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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

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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*

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Moderator

Good morning, my name is Anthony Sebok and I will be the moderator for today's round table. Our first order of business is an introduction by Dean Joan Wexler. Thank-you.

Dean Joan Wexler

Thank-you. Welcome to our round table to discuss Judge Jack Weinstein, Tort Litigation & the Public Good. I am delighted to see all of you here to help us honor this important figure in American law on his eightieth birthday.

Federal judges have always held a special place in American society. It was because of the respect and appreciation of their power that our founders hotly debated the scope of the powers of the federal courts under the Constitution. A popular view of federal judges is that they help defend the individual against the state. This is certainly one of their most important and visible tasks.

Another role federal judges play is that of helping the individual achieve justice in a world filled with large institutions, bureaucracies, and corporations. This is a task that federal judges share with their state colleagues. It is, however, one which the federal courts have taken up with increasing vigor and creativity in the past thirty-five years. Judge Weinstein's birthday provides us with an opportunity to look at tort litigation's new role as a tool for individual justice in the federal courts. Judge Weinstein has a unique perspective on this development, partly because of his long experience on the federal bench and partly because of his extraordinary insights into the historical changes that he has seen.

Since he was appointed to the Federal Bench by President Johnson in 1967, he has witnessed major changes in procedure, the Rules of Evidence, and substantive tort doctrine. During his tenure, there have been at a least two revolutions in the law concerning federal class actions. In the 1960s a tort suit involving one hundred common plaintiffs would have been considered exceptional. Today, Judge Weinstein is presiding over a case involving every smoker in America. Similar sea changes have occurred in the law concerning expert testimony and strict liability.

Judge Weinstein has kept a watchful eye on these changes of the past decades. Sometimes, he was at the vanguard leading them.

Sometimes, he penned cautionary critiques. Throughout his career, his scholarly opinions and courtroom statements have always kept one goal in mind: to help preserve the dignity of the individual in a world of increasingly massive torts.

At today's round table, we hope to show Judge Weinstein how much we appreciate his efforts by asking him and ourselves about where we should go next. Are the models of class action in private contingency fee litigation still practical in today's world? Is it even sensible to try to maintain the aspiration of individual justice in an era where tort litigation is openly embraced as a substitute for legislation? Can we afford individual justice or full compensation in suits that take up increasingly larger plaintiff classes and increasing intractable theories of causation?

Although we certainly won't be able to answer these questions today, I know that our discussants will openly and honestly address them. I am very pleased that we have such a distinguished group with us.

I now would like to turn the proceedings over to Professor Tony Sebok, who conceived the program and organized it and really worked very hard to bring all of you together. Among Tony's many talents, he has an abiding interest in complex tort law issues. He is a well-known scholar who has even opined about a number of Jack Weinstein's ideas. Tony.

Moderator

Thank-you. Thank-you, very much, Dean Wexler.

When the idea for this round table last spring was first discussed, at that point it was a law professor's dream to be able to sit at a table with so many important figures of my living history. And in that sense, it still is a great pleasure for me to be here. And I am really grateful that you have agreed to come to Brooklyn Law School to help us honor Jack Weinstein.

But on September 11th, the questions that we are going to discuss took on a new meaning, both at a level of national but also intellectual salience. After the events of September 11th, I spoke to the judge about the planning of this round table, I turned back to certain writings. Judge Weinstein is not only a powerful figure for the people who appear before him, he is also a powerful

intellectual figure—bridging practice and theory.

I picked *Individual Justice in Mass Tort Litigation*, which is a collection of law review articles published in 1995.[1] I looked at a chapter in which Jack Weinstein talks about an idea which now I think is very pressing: He talks about the need to create something called the "National Disaster Court" and why the federal government and the states should accept such an institution.

A "National Disaster Court" would be an institution designed to handle mass disastrous events in which thousands of people are injured and killed. Judge Weinstein tried to offer a characterization of the features and virtues of such a court. And I want today to remind the judge of the seven things that he recommended such a court should possess.

I believe the article, the chapter comes from an article published in 1986.[2] The seven criteria are: First, that there should be a concentration of decision making into the hands of one judge or a handful of judges (but I think in his mind really one judge is the best). Second, that the one judge should be in a single forum where legal and factual issues can be decided, and decided finally. Third, there should be a single substantive law. Fourth, that there should be adequate judicial support facilities, so that the judge can actually make binding factual and legal determinations. Fifth, that there should be, in his mind, a reasonable fact-finding process grounded on the adequate funding. Sixth, Judge Weinstein suggests at different points in the book either caps or limitations or elimination of pain and suffering damages and punitive damages. Seventh and finally, he recommends—and this I thought was the most interesting impression part—that there should be a single distribution plan and I quote here, "with fairly and flexible scheduled payments."[3]

Now, later in the book, in a chapter called "The Future" the

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[1] *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULIPARTY DEVICES (1995).

[2] *See generally* Jack. B. Weinstein, *Preliminary Reflections in the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1 (1986).

[3] WEINSTEIN, *supra* note 1, at 4.

judge cautions the reader. However we handle mass disasters, he maintained at that time—and these words are his words—a "suspicion of administrative systems."[4] Now, when you put these two chapters together, you see an approach to mass disasters at the center of which is a strong judge. And that's no surprise, because Judge Weinstein is a strong judge.

I think that that is an option which this country could continue to embrace. But in the articles that I sent out to the participants of this Roundtable at the Judge's urging, there is a new turn, in his more recent pieces.[5] There is an open invitation for coordination between the judge in the courtroom with the private litigants and government actors, either through administrative law or criminal law.

And so I detect a subtle change in Judge Weinstein's approach to mass disasters, where now the role of the state is not necessarily one which he treats with suspicion, but one in which there should be a partnership. I think that after September 11, we have seen, in fact, there have been attempts at a partnership between the federal government, private attorneys, and the Southern District of New York in dealing with the events of the World Trade Center attack.

So, I want to provoke this group into talking about the ideas that underpin this vision of how we should handle mass disasters, as well as asking questions about the role of mass tort law as public law, and about how we can integrate actors outside of the private bar into the mass torts process.

One issue I want to raise concerns the fact that whether by design or by accident, America is viewed around the world as having developed a certain model for handling mass delicts or mass torts, and that includes a strong court, that is, a strong single judge in partnership with an active plaintiffs' bar pursuing justice. And I wonder whether or not that model is still workable. I also wonder whether or not the rest of the world should look at that model as our model or whether or not we have evolved past it.

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[4] *Id*. at 169.

[5] *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (2001).

When facing mass torts today, the creative strong judge and the private bar must let in other actors, and the question is whether this should be done openly and explicitly. That's my suggestion. I know you have all come here with many other ideas.

I want to talk a little bit about the proceedings today. Today's event is a bit of an experiment. I have not participated in too many conferences or academic activities that are not structured by people presenting papers in a static format. And I really hope that after I stop speaking, you won't hear my voice very much again. I hope to hear all of your voices.

The way I hope to structure it is the following: Many of you have agreed in consultation with me to prepare short five minute reaction pieces to the article that I sent out. I am going to ask those of you to present them in order one after another. And that should take up, really, less than twenty-five minutes or so.

And then we have another hour for each session to talk to each other. And the only thing I ask of you is to cooperate with me, because I will need to organize people's comments. And the way I would like to do it, with your permission, is when you want to say something, just raise your hand or finger and we will make eye contact, I will write your name down and I will call on you. I may, however, and this is the one little variation, I may exercise a bit of moderator's privilege of asking a certain individual to speak on a certain point if I think it is especially relevant. I think with good will and cooperation this could be a lot of fun.

Finally, I would like to say thank-you to a number of people. I would to say thank-you, first of all, to Dean Wexler for supporting this idea, helping me develop it. I would like to thank Diana Nardone for helping to organize the entire round table, June Seddo for helping us make it possible today, especially the set-up and the lunch later on. My secretary, who was very, very helpful and finally my colleagues, some of whom are sitting at this table and many of whom are sitting in the audience, without whom my education in both tort law and social issues would be far less rich.

The final person I want to thank is Jack Weinstein for agreeing to do this. Thank-you, very much, Jack.

Okay, now, without further ado, I would like to begin. Sheila Birnbaum, please begin.

Ms. Birnbaum

It is a great pleasure to be here this morning with so many of my colleagues from the plaintiffs' bar, academia, and the defense bar. I thank everyone, especially the dean for this opportunity to speak about the thoughts of Jack Weinstein, who I know we all respect greatly.

I have not read the piece in a long time that you mentioned, Tony, on the National Disaster Court. And I think I am going to go back and do that, because I think it has taken on, perhaps, new meaning and new possibilities.

I think one of the things that we have all seen in mass torts is the filing at an early stage in a litigation numerous overlapping class actions in the state and federal courts. And there has been no way to consolidate all of these cases together. Although you can multi-district the federal cases, there is no way, except through an informal cooperation between state and federal judges. Some judges may cooperate, and others will not cooperate.

And the cost and expense of this kind of mass repeating, overlapping cases, all over the country, is enormous. It is a total waste of resources and money that can be better used if there is a real problem to provide compensation to real victims and not compensation to those who are not injured.

In part, a nationalization of the kinds of occurrences like the September 11th disaster is possible, but most dispersed types of mass torts that we deal with every day, from a drug or device recall to other product cases may be better handled in a centralized location with a strong judge.

I think the issue of a single law applying to dispersed mass tort creates a very difficult issue. I believe Professor Twerski may have some comments on the issue as a conflicts expert. But the creation of a national disaster court may be an idea whose time has come.

With regard to the cooperation between administrators and the plaintiffs' bar and the courts, I am more skeptical than maybe Judge Weinstein was many years ago. I think that when you take attorney generals who are quite political and put them in the arena of trying to affect tort law, you can create an unholy alliance that shapes tort law in a negative way.

I think one of the problems with attorney generals participating in the cigarette litigation was even though they may have received a great deal of money from the cigarette companies to avoid trial, all of that money has not been used to affect anti-smoking campaigns or cancer research. Just a small amount of the settlement has been used to prevent tobacco related injuries or effects.

So, I think that that attorney general litigation model is not a very good model. I think the gun litigations is an example of tort litigation that should not have been brought by the government entities. Many of those cases have already been dismissed.

So, I do have a healthy skepticism of administrative and tort law coming together.

With that, I will just let other people comment.

Moderator

Mr. Feinberg?

Mr. Feinberg

Thank-you. I noticed this morning the program, this first section, has a very benign title. I mean, class actions as a mechanism for turning torts into public law.

To really make the panel provocative, we should take out the phrase "class action" and insert Judge Weinstein. Take out "mechanism" and put "force." Judge Weinstein as a force for turning torts into public law.

Here is the formula. Here is the menu as to how he does it, because I have worked with him.

First, he takes arcane civil procedure: jurisdiction, choice of law, the rules of evidence. And he knows it so well that he fashions an argument that breathes life into Rule 23. He is willing to construe and interpret in a way like single choice of law, national consensus law. My students ask, "Who thought it up, I mean, where did it come from?" And Judge Weinstein fashions it in a way that makes for a relatively credible convincing argument. You can agree or disagree, but it is a force to be reckoned with. That's step one.

The second thing he does to make the tort "public" is to

publicize and widen the scope and impact of his rulings. He will hold public hearing after public hearing, inviting people from all over the nation to come and testify. He will reach out to the public and meet with individual litigants urging them to accept or not accept a proposal—but actually reach out and invite individual litigants to meet with him, to talk about the case. He will provide concepts like administrative appeals within his settlement, so that a litigant will get a second opportunity to be heard. If you don't like the initial result there is a person available to hear your appeal. He will coordinate with Judge Freedman and others, in state and federal cases, all designed to promote a wider distribution of the meaning of his ruling than would otherwise be the case.

That is how he makes tort law public. Now, I conclude, there is a pro and a con to this. I conclude that at the end of the day, class actions as a device to make tort law public can be attributable to Judge Weinstein's competence and his philosophy of judging.

That's really what it comes out to. I wonder whether forty years from now, when the judge steps down, I wonder whether there will be much lasting impact in terms of some of this.

When I go around the country, and I argue in favor of this approach, the constant response I get is not criticism of Judge Weinstein. Never that. What I hear in response is, well, that's Judge Weinstein. I mean, put an asterisk, he is sui generis. What about the other federal judges? What about state judges? Certainly you can't expect this from anybody but Judge Weinstein. To me that is a tribute to Judge Weinstein, but there is a question mark as to what it all means in the not so long term.

Moderator

Thank-you. Let's turn to a judge. Judge Freedman.

Judge Freedman

I guess I am again in the position of being the class representative for the entire state court judiciary. Because the penchant among law professors is to look at federal cases, among people who write to look at the federal cases, and yet, as Sheila Birnbaum alluded to the fact, that most torts, most mass torts or every other kind of torts start in state courts and for the most part

remain in state courts. Is that a fair statement? Sheila?

Ms. Birnbaum
Absolutely.

Judge Freedman
Yes. And that's where the problem is. Because, in part, we have, we are stuck with this federalism that our founding fathers thought was important. And I guess maybe even the mothers too. And it hasn't really changed except by force of the personality of someone like Judge Weinstein who called when we were working on asbestos cases together, and we worked together on them. And I think that's probably why I am invited here.

But that model was followed by the other MDL judges who got the mass torts afterwards. Judge Pointer called all the state judges he could find who had breast implant cases. Judge Bechtel called all the state judges he could find who had Fen-Phen cases and told us we better follow his model or else. It didn't work for him totally. We had Judge Ludwig now on the latex glove cases, I have them all. We have Judge Kaplan on the Rezlin cases, and these are the ones at least that I have, that I have been working with these judges.

And it is an interesting issue: how do we take the federal and state cases and bring them together. Someone like Judge Weinstein who certifies a class may be able to do it in part. But just another example that you may not know about, I have something called the Salzer hip cases. They are the hip implants that failed. I've got all the New York cases.

Well, just on the day after all the cases, I got the administrative order putting them all before me in the State of New York, not for class action but for coordinated management, the so-called MDL in New York State, I got a stay from Judge O'Malley who is the Northern District of Ohio Judge, MDL Judge. She had certified a class. So I said, well, we will stay the cases, it is a national class, I don't see any reason why state class should be different despite what the plaintiff's lawyer said, and then the Sixth Circuit vacated that class certification or stayed it. And now I am in the position, do I go ahead, or do I wait for the Sixth Circuit to make its final

decision.

Well, I have decided to at least hold off for a little bit, but there are a couple of judges in California who are pulling ahead from what I understand. And there is the fear that this all yields, that the money goes to the people in California who may get the big verdicts. That's one of the problems we have with this kind of hybrid state-federal system that we are dealing with.

Now, the mass disaster court, I think would be an interesting way of resolving that, but when do we have a mass disaster? When do we know we have a mass disaster? Well, September 11th we know we had mass disaster. Do we have a mass disaster with the filing of the first asbestos case? Probably not. By the time the fiftieth is filed, do we have one or do we not? Is it a real mass disaster or is it a series of disasters? So these are some of the questions I would like to ask Judge Weinstein: when do we have a mass disaster?

When does coordination become beneficial and when does it become a block? For example, I may coordinate with the federal judges who are handling the cases and we try to establish a rational way of proceeding, but some judge in West Virginia is going to consolidate all the state cases in West Virginia, a huge settlement is going to take place, and there will be no money left for the New York plaintiffs. And that has happened in the asbestos litigation—one settlement consumes huge resources—and caused a number of companies to go into bankruptcy.

I have decided that there is no such thing as punitive damages in New York asbestos cases, but my Texas counterparts have not agreed with me. The federal judge has agreed and so it is now, I think, attorney malpractice to file a case in federal court for a plaintiff's lawyer anyway. So we are running into some of these state and federal problems that seem insurmountable.

I think the conflict of the laws issues that we heard about earlier, and that always seem to be invoked as a problem are probably less significant than the local political factors that motivated our founding fathers and mothers to establish the federal system.

Just one other point, and I am kind of rambling a little but, interestingly, I think some of the administrative actions have

inadvertently been the source of some of the mass torts. For example, breast implant litigation started after David Kessler of the FDA made a big issue about them and asked companies to cease manufacture. I think that happened with Fen-Phen to some extent also. When the FDA makes a ruling, that's when the tort lawyers jump in. So, while working together might be interesting, federal government might also be constrained in its mission because of fear of mass torts.

Moderator

Thank-you, very much. Mr. Rheingold.

Mr. Rheingold

Thanks. I have a little fable about Jack and the Beanstalk, and the beanstalk is mass torts. And I have been an observer of Jack and a participant in his court for about thirty years now.

I think the issue that many of us are raising directly or indirectly is: if mass torts is this horrible beanstalk with a giant at the top, how to handle it. And Jack we would put way out at one end, fortunately, as someone who has felt his obligation is to tame this beast, the giant, and hack down the whole stalk. That's for good and for bad. I think we are all bringing out, something is necessary to tame this beast, but the question is how far do you go.

My book on mass tort litigation[6] I dedicated to Jack as a proactive managerial judge. In fact, the first to really try and get into this beanstalk, this big forest and do something about controlling the cases. But at the same time, the subtitle of my book "Rough Justice." And I recognize that any method of settling claims of one hundred thousand people expediently, whether it is one court or a few courts, results in claims of rough justice.

The question is, how far do we go in the name of trying to bring order to these cases? And what any of us might think is a greater good; Jack certainly sees the greater good. Can a federal judge overuse the powers that are inherent in the position to maybe not only kind of solve the problem but also hack down the whole beanstalk?

