

## Judge Weinstein's Contributions to Sentencing Law

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In February 2020, at the age of ninety-eight and after fifty-three remarkable years on the federal bench, Judge Jack B. Weinstein hung up the robes he rarely wore.<sup>1</sup> In an interview with the *New York Times*, discussing his retirement, he described how he viewed his legacy: “I would like to be remembered for trying to work with individuals to help them avoid the life-killing environment of prisons and to save them for a life with relatives and friends, with a job, and with the opportunity to lead a lawful life. . . . It’s on a one-to-one basis that I see myself operating—the judge to the individual defendant.”<sup>2</sup> And through this individualized approach, one defendant at a time, love before fear,<sup>3</sup> questioning dogma till the end,<sup>4</sup> always speaking his mind,<sup>5</sup> the consummate chess-master,<sup>6</sup> with human kindness,<sup>7</sup> Judge Weinstein made an indelible impact on federal sentencing law. This special Issue of the *Federal Sentencing Reporter*, a publication the Judge’s words have graced many times,<sup>8</sup> pays honor to the Judge’s lifetime commitment to justice, fairness, and humanity in sentencing.

We both had the honor of serving as law clerks for Judge Weinstein, Carolin from 2016 to 2017 and Ryan from 2017 to 2018. To recognize the Judge’s pathmarking<sup>9</sup> sentencing work, Douglas Berman and Steven Chanenson gave us the opportunity to serve as Guest Editors of this Issue. We have included a range of contributors, including practitioners, academics, and a former federal judge, all of whom offer varying perspectives on Judge Weinstein’s body of sentencing work. Together, the articles assess the impact that Judge Weinstein, one of the longest-serving federal judges, has had on sentencing law. It was his practice—uncommon among federal trial judges—to issue an opinion for each sentence he imposed. This public—and famously voluminous—record offers the rare opportunity to explore his views on sentencing and the impact he has had on criminal justice reform. While each article examines a different aspect of the Judge’s work, one theme is common to all seven contributions: Judge Weinstein was unafraid to voice his opinion on excessive incarceration and openly resisted injustices he saw in the penal system.

Multiple articles address how Judge Weinstein tackled the issue of harsh sentencing laws through his sentencing opinions. Deirdre von Dornum, Attorney-in-Charge of the Federal Defenders for the Eastern District of New York, wrote about her experiences appearing before Judge Weinstein in sentencing decisions. In her article, she highlights his approach toward two of the federal crimes for which the Federal Sentencing Guidelines (“guidelines”) impose relatively high sentences: child pornography and terrorism. Kate Stith, Lafayette S. Foster Professor of Law at Yale Law School and former Assistant U.S. Attorney, contributed an updated version of her 2012 *FSR* article “Weinstein on Sentencing.” Her piece provides a historical overview of Judge Weinstein’s sentencing jurisprudence and shows how “[a]cting within what he understands to be the limits of the law . . . he has sought to find ways, where warranted, to accord mercy under that law.”<sup>10</sup> Dr. Christine Scott-Hayward, Assistant Professor of Law at California State University, Long Beach, specifically focused on the Judge’s 2018 sentencing opinion in *United States v. Trotter*.<sup>11</sup> Her article posits that through this written statement of reasons, “Judge Weinstein will be remembered as the first [judge] to seriously question the need and usefulness of supervised release.”<sup>12</sup> And we contributed a shortened version of our article “A Judge’s Attempt at Sentencing Consistency After *Booker*: Judge Jack B. Weinstein’s Guidelines for Sentencing,” which was originally

published in the *Cardozo Law Review* in October 2019. In it, we analyze how the Judge consistently considered the same 18 U.S.C. § 3553(a) factors to attempt to mitigate harsh sentencing and achieve consistency in his application of the guidelines since *United States v. Booker*.<sup>13</sup>

Judicial opinions were not the only way in which Judge Weinstein voiced his approach to sentencing law. Jessica Roth, Professor of Law at Cardozo School of Law and former Assistant U.S. Attorney, contributed an article in which she examines how, in addition to judicial opinions, the Judge publicly advocated criminal justice reform using extrajudicial speech and the District Court's supervisory authority. Judge Weinstein notably did not wear a robe during hearings in his courtroom, publicly reasoning: "I think people ought to feel this is their courthouse. This is their courthouse, their justice, their system. The high bench, the robes, they are an impediment to that sense."<sup>14</sup> Thomas Frampton, a former clerk of Judge Weinstein's and Associate Professor of Law at University of Virginia School of Law, examined this approach in his article, analyzing the role judges' robes have traditionally played in the American criminal justice system and discussing how Judge Weinstein's unconventional decision reflected his approach to sentencing. Finally, Judge John Gleeson, Partner at Debevoise & Plimpton and former U.S. District Judge in the Eastern District of New York from 1994 to 2016, reflected on his experience learning from the Judge as a trial lawyer appearing before him, and later as a colleague working alongside him. Judge Weinstein, he writes, "taught us that judges are not merely permitted to speak up when they see injustices, but are obligated to do so."<sup>15</sup>

