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# Procedure as Substance

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# PROCEDURE AS SUBSTANCE

*Elizabeth M. Schneider\**

## INTRODUCTION

Over many years, Judge Jack Weinstein has brought his incredible knowledge of procedure as both a scholar and former teacher of procedure to his work as a federal judge. But he has also brought a striking sensitivity to the nuances of procedure in judicial practice. He is a procedural expert who cares about substance, but sees substance in all aspects of judging. In this Article, I explore the ways in which he sees procedure as a vehicle to get to substance, but also how he sees procedure as inherently and deeply substantive and important in its own right. For Judge Weinstein, procedure has value and meaning in how it is practiced, implemented, and experienced.<sup>1</sup> I suggest that it is not only Judge Weinstein's decision making about procedure that is unique, but also that many cross-cutting procedural dimensions of his judging reflect, and send important messages on, substance. His innovation in many dimensions of procedure is crucial in the service of substance.

I briefly examine a number of different facets of how Judge Weinstein makes decisions and uses procedure in the civil context.<sup>2</sup> The examples run the gamut from individual cases to mass torts, to the way that he organizes information, treats litigants, and relies on

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\* Rose L. Hoffer Professor of Law, Brooklyn Law School. I am grateful to Stephan Landsman for inviting me to participate in this Clifford Symposium, and to all the participants, especially Anita Bernstein, for their comments on and reactions to an earlier draft. Special thanks to Claire Gavin, Brooklyn Law School '16, and Mary Bruch, Brooklyn Law School '14, who provided helpful research assistance, and to the Brooklyn Law School Faculty Research Program for generous support of my work.

1. I have explored these issues concerning the meaning of procedure elsewhere. See generally Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) [hereinafter Schneider, *Changing Shape of Pretrial Practice*]; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007) [hereinafter Schneider, *Dangers*]; Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993); Elizabeth M. Schneider & Nancy Gertner, "Only Procedural": *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2012/13).

2. The 20th Clifford Symposium was entitled *Jack Weinstein's Impact on Civil Justice in America*.

sources, to the way that he structures his cases. Although Judge Weinstein's procedural contributions are often thought of as largely in the fields of mass torts and aggregation, I look at a broader and deeper range of attitudes and judicial inclinations. I begin with some short excerpts from Judge Weinstein's own writing on the scope of procedure.<sup>3</sup> I then turn to different aspects of the Judge's decision making.<sup>4</sup> They reveal the substantive dimensions of procedure and, I argue, challenge conventional notions of "proceduralism." They expand our understandings of the meaning of procedure and process.

## II. JUDGE WEINSTEIN'S VIEWS OF PROCEDURE

Judge Weinstein is, of course, a prolific scholar and writer, as well as a judge. He has written widely on almost every aspect of the law. I mention here just a few of his observations about procedure to set the stage.

One important theme in Judge Weinstein's writing is that procedure often hides substance. For example, Judge Weinstein observes that "[a]s guardians and keepers of the rules, proceduralists have a duty to flush out these substantive arguments from behind their procedural camouflage and subject them to open and honest debate."<sup>5</sup> It is significant that he uses the term "proceduralists" in this way. Judge Weinstein explains elsewhere that "by proceduralists, [he does] not mean a breed of narrow-minded legal militarists committed to notions of perfect procedure at odds with social needs."<sup>6</sup> Proceduralists are "keepers of the rules," but they also have to expose "procedural camouflage"<sup>7</sup> because "substance has been able to hide behind recent efforts toward procedural change."<sup>8</sup> He emphasizes that judges should not "elevate form over substance" because "rules function in the service of substantive outcomes."<sup>9</sup>

A second theme is the importance of access to courts. Judge Weinstein has regularly made strong statements on changes in procedure

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3. See *infra* Part II.

4. See *infra* Part III.

5. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829 (1993).

6. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1905 n.10 (1989) (citations omitted). He goes on to say, "Rather, I mean to embrace thinkers of diverse backgrounds and professional stations in the proceduralist community, just as this conference includes representatives of faculty, bench and bar, with widely disparate expertise and viewpoints." *Id.*

7. Weinstein, *supra* note 5, at 829.

8. *Id.* at 828.

9. *Id.*

that have restricted access to courts and have had a disproportionate impact on access by the poor. Recently, he observed, “In pro se cases, the court must make special efforts to keep litigants out of the law’s procedural tar pits through such techniques as liberal interpretation of pleadings and warnings on summary judgment.”<sup>10</sup> He has criticized the myths of the “litigation explosion,” “discovery abuse,” and the use of procedure as a vehicle for direct curtailment of substantive rights.<sup>11</sup>

But Judge Weinstein has also emphasized that judges “must struggle against their status to wall off public access to the courts.”<sup>12</sup> It is significant that he sees this effort to close access as a problem of privilege. The issue of judicial status, the elitism of federal judges, and the degree to which federal judges are situated in their own experiences, is a third theme.

To his recent biographer, Jeffrey Morris, Judge Weinstein has been “audacious” in his use of procedure.<sup>13</sup> Morris notes that Judge Weinstein has admitted that he plays “fast and loose” with a lot of procedure.<sup>14</sup> Morris suggests that Judge Weinstein has not been interested in jurisdiction, mootness, or standing; he wants to get to the merits and thinks that “power should be exercised.”<sup>15</sup>

### III. FACETS OF JUDGE WEINSTEIN’S DECISION MAKING

In this Part, I spell out some facets of Judge Weinstein’s decision making that are often mentioned only in passing when discussing Judge Weinstein’s judicial work. Here, I want to make them front and center and recognize them as significant and meaningful aspects of procedure. Like recent scholarship that has illuminated the amount of time that judges spend on the bench<sup>16</sup> and emphasized its importance, the ways in which judges conduct themselves on the bench are often invisible, and not even seen as procedural. These aspects of judging need to be given more scholarly attention and viewed as integral dimensions of procedure.

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10. Jack B. Weinstein, Address, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251, 254 (2015).

11. Weinstein, *supra* note 5, at 829–32.

12. JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 195–96 (2011).

13. *Id.* at 112; *see also* Elizabeth M. Schneider, 64 J. LEGAL EDUC. 339, 339 (2014) (reviewing MORRIS, *supra* note 12).

14. *See* MORRIS, *supra* note 12, at 113.

15. *Id.* at 112.

16. *See generally* Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243 (2013).

I organize these facets as different themes, but they are not entirely distinct. These aspects of judging are interrelated; they overlap, and some even appear to be in tension with each other. In describing judging, the United States Supreme Court has recently emphasized that the role of judges is gate-keeping and gate-closing—closing the gates of the courts to litigants.<sup>17</sup> Judges must keep a tight hold on access to court. The frames that I use to capture the dimensions of Judge Weinstein's judging challenge these views.

### A. *Human Interest and Human Face*

Judge Weinstein has extraordinary enthusiasm for “real life” and connection with others. His interest is the “real world”: real facts of life and real people. A recent article that he wrote is entitled *Federal Trial Judges: Dealing with the Real World*.<sup>18</sup> He describes the work of federal district judges and what he loves about judging as “all the facts of real life revealed in our work.”<sup>19</sup> The “facts” of “real life” are meaningful and important to him. He loves the “kaleidoscope of life.”<sup>20</sup> He has a strong sense of compassion and empathy, and solidarity with others.<sup>21</sup> He appears to genuinely like people and to take joy in helping people. He especially recognizes the special problems of “little people.”<sup>22</sup>

This has a number of implications for his judicial work. Judge Weinstein is not interested only in “the law,” or just the law, or in legal theory or doctrine. He recognizes that facts are the context for the law. He has a tremendous sensitivity to facts. He has said that the statement of facts in his opinions is most important,<sup>23</sup> and that he “work[s] at the statement of facts more than [he] work[s] at the statement of law.”<sup>24</sup> He wants to do real problem solving for actual people. Judge Weinstein is obviously brilliant, interested in, and prolific on, many complex issues of legal theory, but his engagement with real

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17. See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (describing the “gatekeeping role” and responsibility of the judge). Recent cases have expanded the gatekeeping functions of the judge. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

18. Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. MIAMI L. REV. (forthcoming 2015).

