

## Introduction of Jack B. Weinstein

*Margaret Berger\**

It's a great honor for me to introduce Judge Jack B. Weinstein, the recipient of one of the inaugural Wigmore Lifetime Achievement Awards. It's also a little daunting to try to compress into a few minutes his remarkable career. Born in Wichita, Kansas, he grew up in Brooklyn, performed on Broadway as a child actor, delivered bread and other products by truck and horse-drawn carriage before he graduated from Brooklyn College, and then served on a submarine in World War II before going to Columbia Law School while working on the docks. Shortly after clerking for Judge Fuld on the New York Court of Appeals, he was invited to teach at Columbia, where he taught Evidence and Civil Procedure. He also found time to work on *Brown v. Board of Education*, advise the Kennedys, write articles and casebooks on Evidence and Procedure, and co-author Weinstein, Korn & Miller, a multi-volume treatise on New York civil procedure,.

When he hired me in 1962 for four weeks to work on the last chapter he was writing for Weinstein, Korn & Miller, I don't think his co-authors had as yet completed their first chapters. In 1963, he took a leave of absence from Columbia and became the Nassau County Attorney. In 1965, Chief Justice Warren appointed him to an Advisory Committee charged with drafting rules of evidence for the federal courts. That project ended up taking quite a few years. As you undoubtedly all know, promulgation of the rules was held up by Congress in part because of Watergate, and the rules were ultimately enacted by Congress, rather than through rule-making.

By then, Jack Weinstein had completed a treatise on the new rules, Weinstein's *Evidence*, and he was no longer a professor of law at Columbia. On May 1, 1967 he had become a federal district judge for the Eastern District of New York. So by the time the Federal Rules of Evidence became effective in January 1975, there was a treatise telling everybody what to do, and a judge who could make sure they did it.

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Most of you here, I'm sure, are well acquainted with his many masterful, illuminating opinions on the law of evidence, including novel opinions on using statistical proof, thoughtful interpretations of the hearsay rule, and his exploration of the probabilities associated with different standards of proof in *Fatico*, a case that includes a survey of the district judges of the Eastern District of New York on this question. Parenthetically, I would add that the judge once told me that reading attorney fee applications in the Agent Orange case was worse than grading exams. That is the only standard of proof that I have ever clearly understood, and one that may perhaps cheer you up at this time of the year.

The law of evidence was certainly at the heart of his teaching in the years he was an academic. When he spoke at an AALS workshop on teaching evidence in 1981 he remarked that he had put a yellow slip at each page of Wigmore where there was "something that I did not understand and needed to reread" so that by the time he left Columbia "it looked as if my Wigmore had grown a yellow mold" because "there was a yellow slip in almost every page." So it is certainly most appropriate that he is receiving the Wigmore award today.

But although this is the Evidence Section and this is an Evidence award, it would be unacceptably provincial to ignore everything else Judge Weinstein has accomplished in his more than forty years on the federal bench. The list is extraordinary; it's tempting to fill up my allotted time by just naming the numerous innovations he has instituted in both substantive and procedural law.

But instead, I'd like to focus on three central and interacting characteristics of the judge: his curiosity, his creativity and his compassion. Those of you who know the judge are well aware that he is curious about everything. He is ever ready to learn something new. He is not only interested in the most abstruse theoretical questions, but is also equally concerned about pragmatic consequences rooted in reality. The result is a willingness to forge new solutions, whether this means reopening bankruptcy proceedings in the *Manville* case to provide more money for asbestos victims, or integrating a school in Brooklyn, or thinking about alternative dispute resolution, or proposing new causes of action and procedures in toxic tort cases and extending them to tobacco and firearms, or chafing at the Sentencing Guidelines. Indeed, at times the only curb on his creativity has been the Second Circuit, which on more than one occasion has disagreed with his innovations. Most remarkable, however, is that in exercising this intellectual prowess he has never forgotten that real people are

involved in the cases before him, and that doing justice requires always keeping these real people in mind.

Rather than trying to say something intellectually challenging during lunch about his remarkable judicial career to a group pre-eminently qualified to read his opinions and the myriad law review articles that analyze and critique Judge Weinstein's jurisprudence, I'd like instead to discuss briefly two cases.