That is evident throughout these articles and in Judge Weinstein's own writings. In a 2004 article, he remarked: "Judges who see the system in operation have an obligation to advise the public of the facts as they observe them. A judge who believes he or she is called upon to commit an immoral act should make that view known."<sup>16</sup> And while doing his best to bring attention to the injustices he saw, the Judge tried to dispense as much justice as he could to each individual defendant. One opinion, article, and sentence at a time, he shaped federal sentencing law.

We hope this Issue of *FSR* gives a glimpse into Judge Weinstein's tremendous body of sentencing work. We are immensely grateful to have learned from him, to have witnessed his brilliance, and to have seen the compassion he showed to the people who appeared before him.

## Notes

- <sup>1</sup> See Thomas W. Frampton, *Hanging Up the Robe*, 33 Fed. Sent'g Rep. 184 (2021).
- <sup>2</sup> Alan Feuer, *A Legal Lion Lays Down His Gavel with a Ruling of 'Love, Not Hate'*, N.Y. Times (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/nyregion/judge-jack-weinstein-retirement.html>.
- <sup>3</sup> See Deirdre D. von Dornum, *Sentencing with Love, Not Hate*, 33 Fed. Sent'g Rep. 189 (2021).
- <sup>4</sup> See Christine S. Scott-Hayward, *Serving a Rehabilitative Goal: Assessing Judge Jack B. Weinstein's Supervised Release Jurisprudence*, 33 Fed. Sent'g Rep. 168 (2021).
- <sup>5</sup> See Jessica A. Roth, *Jack Weinstein: Reimagining the Role of the District Court Judge*, 33 Fed. Sent'g Rep. 163 (2021).
- <sup>6</sup> See Kate Stith, *Weinstein on Sentencing*, 33 Fed. Sent'g Rep. 155 (2021).
- <sup>7</sup> See John Gleeson, *Jack B. Weinstein Up Close*, 33 Fed. Sent'g Rep. 160 (2021).
- <sup>8</sup> See, e.g., Jack B. Weinstein & Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumventions*, 9 Fed. Sent'g Rep. 298, 300 (1997) ("The problem remains at the root—the guidelines as designed and interpreted create too much injustice"); Jack B. Weinstein, *Some Reflections on Several Lean Years of Guidelines Sentencing*, 8 Fed. Sent'g Rep. 12 (1995) ("Those of us who face real people caught up in the justice system dream of the day when the Sentencing Commission abandons the overly harsh and mechanistic" system in place); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent'g Rep. 121 (1994) (criticizing the guidelines' elimination of a mens rea requirement as to drug type or quantity).
- <sup>9</sup> We use this term in honor of the late Justice Ruth Bader Ginsburg, a friend and student of Judge Weinstein's. Aziz Huq and Pam Karlan, *Ginsburg Helped Those Excluded by the Legal System. The Court Needs That View*, Wash. Post (Sept. 22, 2020) ("Ginsburg had a similarly pathmarking predecessor ('pathmarking' was one of her signature words): the incomparable Thurgood Marshall.").
- <sup>10</sup> Kate Stith, *Weinstein on Sentencing*, 33 Fed. Sent'g Rep. 155, 156 (2021).
- <sup>11</sup> *United States v. Trotter*, 321 F. Supp. 3d 337 (E.D.N.Y. 2018).
- <sup>12</sup> Scott-Hayward, *supra* note 4 at 171.
- <sup>13</sup> *United States v. Booker*, 543 U.S. 220 (2005).
- <sup>14</sup> Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, N.Y. Times (May 28, 1991), <https://www.nytimes.com/1991/05/28/nyregion/jack-weinstein-creative-us-judge-who-disdains-robe-and-high-bench.html>.
- <sup>15</sup> Gleeson, *supra* note 7 at 160.
- <sup>16</sup> Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 Fordham Urb. L.J. 131, 166–67 (2004).