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[6] PAUL D. RHEINGOLD, MASS TORT LITIGATION (1996).

So, I would say to Jack, you are the paragon of rough justice and I think there is no other solution than this. I think we are all talking about problems that exist, but there are real time problems that have to be attacked by proactive judges.

And as far as what Kenny said, I do think the judge has been and will remain a model for how to do this: as a cautionary model and, much more importantly, a positive model. Younger judges are always saying to me in federal court, well, Judge Weinstein did that. And I think it emboldens younger, less experienced mass tort judges who get assigned a case that there has got to be some way through innovation and through clever ideas to deal with, not draconian, but creative ideas. And I think Jack is a paragon of—I won't say warping the law, but let's say just—bending just enough to get to the point where the parties want to resolve their case. And, after all, if there is a resolution, that's what the judge is about.

Three of Jack's methods are: First, the state-federal coordination—and far from, I think, there being a national crisis where we've got to have one judge for everything or trust in one judge—just what Judge Freedman here has pointed out to all of us, works: that the state and federal judges can work together. There were hundreds of thousands of Fen-Phen diet pill cases, but they were handled with economy, and not at all the disaster people thought there would be.

The second thing that I would praise the judge for—and he has brought to our attention—is that even though you have a class of one hundred thousand or one million people, it is still composed of individuals. We as lawyers might just see numbers and disposition rates. But Jack has forced us to realize that each person is injured and he or she has her own claim. And I think Jack has gone further than anyone in bringing in these people. He brought in the DES claimant and said, what does this mean to you, what are your fears, what are your goals? And it gives these people a feeling that they had their day in court. They know they are numbers, they know they are in large ranks, but someone cares about them enough to listen to them. And the judge can stand up for their rights, especially if their lawyers don't.

And my third and last point is one that Jack has been an

innovator on; he's been a good scold to us in the plaintiffs' bar because in his writings and in court, he is always pointing out that we do tend to lose track of our clients too. It is not the judge's role; it is a plaintiff's role. A class action counsel doesn't have clients; but even those of us who do have individual clients, still, if you have one thousand Fen-Phen victims you've got to handle them by the numbers, notwithstanding what we say in our ads about, you know, each person counts individually. And Jack has been there in his writings to say that, no, you have an individual obligation, you have to communicate with your people, you have to give them a voice, empower them in their own litigation. And the aim of the plaintiffs' bar, let's say, to get large fees or whatever, must be moderated, as Jack counsels, by your obligations to the system and to your own clients.

So, Jack, I salute you as a good killer of the Giant in the Beanstalk.

Moderator

Thank-you, very much. Professor Mullenix.

Professor Mullenix

Thank-you, very much and I also want to thank Brooklyn Law School and the organizers for bringing me up from Texas to come participate in this. I think it is very, very exciting and also happy birthday, Judge.

We were sent two articles to read and I have dutifully done that. I have read everything that Judge Weinstein has written relating to mass torts either in articles or books or certainly the lengthy, lengthy opinions. He has been kind of both a benefit and bane of my life, having to distill those opinions down into something you can fit into a casebook for students. It is an impossible task, but it is lots of fun.

I also absolutely thoroughly enjoy reading everything that Judge Weinstein writes. I approach everything with a set of anticipation and anxiety, because I know that someplace in there, I am going to have what I call "my Judge Weinstein moment." Which is, I am going to get really irritated. And I was reading through these two articles and it happened, and I will tell you

where. So it is a lot of fun.

What I do want to talk about is Judge Weinstein's evolving jurisprudence, because I think that for people who have followed Judge Weinstein's career, you actually can see this. And I think by the time I got into the mid-to-the-late 1990s, it was very clear through his articles, that he had evolved jurisprudentially to the concept that mass torts in the late twentieth century basically were a version of public interest law litigation. And the model he was using, basically, was what many of us grew up with and were excited about, which was the 1960s-style public interest litigation; that is, the cases dealing with institutional reform.

He basically said, we just have the same thing except it is a tort, rather than dealing with institutional problems, to be dealt with through class action litigation. My take on that was, at least in part, the reason why Judge Weinstein wanted to envision mass tort litigation as just a reincarnation of 1960s-style public interest law was to justify the role of the activist judge. We certainly know it existed there, so you just kind of translate that and impose it on mass tort cases. And I have written extensively about this and I obviously have problems with it.

Well, in reading the two most recent articles that were sent to me, I now came to the conclusion that Judge Weinstein's jurisprudence has evolved even further. What he has done in these two articles is basically to step back and look at an even bigger picture. He wants to look at the entire societal way in which the system deals with mass delicts.

When he steps back and he is looking at the really, really big picture, what he sees is a three-legged stool. That is his metaphor. He says, "What we have here basically is a three-legged stool." And the three legs are the criminal law system and the way that deals with mass delicts, the administrative/regulatory system and that's another way we deal with mass delicts, and then the civil tort law system with a focus on, obviously, class actions. In describing this three-legged stool, he basically comes to the conclusion that what we have are three unequal and kind-of wobbly legs.

And for him the strongest leg on this stool is the civil tort leg, through the class action. That's the point in his articles in which I had my Judge Weinstein moment, when he gets to talking about

the civil tort law system and vindication of rights through the class actions. It is at this point he begins to wax very eloquent about how this really is the strongest leg because it is a bottom-up approach, the most democratic way of resolving mass torts. And he goes on and on, and has written about this elsewhere.

Where he wants to go with this model of the three-legged stool is to say that we need to have a carpenter come in and make it all work together. What we want to have is a stool where all the legs are working; we've got a strong structure. And I think the interesting question is, that it all sounds, very, very interesting, it is a very interesting concept. But is it feasible, can it be done, can we get it to work?

In looking at this evolved jurisprudence, I have a sense of where it is coming from and how Judge Weinstein has arrived at this point. It is a combination of two different things.

One, I think that in recent years Judge Weinstein actually has begun to study and look at how civil law systems on the continent deal with and resolve aggregate claims, either mass tort claims or environmental disasters and so on. And he has come to appreciate that in civil law systems, on a comparative law basis, they deal with these problems in very, very different ways.

I think one of the things he has come to appreciate, for example, and he uses the example of France (it is also true for Italy), that in these countries you can annex civil law claims to criminal law proceedings. He kind of likes that. He thinks that is a very intriguing idea, to serve purposes of efficiency and so on.

So, he likes that concept. The part that he rejects in civil law countries is what he calls "governmental top-down solutions." And he says, "I don't like those, basically because they are undemocratic." I guess they offend American values that he appreciates. I think in particular what he is talking about are the countries that have solved mass torts through fund solutions. If you read the comparative law literature, for example, you know that in Germany they resolved the Thalidomide cases through a governmental creation of a fund that was funded by the defendants and the government.

Now I would like to put in my two cents about what to do with this evolved jurisprudence. First, in reading the articles that were

furnished to me, I continue to have a quarrel with the notion that resolution of mass torts through class actions represents "bottom-up" democracy. I absolutely reaffirm what Kenneth Feinberg is saying. My answer is, yes, you have the democratic model, but it may be sui generis to Judge Weinstein. When you talk to other lawyers and anybody who is involved in lots of class actions, one begins to worry about whether what actually goes on resolving class actions represents "bottom-up" democracy.

With regard to looking to civil law systems for possible alternative ways for resolving these cases, is to think outside the box. This has relevance for a conversation about the victim's compensation fund. This is obviously a very intriguing and interesting idea for me because in the history of the United States, we do not have models of legislative solutions of mass disasters. This is common in the rest of the world. It is highly unusual here. I think we should give this approach a chance, because I think we are all going to kill it off in its inception. No sooner had it emerged when, I have no doubt, large numbers of people's academic careers are going to be made over writing about the victim's compensation funds.

Many people in the room already know that the DOJ has just put out a notice of informal rulemaking. They are seeking comments from attorneys to help structure the legislation for the fund. I think this offers an opportunity for an interesting combination of both the "top-down" and a "bottom-up" approach to deal with a mass disaster.

I hope in working through the guidelines, whatever is going to happen in that model will include provisions that are going to minimize transaction costs, particularly with regard to involvement of attorneys. I hope attorneys are involved actively in drafting the guidelines and the forms. Whatever the procedures, that attorneys should help and assist in creating a fair and simple system, and in that process not create an intricate set of rules that is going to require intensive attorney participation to accomplish compensation to victims.

In other words, I hope that attorneys aren't involved in creating a lot of work for themselves. And in the end, and I hope I am on the same page with Judge Weinstein with regard to this, I think

whatever happens is that compensation should go back to the victims, and not be consumed into transaction costs and attorneys fees.

Moderator

Thank-you, very much. We have two more people to give short presentations and then we are going to open it up. The next is Judge Scheindlin and then we will have Judge Weinstein.

Judge Scheindlin

I want to start by thanking Judge Weinstein. First of all, he gave me the most reading. It far surpassed any briefs that I saw, any circuit opinion that I saw. It was surely the highlight of the reading week.

But, more importantly, ten years ago I was a magistrate judge in the Eastern District of New York and had the opportunity to work with Judge Weinstein on the *Agent Orange* case,[7] which I think was sort of the beginning, the mother, so to speak, of all of the development that has occurred since then.

When I look back at that experience, there is one topic that I want to speak about that no one has mentioned so far, and it is very, very important. And that's the topic of special masters. I want to speak about special masters because I speak as an ordinary judge, not a giant. So to answer what Ken Feinberg was saying, those of us who are not giants, but who are only ordinary laborers in the field of judging need a lot of help. We can't do what the giants can do.

And so we have to have somewhere to turn. I think that the model of *Agent Orange* and the use of special masters is something that has developed enormously in the past ten years, and I want to discuss that. I was a special master in that case, in charge of discovery and other pretrial matters (the more mundane part of special mastering). But Ken Feinberg and others were appointed special masters to really hammer out the details of settlement and distribution plans, and their work there became a model for many

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[7] *In re* "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984).

mass tort cases since then.

Special masters, I believe, are essential to implement the complex compensation schemes that grow out of these mass tort cases. Ordinary judges are bound by many restrictions and often lack the necessary expertise which sadly prevents them from doing the hands-on work of developing satisfactory compensation schemes.

Examples are obvious: ex parte contact with parties or attorneys; contact with experts outside of the presence of parties or attorneys; detailed knowledge of investment vehicles or long-term insurance payouts; an understanding of the contact one would like to make with necessary government agencies, government officials or foreign governments. It is these types of roles that special masters have repeatedly played in mass tort actions, such as Agent Orange, asbestos, breast implants, Holocaust cases and many less well known cases.

I took the time yesterday to run a quick Westlaw search for recent cases supporting special masters. I think you might find it interesting if I summarize five or six ones that you don't hear about every day, just to show you the innovative ways in which special masters are being used today.

In March of 2000, a Southern District of New York judge appointed a special master to enforce and monitor a consent decree requiring the EPA to produce a complex technical regulation dealing with industrial cooling water structures and to recommend an implementation schedule for building those plants.[8]

In May of '99, a district court judge in the District of Columbia appointed a special master to supervise jurisdictional discovery of foreign defendants in a complex antitrust case.[9]

In February, 1999, a District of Columbia judge appointed a special master to resolve preliminary injunction requests by named plaintiffs in a class action brought under the Individuals with Disabilities Education Act, where children had been unsuccessfully

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[8] Cronin v. Browner, 90 F. Supp. 2d 264 (S.D.N.Y. 2000).

[9] *In re* Vitamins Antitrust Class Actions, 1999 WL 1211449 (D.D.C. May 27, 1999).

waiting for special classroom placements for years.[10] Nothing was happening while the class action was pending. So a special master was appointed to deal with the individual preliminary injunctions.

In February, 1995, a New Jersey magistrate judge appointed a special master in a prisoner class action regarding assignments to the special housing unit, meaning the punitive unit, which were being made based on race. The special master heard appeals from the prison's decision to place defendants in what we call the SHU, Special Housing Unit. The parties agreed to be bound by the findings of the special master without the possibility of appeal. The special master's decision would be final as to where the prisoner could be placed.

In May, 1995, a Pennsylvania judge appointed a special master in a securities class action to supervise both settlement and discovery.[11] Now, that was an interesting one. The special master there recommended that the judge delay deciding class certification and whether to add additional named plaintiffs because the special master thought it would affect the settlement. In fact, the special master achieved a settlement which the court then approved.[12]

The last example, in December of 1992, a Northern District of New York judge, in a voting rights case appointed a special master to prepare a redistricting plan for the entire state of New York to protect the rights of voters if the state did not timely prepare such a plan.[13]

So I throw these examples out to you to illustrate the various ways in which special masters can be used as a supplement to the courts when merely ordinary judges find themselves in charge of very large mass tort. But not just mass tort, which is an important point I want to make. Special masters can be useful in any kind of large consolidations. On that note—just a short plug, the Advisory Committee on city rules of which Sheila Birnbaum and I are members, has now proposed a revision of Rule 53, which is the

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[10] Blackmun v. District of Columbia, 185 F.R.D. 4 (1999).

[11] *In re* Chambers Dev. Sec. Litig., 912 F. Supp. 822, 825 (W.D. Pa. 1995).

[12] *Id.*

[13] Fund for Accurate and Informed Representation, Inc. v. Weprin, 1992 WL 512410 (N.D.N.Y. Dec. 23, 1992).

rule appointing special masters. The revision totally opens up that rule. While we don't admit it, if you read the rule in its subtleties, it now actually quietly encourages judges to appoint more special masters with much broader functions. It moves away from the prior rule which was completely outdated and talked only about trial masters, which is the least used form of special mastering. So, I think we owe that development to Judge Weinstein and we thank you.

Moderator

Well, the last person to give a short presentation in this morning's session will be Judge Weinstein and then I am going to explain how we will organize the rest of the day.

Judge Weinstein

Thank-you. I approach this opportunity with the greatest trepidation. One of the speakers this morning has, in effect, said in her writings of me, enough already with the ethics and the philosophy, just decide the cases and shut up. Old habits die hard. So I have written an essay, but I won't read it to you.

It is striking to sit in this room, this beautiful high ceilinged room with people, academics and others, who have given such intellectual attention to this constantly changing problem. If you look out the window beyond the room, you will see in the near distance a state court, the most important of the state courts. That state court deals with children and families and oppressed people who we have not dealt with well, but who are now beginning to come into the federal courts. My most difficult case at the moment involves abused mothers and how the state affects their families. That's in the near distance of this great institution.

When you look a little further, you will see the first major federal courthouse being constructed in the twenty-first century. Nobody knows what that federal court is going to say and what problems it is going to face. We do realize that the group in this room and in this institution will provide the theory that will control what the judges of that court do.

Look a little further into the far distance. You will see nothing. You will see nothing because that's where the Twin Towers were

visible. They have been blasted out with the death of some three thousand people, who we are now thinking about. We are considering how we can deal with equivalent mass disasters—many of which creep softly into our attention, as in asbestos, rather than abruptly, as in an explosion.

Think about the problems of integrating the tort law and its kind of chaotic way of dealing with these problems, and the administrative method reflected in the Act that Congress adopted, which is not yet viable and needs a lot of changes or imaginative interpretation. Consider by comparison the European system—which is perhaps epitomized by the $10 billion Deutsche Institution now paying or trying to pay off the Nazi slave laborers;[14] compare the lack of transparency of what is being done in that institution and what will be done here. That German case is temporarily in my court. The cases involving 9/11 compensation will be heard in the Southern District—a sensible consolidation.

We ponder here the effect of the different institutions available, of the enormous variety of kinds of events we deal with and of the almost anarchic way we deal with them. Nevertheless, we tend to treat these situations and the people who are hurt by them fairly effectively. We are able to utilize a bottom-up viable solution, case by case, and person by person. Our system hasn't worked too badly. It has been flexible. It has been pragmatic. It has met some of these new problems of our strange new social and technological society that have to be met by our legal and political system.

We are utilizing a judicial institution that was developed for three million people in a rural agricultural society. We are trying to apply the rules of that archaic system to three hundred million in a multi-billion people world. There is no way that you can have a single institution in a democracy handling these problems effectively for the predictable future.

Holmes came out of the Civil War. (This part of Brooklyn here is very historical; the first major revolutionary battle was fought here in 1776 with the British; and the Civil War riots took place within sight of where we are.) Holmes came back from that Civil

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[14] *See* Holocaust Victim Assets Litigation (Swiss Banks), *at* http://www.swissbankclaims.com (last visited December 26, 2003).

War and his decisions thereafter were reflected in the fact that he remembered that the Union almost broke apart, and that one of the things the judicial system had to do was keep the Union together.

I, and many other people here, lived through a period when a terrible Nazi-Japanese-Italian set of institutions almost destroyed democracy and killed tens of millions of people. That's in my background. I can't escape it. What it leads to always in every one of these cases is the question: what can I do for the individual—the person who is suffering, or may not be suffering, but thinks he or she is suffering?

How can I handle that, how can I dignify that person? What can the court system do to avoid the rigidity of matrixes that treat people, not as if they were individuals, human beings, but as if they were just marked as numbers (as were so many holocaust victims)? That's the problem for me.

The enigma for all of us is how can we use our systems so we do not lose that sense of the dignity of the individual without losing efficiency. Our legal structures must be competent, with a lot of play. No one institution, whether it is private, administrative, political, or judicial can exercise all power. That's why, when I spoke in Geneva, I emphasized the bottom-up.

