

Morris, Jeffrey B. Leadership on the Federal Bench: the craft and activism of Jack Weinstein. New York, NY: Oxford University Press, Inc., 2011. 398p. \$85, hardbound

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It is unusual to hear or read about federal district court judges; one argument for this could be made that trial court judges don't make law, and are therefore not as significant, judicially, as appellate court judges who have the ability to make case law. So why write about a federal district court judge? What impact or influence could a mere trial court judge have on the administration of justice from what might be considered a low rung on the judicial hierarchical ladder? More than one could ever have imagined.

From the beginning of the book, the author stated that he wanted this book to explore the impact that the personal life of the human behind the robes had on how that individual ran his courtroom—how those personal factors influenced the decision-making process, starting from as early as when the complaint was filed with the court.

The book opens with an overview of what federal district court judges actually do, as well as the role of the federal district courts within the hierarchy of the court system. In that sense, the book starts off with a lesson in Civil Procedure that most first year law students will never receive; without all of the back-and-forth counterclaims and motions, a lay person who has never studied law or even set foot into a courtroom would be able to appreciate this basic lesson which includes the key terms that are necessary for starting to understand the procedural process.

The author is able to incorporate teasers for the reader to note where those particular procedural elements played into future cases that came before this judge. The first few chapters offer both background and perspective for the chapters that follow. First, Morris describes the growth of the federal courts' scope "during the period 1967 to date" (p.73), and the results that national developments had on them. This includes background on the Eastern District of New York to familiarize the reader with helpful details, from the locations of different neighborhoods and socio-economic activities to demographics and government activity within each implicit area. Then, Morris accounts for how those factors made an impact on how Weinstein conducted himself on the bench; this is followed by Weinstein's impact on those factors and places because of his role on the bench. Finally, the author provides insight into the political atmosphere during that forty-year period, including a movement toward more conservative politics and landmark Supreme Court cases.

Much credit must be given to the author for his organization of the contents of this publication. Each chapter that discusses the cases overseen by Judge Weinstein is organized categorically (e.g. first amendment, criminal, civil rights, environmental or class actions and mass torts cases), and where applicable, further broken down by case. The first four chapters provide the essential background as well as what Morris considers the ten [most important] 'Characteristics of Weinstein's Judging' (ch. 4). The next four chapters account for each of Weinstein's decades on the bench. The last few chapters get into more detail on the bigger cases over which Weinstein presided.

The author noted that Weinstein was very comfortable when he first got to the bench; one reason for this can be attributed to the no. 7 “characteristic”—his fierce independence (p. 100). More specifically, it was because Weinstein had a background in legislative activities, teaching law, and writing procedural rulebooks for lawyers and judges, including the New York Civil Practice Law and Rules and the Manual on New York Procedure. But then, Weinstein, himself, is quoted as saying that he would often render an opinion that he knew would be overturned because that was his own subjective view of a “just” result. Moreover, there were times that Weinstein used his judicial discretion to explicitly render an opinion that did not follow precedent because he thought that that was the right thing to do. For someone who wrote the rules on procedure¹, this seemed like a serious betrayal. Was Weinstein just another hypocrite? Lower courts are supposed to follow precedent, leaving little room for the subjective administration of justice; so was this an abuse of his position?

Throughout the book, the author makes mention of some of Weinstein’s more notable cases, where they are discussed in much more detail. Some of those cases include school desegregation and disability cases (*Mark Twain* on p.145 and *Lora*, on p. 168, respectively), criminal sentencing, class actions and mass torts claims (the *Shoreham* case on p. 230 and *Agent Orange* on p. 323). It was in these chapters, especially the chapter on the sentencing guidelines (ch. 8), where the reader can begin to understand how Weinstein’s “rebellious” instincts effectuated an objective rationale in favor of judicial discretion versus Guideline mandates. Weinstein often spent time with the parties before him in order to see them as more than numbers, but as real people whose lives, and the lives and communities surrounding those persons would be affected by the judgment. Sometimes he visited the sites that were directly involved in the litigations that came before him, sometimes holding hearings at the jails (p. 91). He was displeased with the mandates imposed by the Sentencing Guidelines because they allowed no room for rehabilitation and other mitigating factors; he strayed from those Guidelines and was often reversed, but this defiance sparked a movement. Weinstein did not stand that battleground alone; more and more district court judges were refusing to hear criminal cases because they, too, disfavored the harsh punishments mandated by the Guidelines. The “Guidelines regime” (p.251) ended in 2007 when the Supreme Court “restored the broad sentencing discretion district court judges once had” in *Gall v. United States*, 552 U.S. 38. However, his most notable accomplishment would be from his role in the *Agent Orange* case.

Weinstein was especially creative with the *Agent Orange* case during his second decade on the bench. Agent Orange was a chemical employed by the U.S. government during the Vietnam War used as an herbicide in Vietnam’s forests. The chemical was alleged to have caused various illnesses in many U.S. soldiers who A case involving tens of thousands of Vietnam War veterans, Weinstein saw this as more than a products liability case, but as a “major social problem [that] needed settlement” (p.326). At the time, mass tort litigation had only begun to be used in products liability cases; “*Agent Orange* was the first time a class certification was upheld where members of the class “alleged

¹ “Weinstein was the primary draftsman of the revised New York Civil Practice Law and Rules (CPLR)” (p.48) and he “took an active role in the creation of the Federal Rules of Evidence” (p.49).

injuries varying in severity and types, incurred under similar but not identical circumstances” (pp. 317-18). Weinstein application of a “national consensus” of applicable substantive laws (p.330) was the only way Weinstein saw to harmonize an indeterminate number of plaintiffs with a range of various related harms without specificity as to which company’s product caused the harm. The case ultimately settled, and Weinstein issued a “fairness” opinion (p.332) noting his disappointment in both the government and the chemical companies for their unwillingness to admit fault. The only part of Weinstein’s opinion that was reversed was regarding the fee-sharing agreement for plaintiff’s attorneys and the establishment and management of the foundation established from the settlement monies (p.334). The last chapters detail some class action and mass tort cases that appeared toward the end of Weinstein’s career and the tensions that were heightened with the Court of Appeals because of Weinstein’s creative judging.

Some might describe Weinstein as “heroic”; other might say that he was “lawless” (p.379). Both of these accurate adjectives describe one judge who forged a new path: that of putting humanity and sentiment into the law, of making the law about the people for whom it stands. The contents of the book, in every way, lived up to the expectation that the author had and set forth throughout. It was disappointing to encounter numerous grammatical errors, from an extra pronoun that was replaced by the proper noun but not removed from the text, to spelling and spacing errors and some missing punctuation. While this critic would certainly not hold such oversights against the author, some harsher and more experienced critics might assert that such errors can call the credibility of the author’s work into question; however, it is one opinion that, despite their frequency, such errors should be overlooked for the bigger picture, which is simply that this is a superbly written account of one man—one judge—and how he rose from the countless nameless federal district court judges to make a significant impact of the administration of justice, and certainly on the lives of many people.

Charlotte D. Schneider
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