and was among the preeminent legal theorists of the time, the article had great influence in analysis of the legal process. In retrospect, the analysis seems unpersuasive. Nevertheless, Professor Fuller had a point, although—to borrow an advertence from Harry Kalven—not quite the one he was making.

The problem Professor Fuller addressed was the relationship between legal claims (substantive claims of legal entitlement) and adjudicative procedure (the process for hearing and deciding substantive claims of

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<sup>8</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

legal entitlement). In essence, his thesis was, first, that only a certain type of claim could be framed as a legal claim; and second, that the adjudicative process, involving bilateral presentation of evidence and argument based on definite legal premises, is uniquely appropriate for resolution of this type of claim. The linkage of these two propositions was this: legal claims and defenses consist of uniquely reasoned contentions about facts and legal norms, and adjudication consists of uniquely reasoned responses to such contentions.

Two related implications followed from this analysis. First, a claim that could not be presented in the form of such reasoned contentions is not a proper legal claim. Second, and correlatively, only proper legal claims (as thus defined) are within the proper jurisdiction of the courts. Hence, the title of Professor Fuller's paper: *The Forms and Limits of Adjudication*.

Implicit but not articulated in the analysis was a politically charged constitutional proposition: when a claim entails an indefinite legal premise and a factual frame of reference that is wider than can be accommodated through bilateral party presentation, then the claim is not properly susceptible of adjudication. In technical terms, such a claim is not a "case or controversy" and hence is beyond the jurisdiction of the courts.

However, reflection about "public issue" cases, of which *Brown v. Board of Education* is the paradigm, shows that these cases do not involve either definite legal premises or factual frames of reference that can be accommodated through bilateral party presentation. The claim asserted in *Brown* involved a very ambiguous legal idea (if also a basic legal ideal)—that of equality—and a factual frame of reference that embraced the entire social history of the United States. Ever since the decision in *Brown* our legal institutions have been trying to work out the legal premise of that case. What is meant by legal equality was the issue, for example, that defeated Professor Lani Guinier's nomination as Assistant Attorney General for the Civil Rights Division.

Professor Chayes's seminal article<sup>9</sup> (referred to by Judge Weinstein) has explained how the "form" of adjudication in public issue cases radically departs from the model projected by Professor Fuller. So far as the "limits" of adjudication are concerned, Professor Chayes's article assumes that they are wide, if not unbounded. Given the undertakings in which the courts have been involved, including the mass torts that Judge Weinstein discusses, Professor Chayes's assumption is surely correct. After all, if a court is willing to undertake reorganization of an urban school district—in Boston or New York or Kansas City—or to reconstruct the electoral system for the legislative branch, or to hold a Presi-

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<sup>9</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

dent in contempt of court, what undertaking remains outside the province of the judiciary?

Any social controversy can be put in the form of a bilateral legal and factual argument over a claim of legal right. Advocates and judges do it every day. On this point Professor Fuller was simply wrong: there is no inherent restraint in the form of adjudication, at least in the American version, nor any inherent limit on its subject matter.

Correlatively, resolution of any social controversy can also be put in other forms, also without inherent limits. The participants in these other forms have different roles and responsibilities from those in adjudication and are subject to different ethical norms. One traditional form is executive dispensation. That was the form in which most public matters were resolved in traditional kingships. Even in political democracies executive dispensation can confer such things as grants-in-aid or appointment to a government office and can also give forth legislation such as administrative regulations. Another "form" is the work of legislators. They too can adopt measures applicable to whole classes of persons or make specific awards. Legislative dispensations through private bills are still made in the present day, and such was the form in which much of the public business was done in colonial times.

In this light it is worth considering whether Professor Fuller nevertheless had a point.

## V. THE NEW PROCEDURAL REGIME

The forms and limits of conventional adjudication have been substantially transformed in both the mass personal injury cases and the institutional discrimination-poverty cases. The transformation has involved uses of procedural mechanisms in nominal conformity with tradition but with the effect, through incremental changes in meaning and use, of creating quasi-judicial institutions of novel scope and scale. Salient among the adaptations, which Judge Weinstein recapitulates, have been these:

—In the mass personal injury cases, modifications of class suit procedure have been used to evaluate and provide redress in the form of damages for large cohorts of individual claimants; in the institutional discrimination-poverty cases, the class suit procedure has been adapted to evaluate and provide redress in the form of services (such as educational services) for even larger cohorts of individual claimants.