19. *Id.*

20. See MORRIS, *supra* note 12, at 56.

21. Anita Bernstein, *The Feminist Jurisprudence of Jack B. Weinstein*, 64 DEPAUL L. REV. 341 (2015).

22. See MORRIS, *supra* note 12, at 188.

23. *Id.* at 91.

24. MORRIS, *supra* note 12, at 91–92.

people and their lives is what drives his work. He is interested not just in law in the abstract, but very much in the concrete.

Many federal judges, like the smart law students they were, are interested primarily in the law. Law schools traditionally focus on the law and legal doctrine. A federal circuit court appointment is viewed as more prestigious than a district court appointment. Interpreting legal doctrine, making new law, and reviewing district judges is viewed as a big deal; less so than the people involved in the case, the facts of the case, or finding solutions for their problems. “We are a court of law,” said Judge Winter of the Second Circuit in the *Agent Orange* appeal, sharply rebuking Judge Weinstein.<sup>25</sup> Although Judge Weinstein grapples deeply and brilliantly with law and legal theory, the balance he strikes is different.

One other example of his sensitivity to facts is especially significant in light of the Supreme Court’s recent decisions on gate-closing in pleading. These cases have been widely interpreted as encouraging district judges to dismiss cases on the pleadings, without any opportunity for factual development or discovery. In his instructions to his law clerks, Judge Weinstein says that he does not want to hear motions addressed to the pleadings that are submitted by lawyers because they are not presented on a full factual record, and he tells lawyers not to make them.<sup>26</sup> This is also an important issue of access to courts.

Another aspect of Judge Weinstein’s “human face” is how he conducts himself in court.<sup>27</sup> He comes off the bench, talks face-to-face with both lawyers and litigants in the well of the courtroom, and does not wear judicial robes.<sup>28</sup> He does not like the formal manifestations of “status.” He is very interested in connection with litigants—having hearings, televising testimony, talking face-to-face, meeting with victims, and investigating the way in which new technology makes this more possible.<sup>29</sup> He wants to expand these opportunities. He wants to make court proceedings more litigant friendly. Judge Weinstein wants to break through “bureaucratic gobbledygook” in pro se, Social

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25. *Id.* at 333.

26. Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 *BROOK. L. REV.* 439, 439, 441–42 (2011) (spelling out his “views [that] orient new law clerks to some of my principles and practices” and that “may also be useful to those who appear before me”).

27. See *MORRIS*, *supra* note 12, at 188.

28. *Id.* at 101. A recent article described Claudia Wilken, United States District Judge for the Northern District of California, as “unpretentious” because she “insist[ed] that no one rise when she enter[ed] the courtroom.” John Branch, *Judge in N.C.A.A. Case Known as Evenhanded*, *N.Y. TIMES*, Aug. 11, 2014, at D1.

29. See *MORRIS*, *supra* note 12, at 196–98, 322.

Security, and government benefit cases—the cases that many district judges wish would disappear from their dockets.<sup>30</sup>

### B. Gate-Opening

Judge Weinstein often uses the term “gate-opening.” This is so striking in light of the Supreme Court’s emphasis on gate-keeping and gate-closing.<sup>31</sup> Jeffrey Morris describes Judge Weinstein’s view that judges should be more like “gate-openers” than “gate-closers.”<sup>32</sup> Gate-opening is a phrase that Judge Weinstein used as a title for a report on *Daubert: Opening the Gates of Law to Science*.<sup>33</sup> In a lecture on Maimonides, Judge Weinstein also used the metaphor of opening the gate several times:

[T]he “invisible aspect to justice that cannot be ignored” . . . is “the aspect of humanity, of the human spirit, and of the empathy we feel for our fellow men and women,” that “is the gate to justice that gives life and reason to our work as lawyers and judges. We must,” [Judge Weinstein] said, “try to open the gate between the head of the law and the hearts of those who seek justice from us.”<sup>34</sup>

In his judging, Judge Weinstein “opens the gates” intellectually and humanly. He is open to people and other influences: magistrates, special masters, scientific experts, as well as jurors. He is also open to other sources of law, science, and other fields of information. But he emphasizes that judges must exercise humility in their consideration of other sources of law or information. For example, in a discussion of the use of foreign law by United States judges, Judge Weinstein says:

There should be no inhibition about using foreign state and international law as authority, either as a model, or, as is more often occurring, as dispositive authority on a substantive law issue. Rejecting this rich source of knowledge is a form of xenophobia unworthy of our creative American legal system. Care must be taken by seeking assistance from the lawyers and their experts before incorporating this information into a decision. There is danger in transplanting foreign norms and principles into a subtly different American context, given its uniquely diverse population and distinctive legal tradition. Much of the same sense of humility is required before we rely on scientific or other special fields of knowledge.<sup>35</sup>

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30. *Id.* at 188–94.

31. *See supra* note 17 and accompanying text.

32. *See* MORRIS, *supra* note 12, at 309.

33. *Id.* at 309 n.201 (citing Jack B. Weinstein, *Scientific Evidence in the United States Federal Courts: Opening the Gates of Law to Science*, in *FIRST WORLDWIDE COMMON LAW JUDICIARY CONFERENCE*, WILLIAMSBURG, VA. & WASHINGTON, D.C., May 23–28, at 137, 145).

34. *Id.* at 311 (quoting Jack B. Weinstein, Speech at Temple Emanuel, Great Neck, NY: Maimonides’ Tempering of a Justice too Rigid and Cruel for Humanity 6 (Aug. 6, 1999)).

35. Weinstein, *supra* note 26, at 453 (citations omitted).

I see this as another dimension of Judge Weinstein's "struggle against . . . status to wall off public access to the courts."<sup>36</sup> He does not want to close himself off. Access can include both a fuller recognition of law and other sources, and humility in the consideration of those sources as well.<sup>37</sup>

Judge Weinstein's "opening the gate" is also manifested in both his desire to listen and to hear—which is not always the same. He wants to get out of the courthouse, do site visits, bring kindergartners into the courtroom to sit in the jury box, and to be a judge in the real world.<sup>38</sup> He rejects the fancy trappings, the robe, the bench, and the separation from litigants and lawyers.<sup>39</sup> He wants a direct connection with lawyers and litigants. And finally, he wants to reach litigants in mass tort cases, to make proceedings understandable and accessible—which is now possible with technology and new methods of teleconferencing. This also relates to issues of democratization.<sup>40</sup>

### C. Democratization

Judge Weinstein's democratizing impulse can be seen in his anti-elitism and his concern with judicial privilege. Judge Weinstein's recognition of the importance of judicial humility<sup>41</sup> is reflected in his views on the role of the jury. He is a judge who understands that judges are limited by their own privilege, as well as gender, race, ethnicity, class, age, and many other factors. He values the additional perspectives provided by a jury. For this reason, he, often seeks juries in an "advisory" capacity.

I first saw this democratic dimension of Judge Weinstein when studying cases on summary judgment that involved gender discrimination.<sup>42</sup> Two of Judge Weinstein's cases, *Gallagher v. Delaney*<sup>43</sup> and *Ganzy v. Allen Christian School*,<sup>44</sup> really stood out. Michelle Ganzy was an unmarried teacher in a church-affiliated school, who was fired

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36. MORRIS, *supra* note 12, at 195–96.

37. *Id.*

38. *Id.* at 91, 208, 234.