I was his law clerk on May 1, 1967 when he started in the Eastern District. In those days there was no integrated calendar system. Instead, judges were assigned different tasks, including handling the motion calendar, and that's where Jack Weinstein began. One of the cases on the motion calendar concerned two plaintiffs who had bought two small houses in Nassau County in 1958 via an unrecorded conditional sales contract, with title to remain with the vendors until the final payment. While the plaintiffs regularly made their monthly payments, lived in the houses and made substantial improvements to them, the contract vendor was encountering substantial financial difficulties that led to the contract being assigned to a bank and the docketing of numerous federal, state, and county tax liens and judgment liens against the vendor. Plaintiffs brought an action in New York state court against the bank and all the judicial lienholders and other creditors of the vendor, seeking specific performance of their contract. The United States, because of its tax lien, was able to remove the case to federal court. When the case appeared on Judge Weinstein's motion calendar, its posture was that all the parties had joined in asking that the houses be sold and that the various liens be prioritized against the proceeds. I asked the judge what to do. He said give the houses to the plaintiffs. I said, but that's not what they asked for. The result was that less than one month after ascending the bench, in what must be one of his first published opinions, Judge Weinstein wrote that the sale remedy sought by the parties "is entirely inappropriate in view of the existing rights of the plaintiffs and it is denied."<sup>1</sup> Fair warning of what was to come. I still remember how astonished the plaintiffs' lawyer was when he discovered that if his clients paid the few thousand dollars remaining on the conditional sales contract they would get clear title to the properties. I look forward to the judge turning his attention to subprime lending.

The second case I want to mention is a much more recent case, *United States v. Speed Joyeros*,<sup>2</sup> decided before the Supreme Court's de-

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<sup>1</sup> *Engel v. Tinker Nat'l Bank*, 269 F. Supp. 179 (E.D.N.Y. 1967).

<sup>2</sup> 410 F. Supp. 2d 121 (E.D.N.Y. 2002).

cision in *United States v. Booker*<sup>3</sup> modified the use of the Sentencing Guidelines. The defendant and her co-defendants had been charged with using jewelry businesses in Panama to launder ten million dollars of drug money. The defendant pleaded guilty, and the opinion discusses whether the judge was correct in accepting her plea and granting a substantial downward departure in sentencing. The judge notes that he had not seen any admissible evidence, and that even if the defendant was guilty of money laundering this would not necessarily mean that drugs were involved.

Much of the opinion consists of a troubling look at our criminal justice system. The opinion notes that by 2001, ninety-five percent of all federal convictions were being disposed of through guilty pleas, and that it is the prosecution, rather than defense counsel, the jury, or the judge, that now plays the central role in criminal prosecutions because of the threat of much greater punishment if defendant fails to plead. The opinion contains a long discussion on plea bargaining and coercion; the various meanings of "voluntary" in the law; a history of sentencing, bail reform, and constitutional and statutory aspects of the speedy trial requirement; and attorney-client conflicts. Those of you who teach Criminal Procedure, Constitutional Law, Professional Responsibility, or Evidence should take a look at this case.

But what is most remarkable is how this erudite exposition is applied to the facts. The defendant was a forty-nine-year-old, recently widowed woman who had a six-year-old son who had been conceived after years of fertility treatments. She had been incarcerated for more than eighteen months before she pleaded, and Judge Weinstein was extremely concerned that the plea may have resulted from excessive coercion. He notes that her principal desire was to be reunited with her son, and that the psychiatrist whom he asked to evaluate her thought that she might have been under the false impression that if she pleaded she could be sentenced to time served. The Panamanian government delayed turning over documents that the defendant needed to prepare a defense until a few months before trial. Although Judge Weinstein twice granted bail under conditions that he believed would guarantee her presence so that she could work on her defense, the Court of Appeals stayed the grant on both occasions. The opinion contains a discussion with statistics on how denying bail creates intense pressure on defendants to plead. When she started to receive the Panamanian documents just a few months before the scheduled trial date, there was insufficient room in her cell to ac-

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<sup>3</sup> 543 U.S. 320 (2005).

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commodate these materials and the necessary accountants, lawyers, and computers needed to assist her. So Judge Weinstein made available a room at the courthouse to which she was to be transported daily. However, she had to wait outside for hours in February, awaiting transport between the jail and the court, and she had inadequate warm clothing—so the judge ordered warm clothing and additional food, which he also found she was lacking. The government had forfeited all of defendant's assets so that she could not pay counsel; over the strong objection of the government, the court ordered enough of her funds released to pay her attorneys for work already done. But that did not cover payment for future legal services. The judge was extremely concerned about a possible conflict of interest: that the lack of assets to pay legal fees and costs and the prospect of a lengthy trial might have led defense counsel to recommend a plea.

So if you read this opinion you will get some sense of Jack Weinstein as a judge: a person who throughout his years on the bench has been able to juxtapose an unparalleled holistic understanding of our system of justice with a vision of justice for the individual. Please join me in wishing him and us that he will serve many more years on the bench.