One of the great resources of our nation is the legal profession. It is entrepreneurial. It is selfish. It is sometimes stupid. It has all kinds of conflicts of interest. And yet, it is independent, fighting for individuals against institutions. Lawyers need to be kept forceful and effective. That's why I always end up with the tort system and entrepreneurs and why, sometimes, Professor Twerski, I ignore the principles that we learned in the first year in law school, but have not forgotten. We put them aside because we have to concentrate in this mass world, this cruel world, on the individual and what we can do for each person. We have the opportunity to either harm or help. How can we retain individual justice in a world of mass delicts?

Moderator

Thank-you, very much. I sense that there are two streams of ideas. One really about the present and the past, the second about the future. One is about how mass torts has developed as a practice

today with questions about special masters, state and federal coordination settlement practices, choice of law. And the second, what is going to happen post September 11th. Whether or not the new model is something that we should think about self-consciously, and if we do, whether it really captures coordination between government and private actors.

My proposal is that we focus on the first category of ideas for the moment and then after our break, we can focus on the second category of ideas. And I know some people were provoked by some of the discussions about the airline stabilization bill. But I was wondering if we could hold those questions until after the break, because I think there is a lot to talk about. So, I am going to ask someone who hasn't spoken yet to ask a question and then I am going to let you raise your hands and I will call on you in order.

There was a discussion about the notion of top down versus bottom-up. And I raised the point that at the center of the theory of Weinstein, until this moment, is the strong judge. Professor Goldberg, do you see a contradiction here? Isn't there a contradiction between a Weinsteinian theory that represents private mass tort litigation as a bottom-up democratic practice, but at the center, there is well, the strong judge who takes it upon himself to shape and coordinate, using all the brilliant stratagems we have heard about. Is that democracy or is that a Trojan horse?

Professor Goldberg

Well, as a former clerk to the judge I would say, of course, it is not a contradiction. But thank-you for putting me on the spot. It is a great question. Let me answer it somewhat indirectly and I will try to keep it short. The judge's greatest quality in my mind is his refusal to believe that anything is impossible. Anything can be overcome, whether it is *International Shoe* or the problem of administering a million claims or thousands of claims.

Let me give you an anecdote from when I clerked, which has nothing to do with mass torts just to play this out, then I will answer the question, I promise. We had this very un-mass patent case involving two litigants, A versus B. And the supposed infringement was of a plastic fence with tubing that ran through the fence to keep the vertical slats intact. Only on Long Island, right?

The original patent had the horizontal slats shaped with a hollow rectangular shape, so if you looked at a cross-section it would look rectangular. The new product that supposedly infringed had a cylindrical shape to it. The question was whether that was an infringement. After a lengthy discussion, Judge Weinstein turned to me and said, "I think I just squared the circle." And that, I think, is emblematic of his "can-doism."

So, all right, I wonder if Judge Weinstein hasn't tried to square the circle here, to pick up on your question. I wonder if life is, and our legal categories are, more intractable than he would like them to be.

The notion of bottom-up and democratic participation, it seems to me, is trying to do the following work: We are going to synthesize the best of private law and public law. We are going to take the classic notion of tort—that of a wronged individual in the agrarian society of England suing his wrong-doer. But at the same time we are going to bring the best of the regulatory state by delivering mass justice. Hence, we get individual justice in mass litigation.

The title says it all; it is the attempt to synthesize, to square the circle. And I worry that the notions that the Judge has variously expressed as "communitarian" or "bottom-up" principles do not actually achieve a synthesis, but instead subsume the traditional notion of tort law as private law into a public law, regulatory vision.

Judge Weinstein says that there is bottom-up participation, that mass tort litigation is democratic, that it is communitarian, that as Paul Rheingold said, that there is someone listening. Judge Weinstein believes that tort law can be both "mass" and "individual" because each litigant will be able to come into court and be heard. But be heard on what? The litigant will be assured in the following way: "Yes, you have been injured . . . we acknowledge your misfortune." This is surely something. But what is missing is the central idea of tort law. When tort law "listens," it says: "Yes, you have been injured, and yes, there is someone else responsible for what has happened to you, and therefore you are entitled to go against that person."

When Judge Weinstein held fairness hearings in the *Agent*

Orange litigation, they were not about Dow Chemical behaving in an irresponsible way that—creating a defective product—so as to cause injury. We don't think Dow and other companies actually caused any injury. So, what were the hearings about? They were about the government's execution of the Vietnam War. The idea of people coming into court and telling their stories and being heard, while a very powerful idea, doesn't work as a true reflection of the private law idea that there are other people who ought to be held responsible for the bad fates that have befallen them.

Moderator

I am taking names now, so if you want to speak raise your finger. Aaron?

Professor Twerski

I was involved in the *Agent Orange* litigation, believe it or not, on the plaintiff's side. And Judge Weinstein was responsible for one very severe migraine headache that I had after appearing in his courtroom, where he worked me over pretty well.

But I agree with what John has just said. *Agent Orange* is an example of where the judge as philosopher-king fashioned something out of nothing. Causation was nowhere near proved then and still hasn't.

What was proven was that there were some bad actors. And that Dow Chemical and Diamond Shamrock had some meetings where they wanted to withhold some information about the dangers of Agent Orange from the government. And I think that this idea of going after bad actors who may not have had causal responsibility for what took place, is a theme that is running right through a good number of the class action cases. And yes, I am troubled when an issue such as causation is given short shrift. It makes me very, very uncomfortable.

One other aspect: national consensus in law. It is a really interesting concept; it worked for us in *Agent Orange*. But, you know, it just ain't so. Just look at the decision in Wisconsin a couple of months ago in the latex glove cases, where Wisconsin said that whether or not the manufacturer of latex gloves knew or should have known about the dangers of latex, or whether the

dangers were scientifically knowable at the time the gloves were marketed, doesn't make a difference.[15] Wisconsin is out of sync with the law in forty some other jurisdictions. That is a real problem. There is just no way to paper over it.

California, in a decision that came down a week later addressed the issue of scientific knowability of risk in a latex injury cases and said you cannot impose strict liability or a consumer expectation test with regard to latex injury cases.[16] Now, I know on which side of that debate I come down on. But regardless of what I think is right or wrong, the fact of the matter is that we have nothing like national consensus. In reading case law when drafting the Products Liability Restatement, I would have liked it to reflect national consensus. But that's not the way the world is. We have state courts out there doing very, very different things. Sub-classing is not an easy solution to this problem. If varying state laws have to be presented to a single jury, the great likelihood is that the trial will be unmanageable.

So, if judges are to behave as philosopher-kings, unrestrained by law to work out solutions as they see fit, that may work—but it isn't law being applied to a controversy. Perhaps the fault is mine. My Talmudic training has imbedded in me a very, very deep respect for law and for precedent. Seat of the pants justice no matter how noble and well-meaning frightens me to death.

Judge Weinstein

Let's take the Agent Orange and the asbestos cases, because in some respects they represent the same kinds of problems. In *Agent Orange*, there was no direct proof in a tort sense that somebody was injured by a particular act under tort law.

There were poisons, however, that were put into the atmosphere through carelessness by producers. How many people were injured? Which particular people were injured? How much of the atmosphere was denigrated? Nobody could tell with respect to a particular person. But that there was an injury in a sense to the community, not attributable or provable in traditional terms to an

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[15] Green v. Smith & Nephew AHP, Inc., 629 N.W. 2d 727 (Wis. 2001).

[16] Morson v. Superior Court, 90 Cal. App. 4th 775 (2001).

individual plaintiff, seems to me to have been clear. Payment should have been made under those circumstances, money utilized in some community care (and I know you don't like that) way that would permit those who might have been injured to benefit.

Asbestos is a disaster which crept up on us. We are now in *Manville* paying only 5 percent of the amount of damages that we know was suffered.[17] Asbestos is scattered throughout our country. It is a substance that causes, in the community enormous amounts of damage. That should be paid for, not necessarily to each one of the people that has a few spots on his or her lungs. How it should be distributed in this kind of mass case is a problem different from that in individual tort law. The same thing is largely true, I think, of the slave labor cases and the methods of distribution of the funds available there.

Punitive damages need to be distributed on a communal basis in many of these cases because it is the community that suffered. And it is a community that isn't being paid for the harm that is being, or has been, done.

Now, the old tort law fails in these cases and the solution has to lie in the use of some kind of administrative agency—sometimes a quasi-administrative agency of the court, which is often unsatisfactory. Use of such agencies is not what we are appointed for; it is not what we are trained for. A true administrative agency will find increasing utility as in the tire cases.[18] In many other cases the problem will be addressed by the criminal law or privately in arbitration.

All of these institutions for dealing with this kind of problem, it seems to me, have to cooperate because the tort law falls short in dealing with this kind of case. And the courts are not themselves capable, except on an ad hoc basis, of setting up an administrative, democratically-selected agency. Now, that's beginning to change. The United States Securities and Exchange Commission, the

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[17] Stephen Carroll, Deborah Hensler, Allan Abrahamse, Jennifer Gross, Michelle White, Scott Ashwood & Elizabeth Sloss, Asbestos Litigation Costs and Compensation: An Interim Report, RAND, Institute for Civil Justice, *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf.

[18] *See, e.g.*, *In re* Bridgestone/Firestone, Inc. Tires Products Liab. Litig., 155 F. Supp. 2d 1069 (2001).

Federal Trade Commission, the various administrative agencies are making their mark using huge fines after and before the harm becomes apparent. We are seeing parallel changes in the criminal law system through restitution.

We have to recognize that given the different kinds of cases, different kinds of institutions have to handle them. And where the other institutions are not yet available, then I think we have no alternative, except, as in an Agent Orange case, to do something that corrects, temporarily at least, the defect that we face as a community and as individuals.

Moderator

The question that I wanted to keep us focused on at this half is, until the new world is developed, how do we feel about the strong judge doing it on the fly. That is what is happening, and it by necessity involves many doctrinal and technical decisions and choices that have been attacked and criticized in the law reviews and in the mandamus petitions.

And the second question, which you are raising now, is something which I think is very important, which I hope we can get to. I see that Margaret Berger had her hand up.

Professor Berger

Yes, in part, what I was going to say the judge has said. I really think that what—and Aaron's remarks pick up on this—is that advocating that you apply to mass torts the principles that apply in a totally different context does not work.

I think there is a disconnect between the individual horse and buggy case and the mass tort. And insisting that the same theories of causation apply and then lead to the same remedies that traditionally apply in tort law, just is insurmountable. Because I think we are talking about such totally different risk and such totally different injuries and such a different involvement on the part of society with regard to these mass incidents as compared to the individual defendant, that I don't think the system works. And I think that the class action, at least, gives one a vehicle for saying we can somehow manage to distribute over a group of people, which takes away some of the problems.

And when you have a strong judge who perhaps can get state courts to coordinate with him, you alleviate somewhat what Judge Freedman was talking about. That you are going to run out of money in one place before you get to the other. And certainly I think the asbestos cases, with their enormous transaction costs, really demonstrate that something is very awry in the way in which all of this works. We need to think through what responsibility should mean at this point in time. I know Tony doesn't want to speak yet about the future.

But I think that we have seen that unless one somehow keeps the lid on the tort system and its inflexibility with regard to these issues, one really can't do any kind of justice. And rough justice, I think is far better than no justice at all.

Moderator
Peter Schuck?

Peter Schuck
Well, as I listened to your manifesto to Aaron, I was reminded of two words uttered by my late colleague Arthur Leff, which is, "Sez You."

In many of these cases, it seems to me you are something of a benevolent despot. Now if we are going to have a despot, I would just as soon he or she be benevolent, and you certainly are. But it is a despotism nonetheless. Now, that's a heavy statement and I have been very depressed just listening to all the references this morning to 9/11 and to the chaos in our society and slave labor and so forth. While Tony was introducing the panel, I thought that I would introduce a bit of levity by writing an ode to Judge Weinstein. Tony thought that I was scribbling notes very carefully attending to what he was saying, but actually I was engaged in the creative process.

So let me read this. And then when I have done that and perhaps won a little bit of goodwill from the judge, I have a couple of comments on his Illinois paper.[19] The last line of this poem has some words in a foreign language, but as I look around this table, I

[19] *See* Weinstein, *supra* note 5.

don't think there will be any translation difficulty.

Oh, hail to judicious Judge Jack,
Whose judgments new laws never lack.
Towards claimant he'll mass, his actions have class,
For plaintiffs' insurance he'll stack.
Oh, hail to Weinstein, Jack B.,
Whose work product shames you and me.
Strong trial lawyers cower before his robed power,
Especially when he cuts their fee.
Oh, hail to his corpus so weighty,
After all, the judge just turned eighty.
Yet the freight train named Jack,
Still roars down the track,
While above beam his Bubba and Zady.
Does anybody in the audience need a translation?

Okay, I did have some comments on the lecture, which is, of course, very provocative and makes some very good points and I think calls attention to possibilities for a forum that we really ought to take very seriously. I just want to make three very brief structural observations in the spirit of skepticism or refinement, as you like.

First, it is an amazing coincidence that each element of Judge Weinstein's proposal has the likely effect of increasing the power of the judge. I don't know how this happens, but it is amazing how this pattern emerges. The theme of this is coordination and cooperation. And who will the coordinator be? It is almost certainly going to be the judge.

Now, cooperation and coordination are very important elements of governance, but one person's coordination and cooperation is another person's power grab. So the question is: who is going to be the coordinator? Which incentives will animate that coordinator? Somebody is going to be exercising power over others, unless this cooperation is to be entirely voluntary. And Judge Weinstein has provided us with some examples in which apparently cooperative coordination of the three systems—he says that actually there is a fourth system, ADR—seems to have made some progress.

Another point is that in a decentralized system like ours, there

is a lot to be said for mixed institutions, for redundancy, for independent sources of initiative and decision. Even though mixed institutions will almost inevitably create what seem like chaos, inefficiency, and to some degree, lack of coordination.

In a system like ours, and given the political values that this society cherishes, that is a good thing. This doesn't mean that it is the optimal thing and it certainly doesn't mean that the mix, the precise mix of power and influence and institutional weight that characterizes the existing system of cooperation is the right one. I think that Judge Weinstein has made an excellent case that it isn't. But I don't doubt for a moment that we need a certain degree of institutional competition, lack of coordination and independent initiative even at the price of some chaos and inefficiency.

Moderator

Thank-you. Now, Deborah, you are the next speaker. I wanted to ask you a question related to this, which is, given what Professor Twerski said, do you think, based on your experience in studying class action settlements, what we have is, in fact, the best approximation of what people should have gotten had we had infinite resources and they were able to prove causation and liability? Or is it just that we are basically taking money from a nice big pocket and giving it to victims of misfortune?

Ms. Hensler

Thanks for that question. I think based on the research that I and others have done about settlements and class actions, one would have to say that the outcomes are tremendously diverse. Sometimes the outcomes provide considerable benefits for the class, one could argue. Sometimes they also provide social benefits to consumers and others beyond that.

Other times it is hard to see what benefits have been created for the class or society that are commensurate with fees that have been obtained by plaintiffs' attorneys. And consistent with the discussion that has been going on, I think that the outcomes of class actions depend very critically on the actions of the judge. According to my research, a strong judge that takes his or her responsibility under Rule 23 seriously and scrutinizes settlements,

provides for true hearings on the fairness of the settlements, and allows for objectors to come in a proper fashion is more likely to obtain a good settlement for the class.

A judge who, instead, is focused on simply settling a case and getting the case off the calendar, is likely to see a very different outcome. And that brings me back to the more general issue that Tony had raised for all. With regard to strong judges the question is, of course, a strong judge for what? A strong judge can be focused primarily on settling a case without regard to the merits of the settlement. Judges do have substantial powers to press those settlements and particularly in mass litigation with all the conflicts that Judge Weinstein has written about and spoken about this morning, there are great pressures to settle and to go along with that judge. So, I think when we speak of the "strong judge" piece of this paradigm of governance through private litigation, we have to raise questions about this despotic judge, as Peter called him, and what purpose the judge is serving.

I also want to raise one other point that hasn't been raised so far. And that is democracy incorporates notions of representation and notions of accountability. And as one of the first commentators pointed out (it may have been Ken), the model we are really talking about here is a model of strong judges and attorneys working together with that strong judge. If those attorneys don't truly represent the interests of their clients, if instead, they represent primarily their own interests, and if neither the judge nor the law require those attorneys to be accountable to those whom they are supposed to be serving, then there is a very important dimension missing from this notion of bottom-up democracy through the tort system.

Moderator

Well, by happy accident, the next two people I have in my list are, in fact, David Vladeck from Public Citizen and Professor Burt Neuborne, who both I think have something to say about that.

Mr. Vladeck

Thank-you. I agree very much with Professor Hensler. The question is not how to strengthen the role of the judge in

overseeing class action cases; judges have ample power already. Rather, the question is how to ensure that judges are invested in just outcomes. We have seen far too many class action settlements that do not achieve justice pushed through and approved by strong judges.[20] To be sure, settlements are effectuated, dockets cleared, class counsel collect their fees, class members get coupons or some other trinket that passes as value, and defendants purchase the res judicata they seek.[21] But I doubt that settlements of that kind advance the ends of justice or instill faith in our judicial process.[22]

It seems to me that when we discuss the future of mass torts, the hard question is—compared to what? Is there any alternative but to try to perfect this imperfect system? I submit that the answer is no. No one can convincingly argue that we should go back to trial by jury of each individual claim. That is not an option. We would never finish trying asbestos cases, let alone the Fen-Phen cases, or even the Sulzer hip replacement cases, which now involve some six thousand class members. No one wants to try six thousand individual cases involving the same product and the same claims of injury.