39. *Id.* at 101.

40. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 462–64 (2012).

41. The importance of judicial humility is something several scholars have discussed. See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 894–902 (2009); Schneider, *Dangers*, *supra* note 1, at 766–67.

42. See generally Schneider, *Dangers*, *supra* note 1.

43. 139 F.3d. 338 (2d Cir. 1998) (Weinstein, J., sitting by designation).

44. 995 F. Supp. 340 (E.D.N.Y. 1998).



when she became pregnant.<sup>45</sup> She sued the school under Title VII and state employment statutes.<sup>46</sup> The school took the position that Ms. Ganzy was fired because of sexual activity outside of marriage, which violated the school's religious policy, and not because of pregnancy, which would constitute gender discrimination.<sup>47</sup> Judge Weinstein wrote a lengthy opinion exploring legal questions of pregnancy, sexuality, women's employment, and discrimination in faith-based contexts, placing these issues in a broader social and historical framework.<sup>48</sup> He denied summary judgment, emphasizing that

[t]he complex history of women's rights, employment, and sexuality . . . as well as normal methods of determining witnesses' credibility, might lead different jurors to evaluate differently the veracity of the witnesses and the honesty of the Defendant's proffered reason for dismissal. Under such circumstances, a decision by a cross-section of the community in a jury trial is appropriate.<sup>49</sup>

In *Gallagher v. Delaney*, sitting on the Second Circuit, Judge Weinstein wrote an opinion emphasizing the importance of the jury, especially in employment discrimination cases, because "[a] federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations."<sup>50</sup> More recently, in *Chapala v. Interfaith Medical Center*,<sup>51</sup> another employment discrimination case, Judge Weinstein wrote that

the inquiry into whether the plaintiff's age, sex, national origin, or race caused the conduct at issue often requires an assessment of individuals' motivations and state of mind. Because juries possess special advantages over judges' in making this sort of assessment, discrimination cases call for a "sparing" use of summary judgment.<sup>52</sup>

In contrast with many judges, Judge Weinstein acknowledges the "rather sheltered background" of a federal judge and values the jury for "knowledge of how life operates outside our courthouses and our social circle."<sup>53</sup> Juries possess "special advantages." This shows his healthy appreciation of the limits of the role of the judge.

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45. *Id.* at 345.

46. *Id.*

47. *Id.*

48. *Id.* at 346–59.

49. *Id.* at 360–61.

50. *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

51. No. 04 CV 3458(JBW), 2006 WL 2882567 (E.D.N.Y. Oct. 6, 2006).

52. *Id.* at \*4.

53. Jack B. Weinstein, *The Role of Judges in a Government of, by and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 118 (2008).

But as Shari Diamond and Francis Doorley observe, Judge Weinstein's view of the jury goes beyond "background" cases.<sup>54</sup> He believes that "the jury's power and capacity to deal with complex facts and come to a reasonable resolution of a dispute should not be underestimated."<sup>55</sup> He believes that jurors can understand scientific evidence.<sup>56</sup> Consequently, he does not think that only the judge can know what is going on.

And Judge Weinstein also likes to use advisory juries.<sup>57</sup> He has used them in cases involving gun manufacturers and unlawful CIA surveillance.<sup>58</sup> Here, too, on this issue Diamond and Doorley describe Judge Weinstein as having "opened the door."<sup>59</sup>

#### IV. PROCEDURALISM AND PROCESS

At first blush, there might appear to be some tension between the facets of Judge Weinstein's judging that I have sketched. Judge Weinstein has been described as a "judge for the situation" in the mass torts or law reform litigation context.<sup>60</sup> Another perception of Judge Weinstein in the legal community is that he thinks he can do anything—he is an "unabashed rulebreaker."<sup>61</sup> Some commentators have suggested that he goes far beyond the limits of what a judge can or should do in an individual case.<sup>62</sup> When he is judging, he is a one-person administrative agency, figuring out all the ways to solve the problem and often the underlying problem.<sup>63</sup> As Anita Bernstein has observed, Judge Weinstein "is large, he contains multitudes."<sup>64</sup> In this sense, he is often viewed as limitless, as though he sees his judicial authority as limitless. He is a grand hero, larger than life; a heroic

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54. Shari Seidman Diamond & Francis Doorley, *What a (Very) Smart Trial Judge Knows About Juries*, 64 DEPAUL L. REV. 373, 379 (2015).

