

Weinstein on Sentencing

Has Judge Weinstein, over the course of decades, fundamentally changed the contours of federal law and practice in criminal sentencing? I think he would say “not enough.” But that’s not for lack of trying. In addition to many law review articles and speeches,¹ he has written scores of sentencing opinions that exceed the standards of the most exacting academic—thorough, analytically impregnable, and heavily footnoted—attempting to get the Second Circuit, the Supreme Court, and Congress to remake sentencing law.

He has not waged these battles alone—but more than any judge I can think of, he has waged them continually and on every front, with powerful intelligence and humanity. In these ways, he is one of the creators of today’s new sentencing landscape, in which judges are allowed to consider not just what the Sentencing Commission proclaims, but what justice requires.

Never content to rest on his laurels, Judge Weinstein has, in the years since *United States v. Booker*² and its progeny, turned his sights primarily on the Federal Sentencing Guidelines’ (“guidelines”) tough cousin, mandatory minimums. And, never shy about stirring up a little controversy, he’s taken on sentencing in terrorism and child pornography cases.

The Judge’s first pathbreaking sentencing case actually involved neither the guidelines nor mandatory minimums. In 1977, Judge Weinstein had the duty to sentence Daniel Fatico, who had pled guilty to one count of conspiracy to receive stolen goods in interstate commerce, in connection with a truck hijacking at Kennedy Airport. The government advised the court that, at the sentencing proceeding, it wished to call an FBI agent who would provide reliable, informant information that Fatico was a “made member” of the Gambino crime family. Judge Weinstein ordered the government not to call the witness, concluding that this was a new allegation that was material to sentencing under the then existing “special offender” law and, therefore, that such hearsay testimony would violate Fatico’s confrontation and due process rights.³

The government sought mandamus in the Second Circuit. And, as has often been the case, it won—at least initially.⁴

At the sentencing hearing on remand, the government called not one but ten witnesses. Judge Weinstein found that it had proved by “clear, unequivocal and convincing evidence” that the defendant was indeed a member of the Gambino family.⁵ On this basis, he explained, he was

sentencing Fatico much more severely than he otherwise would have.⁶

On the defendant’s appeal, the government requested that the Second Circuit reject both the burden-of-proof standard the Judge had used and “also the entire concept of a [sentencing] hearing.”⁷ The Court of Appeals addressed these matters in a footnote. It did not approve or disapprove of the standard of proof. And it did not require sentencing hearings for important disputed facts. It did, however, allow that it “certainly would not hold it an abuse of discretion” for a district judge to hold such a hearing.⁸

And so *Fatico* hearings were *not* instituted by the Court of Appeals, which had not said they were necessary. And they were not instituted through the Criminal Rules, nor by Congress or the Supreme Court. They were developed and instituted by Judge Weinstein. They became the practice throughout the Second Circuit and many courts beyond. And it is a testament to Judge Weinstein’s vision and persistence that the evidentiary hearings required by the Sentencing Reform Act of 1984 are called, at least in these parts, *Fatico* hearings.⁹

Now let me give but a glimpse of Judge Weinstein’s sentencing jurisprudence in the years since the guidelines went into effect.

It is not surprising that the creator of the *Fatico* hearing was initially hopeful about the guidelines’ potential to bring reason and a greater measure of process to sentencing.¹⁰ At the same time, he warned, “[t]o apply the rules of the new system blindly amounts to injustice. . . . No matter how efficient it would be, we may not delegate the sentencing decision entirely to the computer.”¹¹

As the radical nature of the guidelines became clear by the early 1990s, Judge Weinstein thoroughly soured on them. His discontent coalesced into four main criticisms.¹² First, because they were so rigid, they had perverted the sensible idea of reducing disparity into a “procrustean bed.”¹³ Second, while seeking to reduce inter-judge sentencing *disparity*, what the guidelines actually reduced was inter-judge sentencing *discussion*, at least among the judges in the Eastern District of New York.¹⁴ Third, the new regime required judges to look at the “bad” aspects of the defendant, while neither probation officers nor defense counsel had incentive to be aggressive in seeking out the “good.”¹⁵

Fourth and foremost, the guidelines failed to treat each defendant as “a unique human being.”¹⁶ Judge Weinstein noted that “[i]t would be historically and morally



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inappropriate to equate [sentencing under the guidelines with] deliberate and atrocious war crimes and genocide.”¹⁷ Yet, in the same paragraph, he quoted Hannah Arendt’s work on the Holocaust and expressed his worry that under the guidelines “we judges will cease to aspire to the highest traditions of humanity and personal responsibility that ought to characterize our office.”¹⁸