But we cannot lose sight of the fact that today's system is seriously flawed, especially when measured from the perspective of the individual claimant. One minor but telling illustration is the vocabulary we use to describe the mass tort litigation process. We speak about "inventories," not about people. Judge Weinstein

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[20] To give an example, the settlement in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), was devised by and sheparded through the litigation process by a strong judge. But as the Supreme Court ultimately concluded, the settlement impaired the due process rights of class members and absent future claimants. *Id*.

[21] *See* In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied sub nom.* General Motors Corp. v. French, 516 U.S. 824 (1995) (rejecting coupon settlement in case challenging safety of certain GM pick-up trucks).

[22] *See* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003); S. 274, 108th Cong. (2003). To the contrary, cynicism about class action settlements has sparked a serious backlash against the use of class actions that has taken many forms, including proposed legislation to permit the removal to federal court of many class action cases brought in state court. *Id*. *See generally* David Vladeck, *Trust the Judicial System to Do Its Job*, L.A. TIMES, Apr. 30, 1995, at M5.

started today's discussion by emphasizing the need to ensure that every individual plaintiff feels that he or she is getting justice. Too little attention is given to that imperative. Indeed, lawyers talk about mass tort cases in ways that abnegate the interests of the individual tort plaintiff whose claim has been aggregated, commodified, and often homogenized (at the expense of the plaintiff who has a superior claim) as part of an inventory or class action settlement. The way we speak about these cases reflects the way we as lawyers and judges feel about them.

So, in my view, the question that we must explore today is what can we do to make the mass tort system we are stuck with more fair and more just to all concerned. And to do so, we must be careful to hold paramount the interests of each individual claimant, even if it means sacrificing a measure of efficiency.

Moderator
Mr. Neuborne.

Mr. Neuborne
Thank-you. I am just going to confine my remarks in the first half, to retrospective issues. We will talk about the future later.

I want to say five things. That is the law professor in me. First, having just lived through five years of intense work on class actions with Mike Hausfeld (Mike was the invaluable person with whom I worked on the Holocaust cases), I want to announce an empirical fact. Every time I did any research, every time I confronted a problem, every time we thought about how to structure, what to do, what the problems were, the parameters of both the law and the problems were set in Judge Weinstein's remarkable corpus of work. So, when we talk about the future, we talk about where we go from the plateau that Judge Weinstein has built for us.

Second, I wanted to say something about heroic judging. You know, Ronnie Dworkin's work on human rights assumes the existence of Hercules as the judge.[23] I know he was thinking of Judge Weinstein when he wrote that. I mean, Judge Weinstein is

[23] *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

the model of the Herculean judge; a judge who is able to move mountains.

But that doesn't mean that only he can do it. I want you to think about the model of the founding generation. The founding generation was a generation of giants. If we had the choice today, we would be governed by Jefferson, we would be governed by Adams, and we would be governed by Washington. The "devolution" from the founding generation to the existing generation of political leaders is the strongest argument I know against Darwin.

But that doesn't mean that only the founders could practice democracy. We have learned an immense amount from the work of a heroic, Herculean judge. What we must do, as Shira Scheindlin points out, is learn from it, move forward, do the best we can, but certainly not say that this is a jurisprudence that only Jack Weinstein could carry out, because he was so uniquely positioned to help us learn about it.

Third, what does it mean to be a "democratic institution"? What does the judge mean, I think, when he says that we have "democracy" here? We want to avoid a confusion between democracy with majoritarianism or majority rule. The judge is not talking about majority rule; he is talking about democracy, as a metaphor for the fact that American institutions, when they work best, work because they don't simply involve resolutions by the political majority about what is efficient, expedient and a good idea.

In the American model there are always going to be individual voices saying, "But what about me? What about my individual stake?" This solution may be fine for society in general, but "what about me?" Or, this solution may be fine for large corporations, but "what about me?" What makes the system so democratic is that there is essentially a portal through the good offices of a lawyer, for the individual voice of "what about me?" And I think that makes the system work much better. In the second hour we will talk about how that individual voice gets joined with other voices.

Fourth, there is Peter's suggestion that the judge is a benevolent despot. Let's not lose track of the fact that the vast bulk of what the judge has done over his career is to foster settlement.

Judge Weinstein builds stages on which people can't escape from his courtroom, so that they have to discuss resolutions. I mean, that was DES, that was Agent Orange.

If they don't like what he does, if you can fight through the interlocutory appeals rules, which, by the way have been changed I think in large part because of him. You can get up to the circuit and escape from this man who won't let you out of the room until you sit down and talk to the other person about whether this can be resolved in a just way. Now, that's a very narrow category of despotism. He does not impose his own solution on you. What he does is he imposes on you the obligation of sitting down around a table and seeing if a solution can be resolved. If that is despotism I think we need some more of it.

And then finally, let me respond to Aaron Twerski's provocative and very thoughtful notion. Just before Jack was appointed to the bench, Aristotle wrote, Nicomachean Ethics. I have written about Jack in the *Columbia Law Review* that of almost anybody I know he balances the three demands of Nicomachean Ethics: the good, the just, and the formal.[24] In Nicomachean Ethics, Aristotle wrote that all of us have the challenge of balancing the good, the just, and the formal. The "good" being the best for the society; the "just" being the right of every individual to be treated in accordance with his just deserts; and the "formal" being a scrupulous adherence to the rules. A great judge keeps all three balls in the air. A great judge knows that there is the requirement of the greater good for the society, the individual right of each person, and an obligation to be scrupulously loyal to the system of law.

There is a tendency among all of us to get sidetracked on one of those ideas. Some of us become obsessed about the primacy of doing justice to every individual regardless of the effect on the society. Some of us say that whatever the society's needs are has to take precedence, regardless of the effect on the individual; and some of us say it is not my job to make those judgments, I will just follow the rules laid down by someone else. You show me a rule, I

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[24] *See* Burt Neuborne, *Innovation in the Interstices of the Final Judgment Rule: A Demurrer to Professor Burbank*, 97 COLUM. L. REV. 2091 (1997).

will apply it, and I don't care whether it is good or just, as long as it is formal.

Our greatest judges do a balancing act throughout their careers of keeping all three balls in the air. That is inevitably unruly. It is unruly because somebody who goes at it from only one of those three ideas will always say the judge is ignoring that ball, and advantages the other two. But a great judge respects all three ideas, even at the expense of consistency.

The reason we feel as we do about Judge Weinstein, is that more than any other American trial judge of his generation, and with an intellectual capacity that forces us all to take cognizance of it, he has kept those three balls in the air. And what he is doing on his eightieth birthday, quite remarkably, is tossing those balls to us and saying, "You keep them in the air too. Let's talk about how we do it in the future." That's why I think this is such a wonderful, wonderful opportunity to say thank-you.

Moderator

I feel like I am balancing the good, the break and the lunch. Now I think that we should go to about 11:15, because I have a lot of people who want to speak. And then we will break, and then we will meet again for the second half. Next to speak is Mr. Rheingold.

Mr. Rheingold

I am really glad to hear that the more recent speakers don't think we have a broken system that needs radical repair, notwithstanding what Shira has said about abusive and duplicative class actions, she can't name one in mass tort.

Ms. Scheindlin

How can you say that with a straight face?

Mr. Rheingold

We don't even have class actions in mass torts according to the Supreme Court.[25] And the system works well. And they just fear

[25] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

that fifty state courts are all going to do the same discovery of the defendant that the federal court and MDL is doing. It just doesn't happen. It is a bugaboo that the opponents of the current system would like to bring forward to us. But I think that with Judge Weinstein's approach and what many judges have done in following Jack's work, they've come to realize that through coordination and cooperation these problems can be solved. So, I am glad to see at least a whole lot of people are not for a radical solution to a non-problem.

Moderator
Mr. Hausfeld.

Mr. Hausfeld
I think, picking up on what Burt has just said, in order to judge the viability of what has occurred in the past as well as what is ongoing in the present, we have to look somewhat towards the future and David asks the question best, what is the future of mass torts? And putting aside the legal aspects, I think the future that there will be mass torts is great. And now what is our responsiveness really to that challenge?

It was said before that Judge Weinstein is a strong judge actually crafting his solution and his approaches on the fly. I disagree with that, totally. I think the genius of Judge Weinstein is that he has taken fundamental principles literally of natural law, I think the terms were ethics and philosophy, and applied them pragmatically to situations where there is a responsible actor and injury to a mass number of individuals, but a difficulty is in arriving at what the just solution is.

He also said something this morning that I think we all tend to overlook. Not only are we trying to apply principles that were developed hundreds, if not thousands of years ago, in an agrarian society but to a society which has grown to the point where individual actions don't affect only small numbers of individuals but huge numbers of individuals. So as society has evolved, is there not an equal responsibility on the part of the law to evolve to correspond the responsiveness of the law to the difference in society?

And Professor Twerski, what I get from the issue of causation is one which I think we are faced today with almost a paradox. When we first put forth the proposition that the Swiss banks, for example, were involved in a mass tort, it was laughed at because no one could make the connection, at least at the time, between the financing of a war of aggression and the victims of that war. And now we see today what the government is the major proponent of and the world is focused on, is tracing the financing for acts of terrorism. Not because those who provide the financing are the perpetrators of the terrorism, but they do provide the causal link.

So, how do you respond to the situation where you do have a mass victim and a responsible entity, if you don't have a system which is going to allow the victim to hold that responsible entity accountable?

Again, in some of the Holocaust cases we saw what we thought was a very perplexing attitude on the part of some of the perpetrators. And that was, look, let's put this into the political arena, let's have an international arbitration, let's discuss this in the legislatures, but whatever you do, whatever you do, don't raise this question in a court of law. Why not? Between the three branches of choices that we have, the political, the administrative, and the judicial, would we really want to trust our individual rights on fundamental issues that affect not only our freedom, our liberty, but our well-being to just the political and the administrative?

So, the issue as I see it from the perspective that we were talking about is, is the judiciary an appropriate forum in which to air these issues and which to attempt to resolve them? And I find that the principles that Judge Weinstein has applied are the principles that I feel most comfortable with. And as opposed to seeing him as a lone dissenter at this point or the lone frontiersman, I would suggest that what we need are more giants.

Moderator

Thank-you. Sheila.

Ms. Birnbaum

I am going to pass my time to Barbara Wrubel, who hasn't had a chance to speak and I know her views will be similar to my

views.

Moderator
Well she's the next one on the list.

Ms. Wrubel
Words in praise of the tort system. I don't want to make retrograde arguments, but I think strict rules of proof, of causation, of admissibility of expert testimony lie at the heart of what we are all easily calling mass torts.

Mass torts are massive wrongs. It is not just mass numbers of people who claim they may be injured. In many of these mass torts, we don't know if people are injured. If they can establish their injury, they ought to be able to do that. They ought to be able to come forward with competent medical testimony to establish a causal nexus between their injury and some wrongdoing on the part of the defendant. Not just that the defendant made a product, a drug, for example, but that the defendant wrongfully failed to disclose the risks associated with the drug. I don't understand why we need to relinquish the zeal with which we demand proof of causation, proof of injury linked to a wrong on the part of the defendant.

Judge Weinstein
General or specific?

Ms. Wrubel
I say both kinds of causation. If you have a system where you say, well, we can sort of prove general causation, but the individual can't prove it in the individual case, then I say, good, let's go to an administrative system. If there is going to be a shortfall in proof, why don't we have an administrative system that allocates the money in a fair way amongst all of the people that claim to be injured. That you ought not have the ability to concentrate massive litigation in one place. You ought not have a shortfall in the proofs, while giving a free ride for all on a claim for damages.

We all know, for example, that punitive damages are a wild card. I enjoyed so much your article, because I kept dreaming of a

day when we would take punitive liability and have it resolved outside the tort system. These kinds of damages are designed to vindicate society's interest in deterring bad conduct. The bounty shouldn't go to plaintiff number one or plaintiff number two or plaintiff number twenty. It should go in some way to society. We should punish defendants that do bad things but put the issue into an administrative or criminal proceeding and not keep it in the tort system, which makes massive litigation concentrated in one place too enticing to the plaintiffs' bar. There is too much money to be made, and it's too coercive on the defendant.

After all, in all these mass torts, somebody is paying for this. In *Agent Orange*, it may be that the chemical companies did bad things. But it has been impossible to link those bad things to Dioxin. If that's the case, why is there this need to compensate people? They should have been compensated by the federal government. These were soldiers, the federal government should have done it. Private industry? I don't think so.

Look what happened in breast implants. That litigation bankrupted a wonderful chemical company.[26] Hundreds of millions of dollars were spent before a rule 706 panel concluded a failure of a causal nexus.[27]

Look at diet drug litigation. Does the science as we now know it support a multibillion dollar liability? American Home Products just reported a $13 billion reserve for the litigation. When you can agglomerate all of these claims in one place without requiring proof that this individual was caused an injury by a wrong of the defendant, then I think it is a highly wasteful and inefficient system.

Judge Weinstein, what I found so provocative about your article is that there may be a way to share responsibility for compensating people that are truly injured and there may be a way

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[26] *See In re* Dow Corning, 211 B.R. 545 (E.D. Mich. 1997); *In re* Silicone Gel Breast Implants Products Liab. Litig. (MDL 926), 793 F. Supp. 1098 (J.P.M.L. 1992).

[27] *See* National Science Panel, Silicone Breast Implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction (Nov. 17, 1998), *available at* http://www.fjc.gov/BREIMLIT/SCIENCE/report.htm (last updated Dec. 15, 1998).

to do it partly through the tort system and partly through these other systems.

Those are my comments.

Moderator

Thank-you. Now we have four people and we should break soon. I have Professor Mullenix, Judge Scheindlin, Professor Rosenberg, and Judge Freedman. I think we can get through at least two of you. Professor Rosenberg, you will get the last word and then we will start with Judge Scheindlin and Judge Freedman in the next session.

Ms. Mullenix, you are next.

Professor Mullenix

I have just been sitting here and I absolutely cannot contain myself at some of the outrageous statements I have heard.

I will say one or two things about what people have said, but I do want to come back to the core question as you framed it, which was, I thought, very interesting. What are we to think about the phenomenon of the strong judge dealing with these problems on the fly? There are one or two things that people haven't said that I think are worth thinking about. Which is, why do we have this phenomenon, and how does it come about? I think that there is at least a kind of overarching systemic failure that nobody has talked about.

Peter Schuck focused in and said we are talking about this role of the activist or strong judge. A lot of this has to do with the need for coordination. And this dovetails into what Sheila recognized about this problem, of duplicative and overlapping class actions. There are a lot of people in the room who, a week ago, were in Chicago and attended the meeting of the Advisory Committee on Civil Rules, where the proposed amendments to Rule 23 are underway. There were a series of proposals to deal with this problem of duplicative and overlapping class actions, and there were proposed amendments or changes to the rules that are designed to deal with precisely these problems. One was a model rule that would adopt or codify preclusion doctrines. Then there was a separate proposal that, by rule, would give injunctive power

to the federal courts.

We were asked by the Advisory Committee about these proposals. Five law professors including me—and I am a person who thinks that the Advisory Committee has the most expansive powers imaginable—came to the conclusion that those proposals for dealing with duplicative litigation would violate the Rules Enabling Act[28] and could not be done by rulemaking. I told the Advisory Committee that even I do not think you can do this by rulemaking. But I think it needs to be done by statute.

So here is where I think the nub of the problem is. We are very, very good at identifying the problems. We've written about these problems to death. We have had conferences about these problems. We know what the problems are. The question is, how do you solve them? We have come to the conclusion that you can't solve them by rulemaking. The way that you need to approach solving these problems is by statutory solutions, which means that Congress has to do something.

Where does that leave us? We all know very well that Congress has not been solving these problems. The multi-party, multi-forum jurisdiction act has been reintroduced every year since 1988.[29] The various kinds of statutory proposals that have been introduced to deal with these problems never go anywhere. So we don't have a rule solution, we don't have a political solution. We have activist judges because the other mechanisms by which we might do something basically have not worked. We have to ask ourselves, what are we thinking or what are we doing about that?

I just want to comment on Burt's democratic model of class actions. I was absolutely amused when he said, in describing this democratic model, it might work so well that the system of entrepreneurial plaintiff lawyers encourages democratic voices to come forward to speak. They are the ones who come forward to ask the question, "what about me?" But we are hearing different things when we hear the question, "what about me?" When Burt hears "what about me?", it is the lawyers saying "what about me?"

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[28] 28 U.S.C. § 2071 (2003).

[29] *See* Pub. L. No. 107-273, §11020, 116 Stat. 1758, 1826-1829 (2002) (codified as amended at 28 U.S.C. §§ 1369, 1391, 1441, 1697 & 1785).

for the claimants. When I hear "what about me?" it is the lawyer saying, "what about me?" for the lawyers. That's my problem.

This model of participatory democracies from the bottom up is basically a kind of the worst form of banana republics, with autocrats running around cutting corrupt deals, absconding with the loot for themselves, and then convincing the poor and impoverished citizens that something has been done for their benefit. And that I have obviously spent too much time in Texas, Alabama, and Louisiana. I just have a different vision of what you are all taking about.

Moderator

Okay, this is what I propose: the last person I want to call on is Judge Scheindlin. Well, you can defer.

Judge Scheindlin

I do.

Moderator

Okay, Professor Rosenberg, you will get the last word and then we will start with Judge Scheindlin and Judge Freedman in the next session.