—In the mass personal injury cases, evidentiary procedure has been adapted to administer standardized tests for eligibility and formulas for recovery from settlement funds, in place of individual adjudication; in the institutional discrimination-poverty cases, the decrees are predicated on similarly developed standards for provision of public services.

—In the mass personal injury cases, the right of a lawyer to communicate about need for legal services, envisioned as a right to protect the legally

untutored, has become a means by which plaintiffs' lawyers present themselves as the official representatives of claimant constituencies; in the institutional discrimination-poverty cases, the same right has become a means by which private activist organizations similarly establish themselves.

—In both types of cases, the class suit notification procedure has been adapted to provide the communication system among the cohorts of claimants, the respondent institutions and their officials, and the lawyers and judges who manage the system.

—In both types of cases, the crucial adjudications concern the common questions affecting the claimants as a class, expressed as general rules, rather than the application of law to specific individual facts.

—In both types of cases, the modal method of disposition is settlement, not adjudication.

—In both types of litigation, the cumulative result of these changes are new entitlement programs, the one type dispensing money from private sources, the other type dispensing services from public sources.

The new judicially administered entitlement programs were not planned, nor did they originate as directives from high political authority. They are the product of myriad interconnected ad hoc adjudications and "bargains in the shadow of the law."<sup>10</sup> Generally these programs are poorly organized and are administered by people having no training and usually little taste for administration. The mass personal injury entitlement programs have been shown to involve extremely high "transaction costs"; the programs decreed in the discrimination-poverty cases probably also involve high transaction costs. This is not to say that these entitlement programs are illegitimate. As practical people would say, what are the alternatives?

Nevertheless, in both types of cases, the roles and responsibilities of the lawyers and judges are in important ways incompatible with those in the ordinary litigation whose "forms and limits" Professor Fuller had in mind.

## VI. DIFFERENT ROLES AND RESPONSIBILITIES: DIFFERENT ETHICS

The roles of judges and lawyers in the new entitlement programs resemble those of members of tripartite administrative commissions, assisted by staff and interacting with constituent interest groups. A positive analogy would be to the Securities and Exchange Commission and other agencies having reputation for technical competence, efficiency, disinterestedness, circumspection, and responsibility. A less positive analogy would be to the Federal Communications Commission or state workers' compensation commissions, where partisan interests are intense and overtly political. A still less positive analogy would be to local planning and zoning commissions or public works boards.

<sup>10</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

The point of making such analogies is that if we are to understand the ethical problems posed in mass tort cases, whether involving personal injury or discrimination-poverty, we should address the web of interests, power, authority, and responsibility in which the operatives in these new institutions function. Practical ethical problems—the kind Judge Weinstein is addressing—arise from specific social situations, not from the question of how life should be lived in the abstract. The web of interests, power, authority, and responsibility of the participants within and before the SEC, the FCC, or a local zoning board is not the same as that of the participants in ordinary personal injury or contract litigation. By the same token, neither is the web of interests, power, and social relationships of participants in courts handling mass tort litigation the same as that in ordinary litigation.

Given the fundamental differences between the roles and responsibilities of bench and bar in ordinary litigation and those called forth in mass tort litigation, the question is how far rules designed for the former can be stretched to accommodate the latter. Judge Weinstein's analysis would suggest that severe distortion of traditional professional norms has occurred. This is not to say that mass tort litigation could not be properly governed by a proper set of ethical norms. It is to say that recognition of the differences would entail an acceptance of the proposition that the ethical values protected by traditional professional norms—individualization of litigation objectives, personalized communication, confidentiality and loyalty on the part of the lawyer, and corresponding focus by the judge—cannot be fully realized in mass tort litigation. In short, realization of individualized process values is incompatible with realization of mass substantive dispositions, which is what mass tort litigation seeks to achieve. This could be the point, so far as professional ethics is concerned, of Professor Fuller's conception of the forms and limits of traditional adjudication.

For alternative ethical models, should we examine the norms governing those who wield authority in legislatures and city councils or in corporations and labor unions?