55. *Id.* (citing *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y.1975)).

56. MORRIS, *supra* note 12, at 309.

57. *Id.* at 106.

58. *Id.* at 164–65, 358–60; *see also* Diamond & Doorley, *supra* note 54, at 373.

59. Diamond & Doorley, *supra* note 54, at 388.

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

61. Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DEPAUL L. REV. 393 (2015).

62. In his article in this Issue, Howard Erichson describes Judge Weinstein as an "antiproceduralist judge." *Id.* at 395. Erichson describes himself as "a fan of procedural niceties whose attitude towards Judge Weinstein as one mixed with "admiration and trepidation." *Id.* at 394; *see also* Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997).

63. *See generally* Minow, *supra* note 60.

64. Bernstein, *supra* note 21, at 359 (paraphrasing WALT WHITMAN, *LEAVES OF GRASS* 55 (1855)). In addition to being an intellectual giant, Judge Weinstein is very tall.

judge in an “antiheroic age,” as David Luban put it.<sup>65</sup> But he also has an appreciation for humility, especially regarding the limits of the role of the judge and the important role of the jury. How can these impulses be reconciled?

First, judges are not necessarily internally consistent in their attitudes and rulings, either doctrinally or in their judicial inclinations; their views and judicial impulses are complex and nuanced. However, I have come to see the facets of Judge Weinstein’s judging that I have described as interconnected. Because Judge Weinstein has an appreciation for people and for the significance of facts, he values broader influences in decision making and wants to “open the door” of the courthouse. His appreciation for people and openness to broader influences also relates to his valuing of the jury. He can see that a wider and more diverse group of decision makers could offer perspectives that he does not have. He recognizes the degree to which he is situated and limited, as we all are, by his own experience: his class, race, background, gender, ethnicity, social circle, and age.<sup>66</sup> He understands that these aspects of his experience shape and limit his judgment. He views the inclusion of different and broader perspectives as a good thing, so he not only questions summary judgment, but reaches for a jury in an advisory capacity when other judges would not.

But when Judge Weinstein believes that he does have the judicial authority, or sees himself as having it, he often does not just want to decide the case, but to grapple with the broader problem that is at the heart of the case. This has been especially true in the mass torts cases, which he sees as posing important social issues.<sup>67</sup> And he wants to get over the procedural hurdles, and get to the merits. But he still does it without the superficial trappings of status and authority, without robes, and face-to-face with lawyers and litigants.

I suggest that one lesson to draw from Judge Weinstein’s judging is the importance of a richer understanding of proceduralism. There is not one simple form of proceduralism, but many facets. Judge Weinstein sees proceduralism in a way that is not simply technical or following the rules. He sees a duty of proceduralists to expose “procedural camouflage” and substantive impact. For Judge Weinstein, procedure relates to all aspects of experience. The “head” of

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65. David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2089 (1997).

66. This issue of federal district judges as “situated” within their own experience has been much discussed. See Schneider, *Changing Shape of Pretrial Practice*, *supra* note 1, at 563–70 (2010) (discussing Justice Sonia Sotomayor’s United States Supreme Court confirmation hearing and issues of cognitive bias in judging).

67. Weinstein, *supra* note 10, at 261–74.

the law must be connected to the “heart” of justice. The methods and manner by which he makes decisions matter and are meaningful in themselves. All dimensions of procedure, judicial decisions, and judicial conduct, in the courtroom and in the world, make meaning. The commonality is that they have human, and thus deeply substantive, dimensions.