Professor Rosenberg

I don't think it helpful in seeking solutions to social problems to start from a priori postulates of the "good," come-what-may. We've been told that litigation is a form of "democracy" and that's good; that some class action settlements "commodify" individual loss as well as breach "principles of tort law" and both are bad to do; that mandatory class actions deny the "right to a day in court" and that's bad too; that congressional tort and related procedural reform would destroy "states' rights" and "federalism" and that could be bad or good depending on whether you like the status quo. Even if I knew the meaning (and I haven't heard clear definitions) of "democracy," "commodification," "day in court," "plaintiffs' rights," "loss," and "federalism," to list a few terms being tossed around here, I would reject the notion that these or any concepts should command obeisance from law makers,

including courts. They don't even exist as actual things—they're inventions of our minds that we constantly modify as required in ordering (in multiple senses) the world.

What I think we should start with is what the law should be aiming to do and that's a "should" and normative statement. And I think we might even agree on it and that is, the law ought to aim to improve the welfare of individuals. Now, how is the welfare of individuals improved by the law in connection with mass torts? Well, we have a good deal of evidence about what people want a legal system to provide when it is dealing with accident risk. It wants effective control of the risk. In tort law we call that deterrence. I'll put aside the question of whether judicial sanctions are of any practical use in deterring homicidal barbarians from perpetrating the holocaust, the 9/11 attack on the United States, et cetera.

When people are injured and have suffered major loss as a result of an accident risk, what do they want? We have trillions of dollars of evidence of what they want. It is called insurance. Now, tort could supply insurance but it is notoriously poor at doing it. And, in addition, most people already have it. So, what tort does when it compensates is pay people extra money, in addition to the insurance they already have. Now, if they wanted more insurance, they could have bought more insurance from a commercial supplier, or they could have gotten it from the government by paying higher taxes they evidently didn't want to. Why would they want tort to supplement the insurance they, themselves have chosen not to augment? Of course, we never even asked them.

We mandate it. For example, products liability rules generally preclude consumers from contracting out of "tort insurance" so they won't have to pay its "premium" in higher product prices. The same is true for the "tort insurance" mandated by the tort liability regimes governing workplace, medical, and many environmental risks. Tort insurance is notoriously much more costly and risky than commercially and governmentally supplied accident insurance that covers virtually everyone in the United States. Moreover, in products liability and many other contexts, tort insurance charges a distributionally regressive premium—"insureds" pay the same amounts in higher prices and lower wages and employment

benefits for coverage against the same types of accidents, but they receive differential payouts depending on their relative income and earning capacity (with social status and similar extra-loss factors also influencing damage awards). Of course, some people can't afford commercial insurance and must rely on what the government provides. However, this only means that they certainly can't afford the higher costs and risks of tort insurance. The fact that we mandate it doesn't matter that it makes people better off.

And this whole conference, so far, has been turning on the notion of compensation. How do we compensate? How do we individualize this and that? People don't want that from the tort system if it comes at extra expense and if it in fact isn't very good insurance. We don't see them buying it. Tort insurance is a total waste of scarce social revenues. If tort law usefully promotes the social objective of cost-effectively reducing accident risk, then damages should be assessed as a "fine" for deterrence purposes. After paying the lawyers for their effort, the remainder of the fine should be devoted to increasing the coverage provided by commercial and government insurance—for the specific plaintiffs or, better still, for everyone. People are better off with better coverage for the general risk of death or disability they face from all sources—non-tort (above 90 percent of total) and tort (below 10 percent of total)—than the alternative we presently impose: providing better coverage for the tort risk of death or disability than for the non-tort risk.

Judge Weinstein

If you look behind you, you will see where a million and a half people live who are just about making it to their morning breakfast. They are not buying insurance or anything else because they can't even afford their next meal.

Professor Rosenberg

Judge Weinstein, you forced them to buy insurance when your legal system said we are not going to pay attention to the contracts that you might write with a product manufacturer that says, we won't pay your compensation, we will reduce the price of the product, you force them to buy insurance which you have just

admitted they can't afford. Why did you do that?

Judge Weinstein

You are assuming a rationality and a middle class capacity that simply doesn't exist for two miles out.

Professor Rosenberg

Judge, I am assuming at this point that you are running the world. I do want you to run the world and I am asking you to run it according to the best understanding of what makes people best off.

Let me switch for one second and say something positive. What people probably do want from the tort system, although I am quite skeptical of its capacity to supply it, is deterrence. Effective deterrence. That tells us we don't want this causal individualization. It also tells us it doesn't even make any sense because in mass tort cases the mass production process that produced the risk in the first place never had any sort of individualized relationship with the prospective victims. Causal individualization is an incoherent idea in these cases because they all arise from mass production risks, which have no scientifically determinable relationship to any specific individual in the exposed population. There isn't any one-to-one relationship that can be coherently adjudicated. It is a waste of time, because we can do deterrence without it, and is almost intellectually barren as a thought.

Moderator

Let's reconvene, I would say twenty minutes break, that's what I say. Thank-you, very much.

(Recess taken).

I would like to say that I am speechless with appreciation and with pleasure. This has been really a lot of fun for me. Truly it is, as I said in the beginning, the law professor's fantasy.

As I promised, there are a number of people who wanted to speak on the last topic before we move on to the second topic, and I promised that they could speak. So, the list I have is Judge Scheindlin and Judge Freedman and I believe Ms. Birnbaum.

And then we will stop. I am going to ask people to present

these five minute thought pieces and then we will go back to the discussion. Judge Scheindlin?

Judge Scheindlin

Well, I have been listening hard and we have used the word democracy. I have been thinking about that. Clearly a judge acting as a legislator is not a democratic concept and we really must recognize that. The democracy that we live in has a tripartite system, and we are supposed to have the legislature pass legislation. And the problem is that they haven't. And as you said, Professor Mullenix, if they haven't, we have a cap. But the question is, is the judiciary qualified to fill that gap if they have not been elected to make the laws?

So, I just think of models where there are laws and where we can do some of the same techniques because the law allows us. For example, in the securities area, we don't have the problems of having choice-of-law and national consensus law and overlapping state and federal jurisdiction. We just have the cases, and they are an interesting model.

In my court is the recent IPO cases, where we have 950 class actions filed in one court. We have all the potential chaos—yes, but the chaos that could come from allowing 950 class actions to reside with forty judges and inconsistent rulings and no coordination of discovery would be unbearable. Instead we use techniques to bring them before one judge and consolidate them.

But it is easy, we don't have the mass tort issues that we have all alluded to here. And so my only point was if we were really thinking democratically, we would have to be looking toward more of a legislative approach, which I think is a segue to your second topic. Congress has a responsibility and I know they have been ducking it. I understand that.

But as we move forward to the second topic, we've got to go there. We've got to have that legitimacy and not become legislators ourselves.

Moderator

Judge Freedman.

Judge Freedman

Some of us were elected. Or at least one of us. But that doesn't mean that being a judge is democratic. However, I would like to say a few things, just responsive. There is no question that what Judge Scheindlin said before about special masters has been critical—in the way at least I functioned—in all of the mass torts that I have in New York. And that is clearly based on the house that Jack built.

Without Jack, I would not have been so inspired. I would not have understood the role of special masters, nor would I have had the moxie to appoint them in New York State Court, where there is no provision for special masters.

I just did it by fiat. I did it in part because everyone knew Judge Weinstein did it because the model was so good, and somehow the lawyers have gone along with it and have agreed to pay for the special masters. They are absolutely essential because it is before the special master that the individual litigant really has his or her day in court—the opportunity to tell his or her story. And I think that that's essential because we talk about the opportunity for individuals to tell stories and that being the fair and just way of doing things.

That's a myth. There are no cases that get tried. What is it? 5 percent of the civil cases get tried—3 percent now. And that doesn't mean that those people come into court. Most lawyers have large inventories of cases. They may be pedestrian knockdowns or intersection collisions, but they work with them. The lawyer who appears in court is not the lawyer who has anything to do with, has ever met the client, or who knows the client. The lawyer who settles the case is not somebody who has any personal relationship with the client at all. That's the reality of tort law in the United States now. It has nothing to do with individuals getting their particular days in court.

So that the massing and the allocation and the way it is done by special masters—wonderful special masters like Ken Feinberg—is essential to achieving that individual justice that we talk about. Just a couple of other points.

Causation has been addressed now I think by the *Daubert*

hearings.[30] And although *Daubert* does not apply in the state courts, most—I think—of the state judges are now following, for example, the 706 findings of the federal court. And the 706 panel was instigated by Judge Weinstein. We wouldn't have had it without him, yet the whole breast implant litigation changed as a result of that.

So, I think that fear that you all, that Professor Twerski and Barbara Wrubel and Sheila raised concerning lack of causation is no longer such a fear. I think with a 706 panel perhaps *Agent Orange* might have gone differently, but that was then and this is now. *Daubert* has brought a tremendous change.

At the same time, our Supreme Court, while wanting to take away from the jury in *Daubert* has gone berserk—I think, if you will forgive me—in *Amchem* and *Ortiz* by not allowing for national class actions.[31]

So we are not only dealing with legislative lethargy, we are dealing with a Supreme Court that maybe just not understand what the real problems out there are. And I don't know if you professors can make them understand it. I don't know if anybody can, with the exception of Judge Breyer. I think the elephantine mass of asbestos cases, that cries out for legislative solution, is just not going to get legislature redress. The Supreme Court should understand this.

Moderator

Well the last two people on this subject will be, I believe, Ms. Birnbaum and then Professor Twerski. Hold on—Peter, do you want to jump in on this topic? Or do you want to speak on the second half?

Professor Schuck

On this topic.

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[30] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (implementing a new test for the admissibility of expert testimony that directs the trial judges in the lower courts to use).

[31] Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); Oritz v. Fibreboard Corp., 527 U.S. 815 (1999).

Moderator

Okay, then we have three. Ms. Birnbaum, Professor Twerski, and then Professor Schuck.

Ms. Birnbaum

I would like to talk about several myths. My problem with mass torts today is that there are large numbers of people who are bringing suit, either in a class action or otherwise, who have no injuries.

We are paying millions and sometimes billions of dollars that could be used more productively, for example, for research and development of new drugs and new products, rather than for paying people who are not injured. And let us assume that in the diet drug litigation, that there were several people, hundreds of people who may have been injured by the drug in some way. I think everyone will have to admit the vast majority of people who were involved in the class action settlement had no injury. They just took the drug. Some of my friends who took Fen-Phen are members of the class and are receiving money, small amounts of money, but money that adds up to millions and millions and hundreds of millions dollars. They have sustained no injury and should receive no compensation.

We have an asbestos litigation crisis in our courts because we permit hundreds of thousands of people to come into the courts and sue without an injury, or any functional impairment.

Asbestos litigation is now in its fourth generation with hundreds and thousands of new companies being sued in the litigation who were never sued before. We have forty-five companies in bankruptcy because of payments to thousands of people who have no injury or impairment. They are uninjured in the traditional tort sense.

Why do these cases get settled? Well, when eight thousand cases are instituted at the same time in places like West Virginia, Texas, Louisiana, Mississippi, where some of us spend great a deal of our time, if you don't settle these cases the jury verdicts are usually substantial. The company can be adversely affected in a substantial way.

The economic coercion on American corporations is significant. We have wasted hundreds of millions and billions of dollars in a system that has become irresponsible because of the aggregation of huge numbers of cases that are impossible to try.

I am all for paying injured victims. For example, if there are people with mesothelioma, who have suffered a substantial injury, they should be recompensed.

The problem is not so much transaction costs, which are substantial. There have not been huge transaction costs in asbestos for five years, because there have been mass settlements. But the presence of hundreds of thousands of cases that are in our courts that should not be in the system, is causing a crisis. This mass of litigations is creating all kinds of problems for the judicial system and forcing corporations into bankruptcy.

Moderator

Well, this segues us into a causation question. Aaron?

Professor Twerski

I wanted to respond, basically, because I have been under attack. Number one, in *Agent Orange*, I don't think we got close to generic causation.[32] And that may be true about breast implants as well.[33]

David made the point that causation is not a problem because these cases are never tried. Well, that's the point. They are never tried because no defendant can afford to try causation in a class action setting.

Judge Posner said it well in *Rhone-Polunc*: if you are trying individual cases and you win ten out of twelve or thirteen out of fourteen and you are forced to roll the dice on the entire company based on one case in a class action, the risk is simply too high.[34]

Now, I would really like to align myself with Margaret. I am

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[32] *See In re* "Agent Orange" Product Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

[33] *See In re* Silicone Gel Breast Implants Products Liab. Litig. (MDL 926), 793 F. Supp. 1098 (J.P.M.L. 1992).

[34] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

not arguing for the 1840 model role of causation. But I think that there is a causation question that has to be thought through, and I don't think we have thought it through yet. And it has to be tied to issues of fault. It has to be tied to issues of knowledge. If we are going to try mass torts, we are going to have to rethink what kind of causation model we want to have.

So, I do not want to align myself with the Neanderthals on this issue. But it is absolutely imperative that we seek out a new model for causation.

Some courts have fussed a little bit with the issue of proportional causation, but that doesn't fully answer the problem.[35] What ought the causation rules be for defendants who seek to remain ignorant about the causal connection between their products and future injuries? That may have been taking place in the breast implant cases. What does compensation look like in a world where causation cannot now and may not ever be determined? That is an important question that has to be faced. And it doesn't get faced right now. We profess allegiance to the traditional causation rules and they are not working. As a result we confront huge settlements which may or may not have any integrity.

So, I think we are going to really have to rethink the whole world of causation in terms of corporate conduct and what kind of compensation system we want in a world where we do not know and may never know the answer to the causation question.

Moderator

The last person on this subject is Professor Schuck and then we will move on to the next question.

Professor Schuck

I want to mention two logical errors that I see in this conversation and outside it. The first was exemplified for me by Judge Scheindlin's comment but other people have made it as well, and Judge Weinstein certainly affirms this constantly. We observe

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[35] *See, e.g.*, Herskovits v. Group Health Cooperative of Puget Sound, 664 P.2d 474 (Wash. 1983).

that Congress has not devised a legislative solution to a problem, and the inference is then drawn that Congress is irresponsible. Congress is immoral. Congress has been captured. Any sensible and democratically legitimate institution would craft the legislative solution.

I think that inference is illogical. It is illogical because there are lots of reasons why legislative solutions are not developed, some of which have to do with the fact that it is an incredibly complex problem. And because it is an incredibly complex problem, the solutions that lend themselves to legislative prescription may be worse than the status quo. It may also be the case that there is no political consensus on a solution. That is not capture. That is not irresponsibility. That's the way democratic societies work. We require a consensus on a solution—on how a problem ought to be defined and remedied in a particular way—before we legislate.

It may be that the background institutions are thought to be adequate to handle this, as messy as it may be. Which brings me in part to David Rosenberg's comment, which is that one of our background institutions is the insurance contract. Perhaps legislators think that this is a better way to address this problem because as he suggested—and I think his logic is irrefutable about this—poor people and victims are going to pay for the insurance one way or the other. They can get insurance through a voluntary contract arrangement, or they can get insurance through the mandated tort system. The insurance through the tort system, however, is not an insurance contract that any rational person ex ante would want to buy. After the accident, of course, it is a very different story.

So, there are lots of reasons why legislative solutions are not adopted, and I think it is wrong and in some ways rhetorically irresponsible to suggest that the fact that no legislation was enacted means that there is a void out there that the courts have to fill.

The second logical error relates to Aaron's point. In the *Agent Orange* case, you established as clearly as your judicial rhetoric could that generic causation had not been demonstrated, and you subsequently told me that the scientific evidence that has emerged

since then has fortified your judgment or causation.[36] I think you are absolutely right.

Why, then, did you feel that it was appropriate for you to castigate and excoriate the government for not compensating people whom you said have not been injured in the fashion that was alleged? The government has veterans programs, medical benefits, and so forth that were supposed to cover these injuries, but you are suggesting that the government had an obligation to go beyond that, even as you insisted that no causation has been established. I don't understand that; it seems illogical to me.

Judge Weinstein

Well, you've got to talk about a political issue as you do, compared to a private issue vis-à-vis the corporations.

As far as the corporations were concerned, it isn't true that there was no causality shown. There were the rudiments of a demonstration of possible general causality. Certainly not enough to show—

Moderator

National consensus causality.

Judge Weinstein

Certainly not enough to show that any particular person had been injured by this stuff.

Professor Twerski

Even epidemiologically, that was your point, that epidemiologically—

Judge Weinstein

Epidemiologically the case was not clear. Epidemiology is a science, as you know, that has much more pressure put on it than it can actually absorb.

The epidemiological studies then available and still available in most cases, do not show individual causation—except in the most

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[36] *In re* Agent Orange, 597 F. Supp. 2d 740, 775-99 (E.D.N.Y. 1984).

rudimentary kind of situations, as in certain types of cancers, mesothelioma from asbestos, certain types of lung cancer from smoking, and certain vaginal cancer from DES. In the main there is no epidemiology available that could show with sufficient clarity individual causation from Agent Orange.

But there was at least at that point a hint of possible general causality. We knew that poison was being put in the atmosphere that could have been avoided. And with the skin tests of mice and some of the other tests, there was the possibility of some form of general harm caused by dioxin from Agent Orange.

As far as the industry was concerned, so long as you didn't have to make a finding of direct causality to the person claiming injury, you could within limits say that it's probable you did this and this much general damage. Pay the damage and we will distribute it in a reasonable way. Whether that was right or wrong I am not sure.

But the political problem is different. The political problem, as it was right after World War I, was to assess certain causality on a basis requiring far less scientifically proved statistical relationships. Right from World War I, some diseases were considered as presumptively caused by combat. And in World War II, and now in the Gulf War, we are making the same kinds of decisions.

These are political decisions that I think are properly made in favor of certain categories of soldiers, air personnel, and sailors. You know, the people who are benefiting from the statutory changes include the deep sea sailors who never had any Agent Orange exposure, but there was some kind of a relationship between the diseases and their service.

Professor Twerski

But they had veterans' benefits.

Judge Weinstein

No, they didn't. They had general veterans' benefits. They didn't have veterans' benefits for those illnesses because they couldn't show that they were caused by their service in the Armed Forces.

The benefit system is different. There were no benefits at all for the families. Now, they are beginning, for the first time, to provide some benefits for the families.

The political decisions which gave greater benefits than pure statistical analysis would justify, seem to me appropriate. That's a decision that is democratic. It says this group of people suffered more because—maybe because they were injured—but at least because they were heroes and they think they were hurt and they might be right; and we are going to give them more. I don't see anything wrong with that.

Moderator

That's a really interesting place for us to transition, because in your pieces that you sent out to us, you explicitly call for partnering between the government and private attorneys as opposed to what happened in *Agent Orange*, where the government in some sense was an absent and unwilling participant, and we essentially had to use a lawsuit against the manufacturers to force them to accept responsibility.

In this second half I have a few people who have offered to give short reaction pieces on that theme, and then we are going to open it up again to the conversation we have been having.

The people who I have here are Mr. Hausfeld, Professor Hensler, Professor Neuborne, and Mr. Vladeck. So, Mr. Hausfeld.

Mr. Hausfeld

Cooperation implies an element of voluntariness, and sometimes it is difficult to achieve that voluntariness particularly with government attorneys, both by reason, let's say, of the nature of the assignment they have and of the type of case that they may be prosecuting.

Let's do the criminal case first. Many instances of mass torts arise out of situations where the government may act with a criminal indictment, and then there is a private civil case or mass tort cases filed after.

The difficulty that you have during the government investigation is that the government attorneys are normally consumed by, let's say, a grand jury process or an information

gathering process for which they are precluded by law from sharing that information with you.

Then, even after, there may be an indictment or a criminal case brought. There is a difficulty in them matching their obligations to pursue the criminal case with, let's say, a natural coalition with private litigants to exchange information.

There are witnesses who may want to go into a government immunity program or some amnesty program that they would not otherwise do if they felt that they were then being thrown to the private bar as an additional stop between the cooperation between the government and the private attorneys.

The concept of cooperation also now involves exchanges on an international level. In the antitrust area, which most people don't consider is mass torts but, you know, an antitrust violation is a tort. And there are such things now called global cartels.

What happens when there is a global cartel that operates, for example, out of Europe which has international repercussions that are only pursued in the United States? Can you get cooperation of international agencies to exchange or release information that they may have been gathering in the course of their investigations? Can you basically bypass Hague rules and get information without having to respond to the intricacies of Swiss privacy law or German privacy law without, in essence, putting the person who may have cooperated with an international government agency at risk of prosecution within his own state for releasing information which is then used in civil litigation in the United States?

You've got the Justice Department Antitrust Division in the United States and you have the European Commission, basically situated in Brussels, looking at the same types of global cartels. Can you get cooperation between the European Commission and the private plaintiffs that have not yet prosecuted their case in getting the European Commission to share with you the evidence that they might have? That transcends as well, not just the mass tort antitrust aspects but mass tort aspects generally. *Baycol*[37] is

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[37] *In re* Baycol Products Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001) (ordering thirty-six actions "concerning the safety of Baycol, a prescription drug used in the treatment of high cholesterol," to be centralized in the District of

another recent example of how there might be cooperation between government investigators in Europe and United States civil cases.

I think the frustration in getting that cooperation and the benefits that you could receive in that cooperation are somewhat highlighted by a present case that we have, where there is both a government component and a private civil component. The government has filed its lawsuit against the tobacco companies, essentially piggybacking some of the concepts that were brought by the states but also invoking a RICO claim.[38]

The public health aspects were dismissed but the RICO claim was maintained.[39] And the theory in the RICO claim was that there should be a disgorgement because there was a fraud perpetrated on smokers—that the smokers paid for cigarettes that they otherwise obviously maybe would not have otherwise purchased. And the cigarette companies or the tobacco companies should disgorge their ill-gotten gains.

We filed a case on behalf of the smokers, and the government said to us, "What are you doing in this case?" and we said, "Well, we represent the smokers." And basically, they said, "Well, no matter what happens, if we recover, you are going to want a piece of what we recover." And we came to them and said, "Well, you are basically acting as parens patriae for all the smokers, but you haven't brought the cases parens patriae and you can't. So, what gives you the right to recover the ill-gotten gains that were paid for by smokers, when there are smokers who can recover in their own right?"

Putting that aside, we said to them, "Look, the cases are in the same court and they involve many of the same issues. Don't you think we should coordinate so that we could minimize duplication and maximize efficiency and strengthen the unity in presenting a single case." They absolutely refused.

So, the government is now proceeding at its own pace, in its own litigation style and mode, while we are proceeding on our

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Minnesota).

[38] United States v. Phillip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000).

[39] *See id.* at 135 (denying a motion to dismiss the government's RICO claim but dismissing the government's public health claims).

pace which now as we presented before the judge is actually quicker than the government's pace, so that we can be ready for trial before the government can.

And then what happens? Many of the motions that we now have pending will decide issues that the government has to face.

Would it not have been better to coordinate the resolution of those issues, as opposed to either one trying it without the benefit of the other?

These are the practical problems, I think, that are facing coordination and one in which there should be more of. But I do not have a solution on how to make that occur.

Moderator

Thank-you. Professor Hensler.

Professor Hensler

I wanted to talk just for a few minutes about the implications of the compensation program for the victims of the September 11th attacks.

As you know, Congress passed legislation authorizing such a program very shortly after the attacks, and the Department of Justice is currently drafting rules. There has already been some public debate about what the rules might look like. There has been controversy in particular about whether charitable contributions ought to be offset against federally provided compensation.

And this week there has been some discussion about how benefit determinations are to be made—whether they are going to be made according to some kind of matrix or schedule of damages or on an individualized case by case basis.

To me, the program is important for many different reasons. Many people see it as a potential model for mass compensation in other circumstances. But it is also an interesting program because, at least as drafted by Congress, it appears very much as if the model for this federal compensation program was the tort system.

And it seems to me, that both the passage of the program and the debate that is arising with regard to it do raise questions, not just about what is appropriate for the September 11th victims, but also what is appropriate in other mass tort situations.

And I just want to very briefly run through the questions, many of which echo some of the other concerns that people have expressed about other mass torts.

The first one is how do we decide who is responsible for dealing with the consequences of situations in which bad, disastrous things happen to people through no fault of their own? As we know in the U.S., if an individual becomes ill or dies of natural causes, it can have huge disastrous consequences for their family.

We seem, as a society, to be generally comfortable leaving that to that family to deal with. But if we can link the illness to a product or a substance on deterrence grounds and maybe on corrective justice grounds as well, we think the corporation that manufactured the product should pay. And clearly in the case of September 11th, Congress decided that we should all pay to help the victims of the terrorist attacks, and I don't think there has been any public dissent on that action to date.

So this seems that this division among different sorts of disasters—not caused by anybody whom we can determine, caused by some corporate wrongdoer, and caused by some terrorists who are criminal—seems very tidy, until you look at it very closely.

And I think what we have been doing this morning is taking a look at that. And we see in practice in mass tort litigation, litigation in which there is considerable question as to whether the tort claimants who recover are actually ill, whether their illness can be linked reliably to a certain product, whether it can be linked in the case of new asbestos cases to the negligence of the new defendants.

And there are also mass torts, as we know, where there are causation questions for some plaintiffs and not for others. And yet, we pay those claimants about whom we have great question about the legal claim, and thereby, inevitably leave less money to pay the claims that are stronger on the law and the facts.

And we also clearly have mass torts where the government took actions on our behalf that contributed significantly to the harm. That was certainly true for those who were initially injured by asbestos.

We could also think of situations in which, in fact, it is the

government's fault that a device wasn't properly regulated, but there has been no government contribution to compensate those who were harmed.

In cases where there is a large mismatch between causation and harm and the wrongdoer's behavior, notwithstanding David Rosenberg, I think most deterrent theorists say it is very hard to make an argument that the tort system is, in fact, an effective deterrent system. But perhaps, there are other reasons why we want to hold these corporations responsible.

It seems to me that the Congressional action—which is really not unique—since we do have other federal compensation programs, but nothing quite like this, should encourage us to think about under what circumstances are different parties—the government, corporations, individuals—responsible for harm.

Secondly, when we provide compensation for injury and death through the tort system, the goal is to make the victim whole, presumably, because that serves deterrent objectives and corrective justice. But the consequence is to sustain the sharp differences in income that exist in our society.

In the current debate about the rules for the victims compensation scheme there is the notion that we should insist on a plan that replicates tort and all the inequities in terms of real social justice that flow from the operations of the tort system. That is seen somehow, as an appropriate expression of a program that represents the society's and citizens' desire to take care of victims of these events. It seems to me to be questionable.

I think we need to think much harder in mass torts generally about what our objectives ought to be with regard to compensation. We ought to think about issues of whether there are situations in which the appropriate objective would be to provide insurance or even the possibility—I know it is not popular in this country—that we might give more to those who need it, rather than more to those who had the most to begin with.

Third, there is the issue that, when Congress chose to pass this legislation, it clearly made some decisions about whom to provide for. The act is rather narrowly drawn. We know in this city, as elsewhere in the country and really the world, there are many people who have suffered economic losses. They are not eligible

under this program.

In mass disasters, where many people have small injuries and few losses but others have significant injuries, our norm is to allocate funds to all those who come forward without regard to severity of injury, even though, as I said, that dilutes the resources available for others.

Is that even the policy that victims themselves would choose, if they were asked freely to express their opinions? Again, I think we ought to think harder about that when we compensate people, regardless of who pays for the compensation. Who ought to be eligible for that compensation?

And, finally, there is the critical question that Jack Weinstein has talked about—what the procedures ought to be for determining who is eligible or compensation and how much they should obtain. This week we have seen discussion about that issue in the press. Some lawyers have equated administrative allocation schemes with schemes that provide small, inadequate and unfair compensation, and by inference, they have equated adjudicated determinations with larger and fairer compensation.

The empirical evidence doesn't seem to me to support this contrast in mass tort litigation. And I think that brings home to me the need for us to work harder to design administrative systems that can meld bureaucratic efficiency and fair process.

Moderator

Thank-you. We have already a growing list of people that want to speak afterwards. So, I am going to ask the next few speakers to be brief, and we will then move on to the open discussion.

Professor Neuborne

Sure. I want to respond very briefly to the Illinois piece that Judge Weinstein wrote, which I found extremely interesting, and very, very provocative.[40]

At the risk of attributing more grandiosity to it then it bears, it strikes me that at this point in his jurisprudence, Judge Weinstein is starting to think about a unified theory of mass tort compensation.

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[40] Weinstein, *supra* note 5.

In other words, how you bring together in some single theory the various institutional strains of efforts to deal with aspects of a mass tort or a past event that has caused very dramatic injury to large numbers of people?

In thinking about where we go in the future, I found the Illinois piece got me focusing on why the system is essentially disorganized, with groups operating separately, and why that is not an optimum model. And that may tell us a little bit about what the future ought to look like.

I come at it this way: As I was reading the Illinois piece, I began to think to myself, what is it that we try to do when we try to do justice in these mass settings—ranging from the extraordinary experiment of the Holocaust cases, which may not be really court cases at all but simply an opportunity to provide a judicial matrix within which there is a political settlement,[41] ranging to more traditional litigations.

We are trying to do three things, I think. We are trying to engage in disgorgement, where we feel that there has been morally inappropriate behavior by someone that has resulted in someone obtaining money that they shouldn't have. We have this sense—there is a sense of justice—which requires that they disgorge their ill-gotten gains. We also want restitution in some sense. Let those ill-gotten gains be shifted to the people who actually deserve them and from whom the money was taken.

And then, third, a more generalized idea of compensation, that is unrelated really to disgorgement or to restitution, but some sense that the victim population be left whole.

Deborah, one of the reasons why the September 11th Act may be interesting but not terribly helpful in mass tort, is that disgorgement and restitution are simply not present. That is a model of attempting to find compensation for a horrible event, but not attempting to lay elements of moral determination that underlie both disgorgement and restitution.

But it is clear, I think, in the cases that we do think about now, we try to do all three. And I found myself during the Holocaust

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[41] Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U.L.Q. 795 (2002).

cases constantly thinking to myself—is this a disgorgement strategy I am following, is this a restitution strategy I am following, is this a compensation strategy I am following, and what institution is best suited and what galaxy of forces are best created to achieve the particular end of the litigation?

We don't often segregate out in our own minds whether it is disgorgement, restitution, or compensation that we are trying to achieve, and that's one reason why the current system acts in an untidy way.

I am also going to suggest that the current system acts in an untidy way in two systemic ways. Two systemic breakdowns—that's what is really driving the Illinois piece—the systemic breakdowns of the existing system.

The system breaks down, as Aaron Twerski brilliantly put it in the first hour—the system breaks down on error deflection. We may not want the same error deflection rules when we are thinking about a disgorgement remedy, a restitution remedy, or a compensation remedy.

When we don't know; or we can't know, and we have to decide, how do we tilt it? What are the burden of proof rules?

I think, de facto, if I did a piece on Judge Weinstein's jurisprudence, I could argue that, de facto, over the years, what he has done is dissolve some aspects of the error deflection mechanism into a much more sophisticated system, where if there is a sort of general determination—call it generic causation, I don't care, but call it some general determination of fault that would justify a disgorgement remedy or justify a restitution remedy or justify some sanction based on moral fault—at that point, he shifts the error deflection rules and says essentially, "Prove that it didn't cause it." And morally, that may be exactly right. It may be exactly what we should do, but it is being done in a way that I think sometimes has not surfaced, and we don't debate it enough.

And so, I suspect that the future systems and the systems he is predicting will think much more closely about how you want to set up error deflection along those three different streams—disgorgement, restitution, and compensation. And it may well be that certain institutions operating in this area will shift the error deflection mechanism.

If you have a government program, then you prove why the person shouldn't get it, rather than why the person should get it. And we can set those things up in a very, very subtle way to achieve exactly the end we want.

The second systemic breakdown, this is written about in the academic literature, but lawyers don't talk about it very much, is an unholy alliance between defendants' counsel and plaintiffs' counsel, which may prevent the system from working as well as it does.

I know, as a human being, working in the Holocaust cases, I couldn't put out of my mind what the consequences to me were of certain actions. I tried very hard to do it, but human beings can't do it. There is no way 100 percent you can put that out of your mind. And there is a common ground between defendant's lawyers that want broad releases, and plaintiffs' lawyers who can deliver those broad releases and who owe a duty to the plaintiff class but also are human beings and understand the economic consequences of delivering the broad release.

That leaves us with a lingering sense that the institution isn't functioning as well as it could. And as we go into the future, is it possible to work out constellations of institutions, working on the same problem that will both minimize the error deflection issue and minimize the potential for conflict of interest.

As has happened so much in the past, the Illinois piece points the way to do that—by collaborative action, by various institutions that can check each other in areas where the existing system breaks down.

I will just close by saying, if the Holocaust litigation has any interest for the bar generally—and it may not, because it really may be sui generis—but it if it does have interest for the bar, I think it is going to be the fact that Michael and I are running a controlled experiment here. We are running a controlled experiment with two systems: a Swiss settlement, a settlement that is operating under very traditional Rule 23 standards, brilliantly supervised by Chief Judge Korman. And while the negotiations were a coordinated government-plaintiff bar operation, the actual administration of the fund is a classic lawyer-driven, judge-supervised Rule 23 operation.

The German Foundation is a whole different way of thinking about dealing with the issue. It is a non-judicial fund set up with essentially political and diplomatic efforts to run it in a non-judicial way. I have just emerged, myself, with two interesting personal perceptions that are obviously not empirical because they can't be generalized, but my sense is that the class action mechanism yields more money and yields more transparency and yields more, at least, intense preoccupation with individuals. Whereas the non-judicial mechanism—this mixed mechanism, where lawyers, diplomats, all got together to make a deal—yields less money, less concern with individuals, but much greater speed and much more potential for lower transaction costs, lower individualized transaction costs.

And we are going to wind up having to make choices in the future in building these inter-systemic mechanisms to give us the best possible resolution.

Moderator

I am gathering names to call upon after David speaks.

Mr. Vladeck

I would like to take as my starting point Judge Weinstein's Illinois law review article, which focuses on the interaction among the three major disciplines on the marketplace that, at least in theory, deter tortious conduct: criminal law, regulatory law, and the tort system itself.[42] One of the insights that comes through in Judge Weinstein's article, but which is largely undeveloped in the academic literature, is the nature of the interaction among these three legs of what Judge Weinstein has dubbed "our wobbly stood of civil justice."

The point I want to begin with is descriptive: namely, that it is wrong, given the current state of affairs, to place too much stock in either of two legs of the stool—criminal and regulatory law—and that to the extent the civil justice system rises or falls, it will be as a result of refinements in the tort system. Neither the criminal law nor the actions of our regulatory agencies provide effective

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[42] Weinstein, *supra* note 5.

discipline on today's marketplace.

Let's begin with criminal law and ask whether criminal law effectively deters corporate misconduct in the field of health and safety. The answer is plainly no. The major federal workplace safety law, the Occupational Safety and Health Act, provides for criminal sanctions where workers are killed on the job through an employer's willful misconduct or where an employer deliberately falsifies records accident records.[43] Thousands of American workers die each year in industrial mishaps.[44] Many of these deaths are not accidents. In one high-profile case, a fifty-nine year old illegal immigrant from Poland, who worked for a year stirring tanks of sodium cyanide at the Film Recovery Services plant in Elk Grove, Illinois, became dizzy from the cyanide fumes, went into convulsions, and died of acute cyanide poisoning. OSHA inspected the plant after the worker's death and fined the company $4,855 for twenty safety violations, but later halved the penalty when the company objected. OSHA did not seek criminal sanctions against Film Recovery.[45] Unfortunately, OSHA's handling of the Film Recovery case was not aberrational. Although the criminal provisions of the OSH Act have been on the books for over thirty years, they have barely been used, and no one could plausibly

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[43] 29 U.S.C. § 666 (2003).

[44] Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Facts, at http://www.osha.gov/as/opa/oshafacts.html (last visited Sept. 12, 2003). According to OSHA's most recent statistics, there were 5,900 worker deaths in 2001. *Id.*

[45] *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 543 (1987) (detailing OSHA's half-hearted enforcement effort, and pointing out that state prosecutors indicted the corporation and three of its top officers for murder and obtained convictions). Illinois v. O'Neil, 550 N.E.2d 1090 (Ill. App. 1st Dist. 1990). Following the publication of the above note, the Appellate Court of Illinois vacated the convictions and remanded for further proceedings. *Id*. *See also* David Barstow, *A Trench Caves In; a Young Worker Is Dead. Is It a Crime?*, N.Y. TIMES, Dec. 21, 2003, at A1; David Barstow, *U.S. Rarely Seeks Charges For Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1; David Barstow, *California Leads in Making Employer Pay for Job Deaths*, N.Y. TIMES, Dec. 23, 2003, at A1.

claim that they have had a real impact on workplace safety.[46]

The story is no different under the Food and Drug Act, which also contains criminal provisions.[47] The Food and Drug Administration, which administers the Act but is represented in court by the Department of Justice, invokes its criminal authority only sparingly. Part of the reason may be the reluctance of the DOJ to bring criminal cases against corporations. Most notorious is the DOJ's decision, over the heated objection of FDA counsel, not to proceed with an indictment of a company that had manufactured and sold defective baby formula, placing the babies being given the formula at risk of long-term neurological damage and death.[48] Even when the agency succeeds in persuading the DOJ to bring criminal cases it has had difficulty obtaining convictions. The most notable illustration is the agency's prosecution in Judge Weinstein's home court of senior officials of the Beech-Nut corporation, which knowingly sold apple juice for babies that was in fact, not "juice" at all, but was simply water with sugar, corn syrup, and food coloring in it. Although two high-ranking company officials were convicted after a full trial, the Second Circuit reversed their convictions and the officials were never retried.[49]

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[46] *See* People v. Pymm, 563 N.E.2d 1 (1990) (noting OSHA's inaction in a case involving industrial workers gravely injured as a result of exposure to high levels of mercury in the manufacture of thermometers); *see also* Lynn K. Rhinehart, *Would Workers Be Better Protected if They were Declared an Endangered Species?: A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AM. CRIM. L. REV. 351 (1994). "OSHA has rarely used its criminal prosecution authority and has even more rarely been successful." *Id*. at 359; S. Douglas Jones, *State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Failed?*, KY. L.J. 139 (1991) (decrying the "abysmal performance of OHSA" in prosecuting workplace crimes).

[47] 21 U.S.C. § 333 (2003).

[48] Philip Shenon, *Agencies Split in Baby Formula Case*, N.Y. TIMES, Sept. 24, 1985, at A28.

[49] U.S. v. Beech-Nut Nutrition Corp., 871 F.2d 1181 (2d Cir. 1989) (reversing the convictions of two high ranking Beech-Nut officers on all but one conspiracy count); *see* Leonard Buder, *Ex-Beech-Nut Chief Seeks Probation*, N.Y. TIMES, June 7, 1998, at D2 (noting the jury's decision in Beech-Nut case);

The inability of these and other agencies to effectively use the criminal laws to punish and deter misconduct should come as no surprise. Enforcing criminal laws against corporations is problematic because layers of responsibility and lines of authority are often blurred and diffused. Finding the one or two individuals responsible for misdeeds taken in the corporation's name is hard enough, proving that they should be held criminally liable for those misdeeds is often impossible. And so, at least in the health and safety context that gives rise to mass torts, the criminal law cannot be seen as an effective deterrent.

As Judge Weinstein pointed out earlier, regulatory agencies hold enormous promise in terms of placing effective disciplines on the marketplace. Certainly as a matter of theory, Judge Weinstein is right. After all, the main function of regulatory agencies is to set and enforce rules of prospective application to prevent injuries from occurring.

But it is evident that this promise is unmet. Much of what we see today in court as mass tort cases—tires with treads that separate; drugs and medical devices that do more harm than good; and high levels of toxic substances in the workplace—are the product of the systemic failure of our administrative state. And there is no mystery why our regulatory agencies are ineffective in preventing mass torts.

First, since the early days of the Reagan administration, there have been sharp declines in the funding of regulatory agencies, measured either by absolute numbers or as a percentage of Gross Domestic Product.[50] As a result, the size of our health and safety regulatory agencies has shrunk, not grown, even though the economy has exploded and the responsibilities entrusted to the agencies have increased. Today's regulatory agencies are ill-equipped to carry out their statutory functions.

Consider the National Highway Traffic Safety Administration (NHTSA), which is responsible for regulating the automobile

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Rifka Rosenwein, *Beech-Nut Appeal Based on Excluded Evidence*, MANHATTAN LAWYER, Dec. 13, 1988, at 6.

[50] *See* David Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, 22 AM. PROSPECT 78 (1995).

industry and all that it makes—including, among other things, occupant crash protection, airbags, fuel system safety, tire design, and fuel economy. According to its 2003 Budget, NHTSA has a total of 659 employees for all of its tasks, regulatory and enforcement.[51]

Not surprisingly, the agency cannot possibly keep up with technological advances in automobile design, let alone set standards that would force automakers to install new, safer technology. For example, there have recently been many high-profile cases involving car accidents with ruptured fuel systems, leading to fires.[52] Many people have been killed or seriously injured. Judge Weinstein might ask, why hasn't effective regulation reduced the incidence of these horrific accidents? The answer is hardly satisfying: NHTSA's fuel safety standards are woefully out of date and are unlikely to be modified any time soon. The fuel systems in today's cars are governed by the same standards that governed government automobile purchases in 1967. NHTSA simply adopted the standards shortly after the agency was created in 1966 and has not revisited them since. NHTSA is well aware that its standards are inadequate. In 1991, it conducted a study that found that cars on the road were just as likely to sustain fuel tank ruptures as they were in 1967.[53]

Why has NHTSA failed to act in the face of this evidence? Because it is an under-funded agency with a skeleton staff that is outmatched by the industry it is charged with regulating—an industry that historically has aggressively resisted regulation.[54]

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[51] Department of Transportation, Budget in Brief, Full Time Equivalent Employment (Feb. 2002), at http://www.dot.gov/bib/fte.html (last visited Sept. 11, 2003); *see also* WILLIAM F. FUNK, RUSSELL L. WEAVER & SIDNEY A. SHAPIRO, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES (2d ed. 2001) (reporting, based on data from 1988 through 1991, that NHTSA had 913 employees).

[52] *See* David Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 SETON HALL L. REV. 631, 638 & nn. 27-31 (2001) (discussing NHTSA's regulatory failures in more depth).

[53] *See* Barry Meier, *Officials Did Little, Despite Report Saying U.S. Rule Wasn't Cutting Fatal Car Fires*, N.Y. TIMES, Nov. 21, 1992, at A7.

[54] Motor Vehicles Mfr. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29,

NHTSA picks its battles very carefully and has not chosen to fight over fuel safety systems. And even when the agency seeks to push through innovative regulation, it can be stymied by political interventions. Over the past decade or so, rulemaking has become highly political, with interventions (both subtle and overt) coming from the Office of Management and Budget and other political entities within the White House and, at times, from Congress.[55] It was interventions like these that delayed in the installation of airbags for over a decade.[56]

Consider another example. The Food and Drug Administration regulates 25 percent of our nation's economy. It is entrusted with safeguarding our nation's food supply, including imported foods. All drugs, biological, medical devices, and radiologic products are regulated by the FDA, as are blood products, veterinary medicines, cosmetics and dietary supplements. To accomplish this enormous task, nationwide the agency has only 9,000 employees.[57] That is it—9,000 employees. It is no wonder that problem products, like Fen-Phen and the Sulzer hip replacement medical device, sometimes slip through the cracks.

The Occupational Safety and Health Administration is no better off. It is charged with the responsibility of regulating virtually every worksite in the nation, as well as setting standards to protect workers from toxic substances and harmful physical agents. According to OSHA, it protects 111 million workers at 7 million sites.[58] Yet OSHA has a staff of barely 2,300 employees, 1,123 of whom are inspectors.[59] With a staff of this size, most

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49 (1983) (noting that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag").

[55] Thomas O. McGarity, *Presidential Control of Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456 (1987); *see also* Pub. Citizen v. Mineta, 318 F.3d 845 (2d Cir. 2003) (setting aside NHTSA rule that had been substantially modified at the insistence of the Office of Management and Budget's Office of Regulatory Affairs).

[56] *See Motor Vehicles*, 463 U.S. 29.

[57] *See* Food and Drug Administration, *at* http://www.fda.gov/opacom/faqs/faqs.html (last visited Sept. 11, 2003).

[58] *See* Occupational Safety and Health Administration, *supra* note 44.

[59] *Id.*

employers will never see an OSHA inspector, and even the most deadly workplace hazards go unregulated. For example, in 1993 the agency promised to regulate hexavalent chromium—a widely used metal that is a recognized human carcinogen—calling this the agency's highest priority. A decade later, the agency has yet to publish even a proposed rule and admitted in court that, absent court compulsion, "OSHA might not promulgate a rule for another ten or twenty years, if at all."[60] Even were the Court to direct it to issue a standard, the agency doubts that it will be able to complete rule-making until 2007 at the earliest.[61]

The point of this very brief overview is simple: These agencies do not have the wherewithal to do their jobs effectively, and there are significant limitations apart from resources. Most of these agencies do not have subpoena authority. OSHA does not have general subpoena authority.[62] Neither does the FDA nor the NHTSA. And even when an agency musters the resources to take protective measures, it still must run the political gauntlet through OMB, the White House and Congress.[63]

I agree with Judge Weinstein's intuition that we would get substantial returns on our investment were we to reinvigorate our administrative agencies. We might avoid many of the mass torts that are plaguing our courts. But that day is a long way off. Until agencies have the personnel, technical data, and other resources to deal with emerging hazards; until they issue regulations swiftly when faced with a problem requiring a solution; and until agencies can make decisions insulated from political pressures from inside the executive branch, from congressional committees, and from powerful industry lobbyists, they will not fulfill their promise of

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[60] *See* Pub. Citizen Health Research v. Chao, 314 F.3d 143, 145 (3d Cir. 2002) (condemning the agency's delay and ordering it to expedite the rule-making in the fact of grave risk to exposed workers).

[61] *Id.*

[62] *See* 29 U.S.C. § 651 *et seq*.

[63] OMB's interference pursuant to Executive Order 12,866 (as amended by Executive Order 13,258) may delay or derail rule-making, and through the Congressional Review Act, 5 U.S.C. § 801, Congress has reserved to itself the right to overturn major regulations—a right Congress exercised in overturning OSHA's ergonomics rule.

providing an effective discipline on the market. Because the rejuvenation of these two wobbly legs Judge Weinstein has discussed appears unlikely, we have no choice but to rely on our tort system to both deter mass torts and to compensate those injured by them, and for that reason, the tort system must remain as robust as possible.

So we return to the question of how to strengthen our tort system to provide, insofar as we can, individualized justice in mass tort settings. I share Linda Mullenix's concerns about the procedures currently used, which are principally aimed at enhancing the efficiency of the system. My point is that we need to find ways to modify the mass tort system to deliver individualized justice, even if that means accepting less efficiency.

Moderator
Thank-you. Mr. Feinberg.

Mr. Feinberg
The Judge asked me if I would be prepared today to give just some summary thoughts about the September 11th fund. And having read the statutes and the regs, as many of you have, I think that if the fund does not work properly, it won't be tried again. And if it does work properly, it won't be tried again.

Everybody around this table understands that Congress occasionally intercedes with a polio vaccine statute or a Price-Anderson statute or a downwind-rancher statute or a uranium-miner statute or a black lung statute or a September 11th statute.

One shouldn't read too much into these statutes in terms of long term impact. I don't think they are a substitute, in my experience, for anything other than, importantly, a response to a specific unique situation.

Or to put it another way, I haven't, in the last thirty years at least, seen any indication that De Tocqueville was wrong when he wrote in 1840 that sooner or later every public law issue of any importance ends up in a courtroom in the United States. And I think that is probably still the case, for good or for ill.

So, the academic, you know, Linda will write some fabulous articles about this, and Deborah will do some fabulous research,

but I am dubious about the long term implications of a response to a horrific unprecedented event.

Also, you know, it is very interesting when you read this statute. In a way, the problem of implementing the statute is much easier than some of the mass torts that we all are familiar with. It is a mass claim, but it is not the type of mass claim I am used to, with hundreds of thousands or millions of claimants.

The way the statute is drafted, it is relatively cabinized as to how many people will claim.

Secondly, it is in large part—everything is relative—it is a traumatic disaster. You are not going to have the toxic tort Agent Orange causation problem that bedevils the system. That's a plus in terms of trying to figure out a meaningful way to implement it.

I think the problem will be the emotionalism surrounding the whole event and the statute, and the politicization that goes with it. So you are going to have to come up with a plan that deals with that problem of visible emotion and the political fall-out of the statute.

In terms of some of the substantive issues—we have to have offsets; we can't have offsets; charity should be offset; charity should not be offset. Let's run the numbers and see if with offsets somebody gets zero. I suggest that there is going to be a limitation on offsets. If without offsets somebody is going to get $72 million in economic loss through an administrative system, I suggest to you that there is going to be some adjustment.

Judge Weinstein

Machiavelli, not Freud. What intrigues me about this statute and experience with Agent Orange and also with asbestos is the temporal flexibility that is required, and isn't available generally in the law.

In *Agent Orange*, there was a temporal problem. We got out a little money in order to permit the government ultimately to step in and do what the government had to do that was right, whether it was technically sound or not. They did the right political thing and picked up the ball. And so the court order was just a stop gap to permit something good to happen on the political field.

In asbestos, we have allowed a system to develop that is utterly

debilitating to everyone. We are now in the position where in the Manville bankruptcy, which I revised some years ago because it was being abused, we are paying 5 percent of the value of claims of people with mesothelioma diseases and also 5 percent of claims of people who are just marched through these trailers and find a little spot here and there; they are not suffering from anything.[64]

Query: Can the court system, as a court of equity, respond flexibly so that when it appears that the system set up is breaking down, it can intervene on an equitable basis and say, "The system we set up at first is not working. There was a final judgment, but we are a court of equity, and we are going to take another fresh look at it and revise it." Can we do that? Can we put such an escape valve in the original settlement or judgment? Both sides might balk.

And that's true in a number of other cases where we don't have the epidemiology, or we do have it, and new information is made available, or we think we will have it. How can we deal with finality?

Now, in the case of this 9/11 act, you have the possibility of doing that to some extent. We know we have about three thousand people dead and probably about ten thousand or so who have been injured in some way. It is quite possible for the special master to say, look, we are not going to look at the New York statute—death statute—where the guy or gal on the 105th floor who was going to make $100 million probably and leave it to a spouse, we are not going to give them 100 million times more than the Guatemalan immigrant who will probably not be able leave a penny to a spouse. Zip for one and $100 million for the other? Forget about the New York tort law. It is not going to work.

We can say immediately we will give everybody in the family

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[64] *See* Frank J. Macchiarola, *Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583 (1996); Illinois Municipal Periodicals, Lamb That Roared, at http://www.lib.niu.edu/ipo/im890515.html (discussing Manville bankrupcty); Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, *Hearing Before Senate Judiciary Comm.,* 108th Cong. (2003) (statement of Sen. Chuck Hagel), *available at* http://www.litigationdata source.com/june4_Hagel_testimony.pdf; Asbestos Litigation: Falling Victims, at http://www.asbestosfairness.com/Victims.pdf.

of the person who died $100 thousand. Come in. Fill out the form. Here is your check. If you had this injury, you get this. So, that's payment one.

We don't know what your final payment is going to be because society hasn't decided how we are going to handle this thing—what the appropriate equities are. So, we are going to appoint commissions or a special master, and in a year or two, we are going to be able to make a second payment—whatever it will be—based on as a new rationale.

That seems to me to make some sense in many mass tort cases. It would take care of the changes in not only evidence, but also in sensitivity with respect to what the compensation should be.

That can be done in asbestos. That's the advantage of an administrative agency—even a quasi administrative court supervised agency—which can change the rules over the years.

Why do we have to be fixed in our judgment, which is one of the characteristics of the tort system? You get your judgment. Everybody is bound and you go on.

But that doesn't apply in many mass torts where you have such a general changing community interest, as well as, a lot of individual interests, and when you have changing targets with respect to the science, with respect to how people feel about these things, with respect to the availability of the principle and how it should be applied.

Can we build that flexibility into our mass tort system?

Moderator

David Rosenberg.

Mr. Rosenberg

The question I have is whether this legislation is a useful substitute for a mass tort class action. The short answer is it's not; it doesn't promote deterrence or insurance objectives—it's a waste of money that surely could be allocated to more important social uses. It is buying out these tort claims, much as the Price Anderson Act was read by the Supreme Court to buy out the tort system.[65]

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[65] *See* 42 U.S.C. § 2210 (2003); Duke Power Co. v. Carolina

And so we ask ourselves, is this a good substitute for mass tort class action?

And then, we have to ask ourselves what would we want the tort system to do? And again, I come back to the starting point, because people have made such a big point of it, do we want the tort system to deliver compensation to redress people's loss?

And I think we are going to find out a good deal about what people lose in these kinds of situations because there is elimination of collateral source—of the standard collateral source rule in this legislation. We are going to find out just how much insurance people actually had because coverage like life insurance will be subtracted from recoveries they get under the 9/11 fund.

We know that most people, that 84 or 85 percent of the people have first party insurance from commercial suppliers and the rest of the people are covered by various forms, and the first group, too, are covered by various forms of government insurance for catastrophic losses, my statement is that the 9/11 fund is a waste of money.

There is no need for compensation. People have been injured terribly, but their injuries do not have any different effects on families of victims from the effects of the injuries that take place on the Major Degan Highway every day. Death is death and disability is disability—and the resulting turmoil, suffering, and disruptions to lives and livelihood are generic consequences of these awful events. We are and should be concerned that dependents have insurance to replace catastrophic losses regardless of the cause. From a compensation point of view—putting aside the rationale of buying out tort claims—when people have adequate insurance they should not receive any special payout because of the cause of loss, 9/11 or otherwise. If we think people don't have adequate insurance, then it's inadequate in general, not just for 9/11 or any specific risk. Apparently, judging from the estimated total payout under the 9/11 fund, Congress has $5 or $6 billion extra that could be devoted to catastrophic loss coverage. Everyone would have been far better off had Congress allocated that sum to increase coverage under social security and other

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Environmental Study Group, Inc., 438 U.S. 59, 84 (1978).

government insurance programs, including FEMA.

And so, again, I come back to the fact that the tort system shouldn't do it, and this substitute for it shouldn't do it.

What would we want? Again, I come back to the idea that the tort system's basic rationale would be deterrence. If we are going to substitute the tort system, then we want effective deterrents. How would that be achieved? Well, it won't be achieved if the money is going to come out of the public treasury, which is what is going to happen here. We are not charging the airlines. We are not charging the security agencies. We are not charging the architects. We are not charging the owner of the buildings about the design and so forth that might have created the risks. We aren't charging New York City for allowing 110 story buildings that could be a security risk.

Oh, you say, well, wait a minute, it is a foregone conclusion that we would want 110 stories. Maybe it is—if people are willing to pay for it. The only way you can find out whether they are willing to pay for those risks is to impose the costs on the people who are constructing the risky enterprise. It is a harsh hard way of thinking, but if you want a sensibly run society, you will have to think that way.

And for the government to bail out potential tort defendants, which is what this is doing, you are running the risk that our society is not controlling the risks we most desperately want to control.

Now let me just extend this further point. Deterrence is the only rational social objective for the tort system, but I don't think that all of us involved in the system—judges, lawyers, jurors, academics—have adequate training and resources to do the kind of hard analysis required for effectively thinking through and solving the problems of how best to control risk. Special masters and other experts can be hired to assist the lawyers, judges, and other decision makers, but if they truly have uncommon knowledge and skills, then how will the inexpert assess their expert advice? We'll have to hire experts to do the assessments, and then to monitor this work, we'll have to hire another set of experts.

We are in desperate, near intellectually bankrupt situation.

So, when I talk about deterrence it is with a big qualification.

The legal system as presently constituted can't do the work of devising and implementing effective means of managing accident risks in a socially responsible fashion. I agree with the point Peter Shuck made: courts and the tort system are primarily justified as a check and balance against the power and potential for slacking, self-dealing and perfidy in other social as well as governmental institutions. Inevitably, we will pay a high price for having this mixed system. The cost can be reduced substantially, however, by devoting the resources to training those who oversee the tort system in the theories and methods of effective social problem solving and policymaking, in particular, in controlling accident risk. It's a task for the law schools, which so far have failed society abysmally.

Judge Weinstein

Deterrence, deterrence. It is a shibboleth. I see it every day in my criminal court. I see it in the civil court. There is no indication of any deterrent. The deterrents, with respect to September 11th in searching baggage, was nonexistent. Every one of the baggage searchers continued to do exactly what they did. Deterrence isn't going to do it.

If the government steps in and says the system didn't work, we will do it now in a different way, that may work. But deterrence? I would like to see studies of the deterrence in the criminal or civil systems.

Every ten years, I get the same group of new people who were just let out of jail, who are committing the same crimes with respect to housing here and abusing federal funds. And I don't think anybody has suggested that the tort law has any deterrent effect. Have there been such studies, Professor Hensler?

Professor Hensler

There is no good evidence that the tort system deters bad behavior, and there is lots of good reason to think that it would not because of all of the characteristics that we have discussed here.

The deterrence theory is based on a set of assumptions about the link between a decision and its outcomes. And if that link doesn't exist, why you would expect to get deterrence is beyond

me.

Moderator

Well, because we are going to have to break for lunch at 1:15, I've got a group of people here I know have asked to speak and Sheila is the next one.

Ms. Birnbaum

Let me just say, Judge, I think that if we had a system—you can go back to the Manville bankruptcy, perhaps—I think, in your equitable powers and redistribute the money that is left.

Moderator

The money that is left in the trust now?

Ms. Birnbaum

Yes, I think you can do that. Well, we can talk about that. But the answer is that wouldn't really solve any problem except in the Manville Bankruptcy.

The fact is that unless there is some legislation, what you do only affects one defendant who is already in bankruptcy and doesn't affect all the other thousands of cases, hundreds of thousands of cases in all kinds of state courts because no one sues in a federal court for asbestos anymore, in which they are not going to follow Judge Weinstein, even if he has the right approach because they will do what Helen Freedman was just talking about. They will make sure the people in West Virginia, are going to get as much as they can as soon as they can and the hell with people in the rest of the country.

So unless there is some nationalization, unless there is some real dramatic change as a result of legislation, we will not resolve these issues.

I think Ken is absolutely right that this is a one time situation, based on a horrendous act that no one was really responsible for in the end.

I would like to just raise one other issue. I am pessimistic that we will see real reform. We will likely make changes around the edges. For example, we will create more transparency in class

action settlements.

The problem is that we have created through the mass tort system what I would call institutionalized victimization. Everybody has become a victim. Everybody who ever took a product that has been recalled becomes a victim. And, in fact, the problem is that people really believe they are victims because their lawyers and others tell them they are victims.

I am not talking about the cases that present political issues such as the litigation involving the Swiss banks and the Holocaust, I am talking about the every day mass torts that arise when a product is recalled especially drugs and devices. That's where most of the mass tort litigation have occurred and continue to occur. Every recall has the potential to become a mass tort.

So, Judge, I wish some of your ideas could catch on. I think in fact, in the state courts, few of these ideas are being implemented.

But this is a tort litigation system that needs a great deal of fixing and I don't think the fix is going to come very soon.

Moderator

Mr. Hausfeld.

Mr. Hausfeld

I hear you, Professor, when you talk about deterrents, and whether or not the bar and judiciary are the appropriate mechanisms to impose or at least even oversee risk management. But I say to you from a practical experience, there are a group of people out there who feel they are perfectly capable to exercise risk management and have. And that is the corporations. They will sit there and they will make the determination as to whether or not with the foreknowledge that there is a risk involved, to take that risk.

I remember in the congressional hearings when they were asking the chairman of Exxon whether or not they foresaw the possibility that there would be a disaster of the magnitude of the Exxon Valdez and he said, yes, and we determined to take the risk.

Well, that's very nice, except the people that paid for that risk weren't asked if they were willing to assume that risk.

Also, these same companies will then measure what the

economic loss is. They take that risk as opposed to proceeding on an individual basis through separate litigation to literally protract the ability of each individual victim to receive justice, as opposed to right now saying, "Okay, I made a mistake. I am going to offer restitution or disgorgement or compensation to those that I hurt en masse because there was a mass wrong."

They will make that determination if we don't. So rather than deterrents in risk management, I look at this as a matter of accountability. If we permit companies or individuals to assume the right to basically take the risk or avoid the risk—a risk that they don't pay unless they are held accountable—if we don't impose through the judicial system the concept of accountability, then what do we do other than foster lawlessness?

People then can act the way they want, take whatever risk they want to impose on others, and then have no liability other than through a political system which is set up to hear conflicting interests of special groups or an administrative body which is principally set up to establish sets of minimum standards or sets of rules of minimum behavior.

Are you really saying that because you don't like the quality of the justice that's available through the judicial system then there should be no system?

Moderator
Deborah?

Professor Hensler
The September 11th program is clearly not a substitute for mass tort litigation generally. The reason the model is important is that if the program is judged to work well, then it leaves open the possibility when there is a consensus that the tort system is not doing the best job in a mass injury case, that we could consider another option.

Moderator
Where we are now is that we have about ten minutes left and then we have lunch. And I have Professor Schuck, Professor Berger, Mr. Goldberg and Mr. Vladeck. I really want to give Jack

Weinstein word.

Professor Schuck

I will try and be brief. I want to make two points that may seem incompatible, and then explain why I think they are perfectly compatible and then make an institutional point.

The first point is that Deborah Hensler is absolutely right. Everything we know about the tort system suggests that we really don't know how much deterrence the tort system produces.

In some areas it may be relatively significant, maybe in products liability. In other areas, it is probably minimal or non-existent, such as in automobile accidents. But we don't really know. She is absolutely right about that.

The second observation is that there is enormous deterrence out there. Take 9/11. There have been more than thirty years of terrorism without a single incident like this. You can't simply look at 9/11 and say, "Well, the system broke down and, therefore, there is no deterrence." You can't just look at the criminal justice system and say as Judge Weinstein just did, "All these people come before me as recidivists and they have committed crimes, so there is no deterrence."

There are lots of deterrents out there but tort law is not probably a major one. Criminal law, I suspect, is a major deterrent, as is the regulatory system and market incentives and other incentives in the case of 9/11. These deterrents help explain why for thirty years there has been terrorism, but there have been no incidents like this.

Now, to the institutional point, one of the reasons why I don't want judges, even judges as brilliant and as just as you, making broad public policy is that you see a very, very narrow part of the world from the bench. You see the criminals that come before you and infer that they are representative of the larger world. You don't see the people who are deterred by the criminal law and don't commit crimes. You see the people who are brought before you.

Similarly, you see the accidents that occur, and you don't see the non-accidents that were deterred by the legal system and other deterrents. You see a very small part of the world and you do your job as well as it could possibly be done, but your perception is

systematically and institutionally distorted. Everybody around the table agrees that you do it as well as it can be done. But you still have an institutionalized narrow view of the world, and public policy ought not to be made that way.

Moderator
Professor Berger.

Professor Berger
I wanted to return for a moment to the articles on combining administrative, criminal, and tort law[66] and relate them to two of the real issues with tort law that we haven't quite dwelled on, and that is the compensation scheme that exists under tort law and the attorneys' fees that exist under tort law, both of which we've been tangentially referring to.

I think the value of looking at the criminal and the administrative schemes, though there are lots of other problems that come up, is that maybe it would cause us to rethink a little what compensation ought to be in these tort cases. We perhaps need a much narrower, narrower scheme, and we need to think it through, as well as the attorney's role in producing these awards.

Another problem is that we have a shift in the heads of administrative agencies every time we have a new election, and we have a politicized administrative scheme and a department of justice that is more politicized than what we see in the judiciary. And I see that as adding a new layer of problems, that one has shifts in policy, that are far greater than what happens in the court system.

But I think that for other reasons we really should take a stronger look as to whether there are things one could get out of these other systems in terms of remedies and allocation of resources that we need to pay attention to.

Moderator
Professor Goldberg.

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[66] Weinstein, *supra* note 5.

Professor Goldberg

One way to think about the intersection of these areas of law is as a three-legged stool. Or, better, the question is whether we believe the stool really has or should have three legs, whether there's a distinct role for criminal, regulatory, and tort law to play.

What I haven't heard yet from the judge is why tort law is different from administrative law or criminal law. In his view, tort looks like the third leg of the stool, the bigger leg, the stronger leg, because it is not just tort law in the conventional sense of identifying a responsible wrongdoer but also administrative law and criminal law already rolled into it as a kind of super leg.

And so I think we need to think harder about or distinguish two sets of questions. One is what do you want tort law to do as a distinctive institution, if anything? And once we have isolated that question, then there is an entirely separate set of questions, which is should there be other institutions besides tort law, because tort law doesn't do a very good job of certain things?

If we conceive of tort law as an institution for redressing wrongs or whatever you want to call it, it may be that it actually does that pretty well. It also may be that it needs modification to do it well with respect to modern torts. It may be that we need to rethink not just causation but what the definition of a wrong is. For example, it may be a corporate wrong not to disclose information, as Margaret Berger, has suggested, in which case the wrong is complete upon the nondisclosure.

But that's still within the conception of tort law as redressing a wrong. Now, that system may be terrible at deterring. It may be terrible at compensating people systematically and equally, but that doesn't mean we should take tort law and make it into something else, which has been the instinct of every academic that has studied tort law in the twentieth century. Rather, it may suggest that we ought to let tort law do what it does well, and then develop other modes of law, regulatory, whatever, which can do the jobs that we want the law to do, not tort law, but the law.

Moderator

Mr. Vladeck you have the last comment and then Judge Weinstein you wrap up for us.

Mr. Vladeck

I will be brief. I just want to respond to the implication that has been raised on a number of occasions—namely that the rise of "no injury" mass tort cases is the responsibility of the plaintiffs' bar. That suggestion is myth, not fact. And to understand why, it is important to distinguish between cases involving cognizable injuries, like asbestosis, and those cases seeking "medical monitoring" or other forms of relief, not because the plaintiffs are currently suffering injury, but instead because the plaintiffs have been exposed to a dangerous substance and therefore are at risk of developing serious illness.[67]

I agree that it is the plaintiffs' bar that has pressed asbestosis cases, but those are cases in which the worker is suffering injury, albeit in many cases the injury is slight. And I recognize that those cases are problematic where insurance-poor or thinly capitalized defendants end up depleting their assets to pay off these claims rather than claims from workers suffering from mesothelioma, lung cancer or severe asbestosis.

But I disagree with the idea that it was the plaintiffs' bar that pushed the exposure-only cases. Insofar as I know, exposure-only cases were the invention of the defense bar and that the plaintiffs' bar, at least initially, had to be bludgeoned into taking them on.[68] After all, resolving exposure-only cases benefits defendants at least as much as, if not more, than plaintiffs' lawyers. What defendants seek in mass tort cases is to purchase as much res judicata as they can at the lowest price possible. Exposure-only settlements often permit the defendant to substitute what is invariably an inexpensive insurance policy for the tort system. That is what triggered the phenomena of exposure-only cases. Fortunately, the

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[67] *Compare* Norfolk & Western Ry. Co. v. Ayers, 537 U.S. 807 (2003) (holding workers suffering from asbestosis may bring suit under the Federal Employers' Liability Act) *with* Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (holding disease-free asbestos exposed workers may not sue under FELA for medical monitoring).

[68] *See* Ortiz v. Fibreboard, 527 U.S. 815, 824-25 (1999) (detailing the history of the Fibreboard settlement and the fact that defendants, not plaintiffs, pressed for the inclusion of the exposure-only plaintiffs).

Supreme Court's rulings in *AmChem* and *Ortiz* have dampened the enthusiasm for exposure-only settlements.[69] But I believe it is revisionist history to blame them on the plaintiff's bar.

Moderator

Judge Weinstein, I would like to let you close.

Judge Weinstein

I will need another eighty years to reflect on what you, my learned and dear colleagues, have said today. Thank-you.

My closing for now is the same as the opening with respect to at least tort law. The big advantage of tort law, as I see it, is that in general you have an attorney who holds the hand of the person who feels injured. And that aspect of law seems to be particularly important in the kind of world we are getting into, where people feel disassociated—cut off from the mainstream—where you have so many people and where much of the political system finds itself incapable of dealing with these problems.

To know that you have somebody competent who will fight for you and treat you with the dignity you feel you need under the circumstances of your hurt, seems to me a critical aspect of the work of the legal profession.

Attorneys have begun to solve these problems even in these mass cases. In *DES*, they had TV cassettes that they send out.[70] There are organized plaintiffs' committees. There are e-mails. There are meetings with the court and with others. There are attorney hotlines.

I am skeptical about deterrence. I am skeptical about compensation. I am even skeptical about reliance on rules of evidence or procedure.

But I do believe that the American lawyer serves a vital function as learned friend of all of these millions of people out here who are bereft of any possibility of protecting themselves and finding some solace on their own in the law and in our present

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[69] *See id.*; Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

[70] *See* Sindell v. Abbott Labs., 607 P.2d 924 (1980); *see also In re* DES Cases, 789 F. Supp. 548 (E.D.N.Y. 1992).

society.

Moderator

Well, that's a very, very fitting way to end today. I want to thank you and all of the participants for a wonderful session. I really think we had a great conversation. Thank-you.