Judge Weinstein has never ceased to aspire to the highest traditions of his office. Acting within what he understands to be the limits of the law—which for this Judge are, essentially, appellate opinions directly on point and mandates from the Second Circuit *to him!*—he has sought to find ways, where warranted, to accord mercy under that law. Early on he became a judicial Houdini in freeing himself from various guidelines mandates. Thus, he read the Sentencing Reform Act to allow departures in areas not specifically contemplated by the Commission, and so departed on the basis of physical illness,¹⁹ being a single parent,²⁰ “pathological gambling addiction,”²¹ insufficient evidence that the drug courier defendants knew that the drug in the balloons they’d swallowed was heroin,²² and many more such creative bases not directly addressed in the guidelines. More recently, he was among the earliest district judges to make use of the First Step Act’s provision for retroactive sentence reduction for certain drug offenses.²³ In several cases, he deferred sentencing for a year so that the defendants might have an opportunity for rehabilitation.²⁴

I get a special kick out of a case where the Second Circuit had earlier reversed his order granting bail. At sentencing, Judge Weinstein granted a departure because of, among other factors, “the defendant’s long pretrial incarceration under onerous conditions.”²⁵ (So there, Second Circuit!)

Judge Weinstein actually got away with all of the decisions I’ve mentioned—but perhaps that’s because the government, for one reason or another, didn’t appeal them.

Where the government did appeal, Judge Weinstein was less successful.

The Second Circuit rejected, for instance, his 1994 holding that a close reading of the Sentencing Reform Act revealed that the guidelines were not, in fact, mandatory.²⁶ In another case, where the Court of Appeals insisted that he apply a six-level increase due to relevant conduct,²⁷ the Judge asked, regarding the sentence he was required to impose, “Under the blindfold, does justice weep?”²⁸

As these decisions suggest, Judge Weinstein is proactive. In 2003 Congress enacted the Feeney Amendment, which required the Courts of Appeals to review *de novo* any departure from the Sentencing Guidelines that lacked adequate explanation, authorization, or justification, or that simply did not “advance the objectives” of the guidelines.²⁹ The Judge responded by publishing a memorandum, in Federal Rules Decisions, called *In re Sentencing*.³⁰ There he announced that henceforth all of his sentencing hearings would be videotaped, in order to “assist the Court of Appeals judges in their new onerous task.”³¹ He noted that

“the appellate judges can then observe the actual people they are sentencing.”³²

Not surprisingly, since *Booker* came down in 2005, Judge Weinstein has . . . exercised his discretion.³³ For instance, he has refused to apply sentencing enhancements where there is no proof of *mens rea*.³⁴ He has departed from the guidelines on the basis of the impact a sentence could have on a defendant’s mental health.³⁵ And in an opinion spanning more than one hundred pages, he decried—even as he applied—mandatory minimums for minor participants in drug crimes.³⁶

As I noted at the outset, Judge Weinstein’s commitment to ingenious legal interpretation has not wavered in the face of public controversy. He has consistently refused to countenance harsher-than-necessary punishments for the “crime du jour”—even as a nearly lifelong New Yorker presiding over cases involving terrorism. In 2019, Judge Weinstein sentenced a female ISIS supporter who had pled guilty first to conspiracy under the material support statute and to obstruction of justice by destroying evidence of her continuing aid to terrorists.³⁷ Understandably, the case of an “ISIS recruiter in Brooklyn” who federal prosecutors insisted was a “double agent” grabbed local and national headlines.³⁸ While the government requested a sentence between thirty and forty years (the applicable guideline range as applied within the statutory maximum), Judge Weinstein cited the defendant’s history of abuse and her potential for rehabilitation in explaining his sentence of just four years (eighteen months in prison after time served).³⁹

He has also taken on the difficult and sensitive matter of sentencing in child pornography cases.⁴⁰ In a 2016 case, he had to sentence a fifty-three-year-old father of five who pled guilty to one count of possessing child pornography photos and videos.⁴¹ Judge Weinstein varied from the guideline range of six-and-a-half years to eight years—down to just five days’ time served, plus seven years of “strict” supervised release including treatment.⁴² In an opinion spanning over sixty pages of the Federal Supplement, Judge Weinstein painstakingly explained his departure from the guidelines. He emphasized that imposing the guideline sentence on this defendant, who was never involved in production of the pornography, would “not further the interests of justice,” “cause serious harm to [the defendant’s] young children by depriving them of a loving father,” and “strip [him] of the opportunity to heal.”⁴³ The government did not appeal.

In another child pornography case, decided in 2011, Judge Weinstein found that applying the five-year statutory minimum would violate that defendant’s rights under the Eighth Amendment’s ban on cruel and unusual punishment.⁴⁴ This was no idle speculation; the Judge wrote an approximately four-hundred-page opinion explaining the historical, doctrinal, and factual bases for his judgment. The Second Circuit reversed, and Judge Weinstein reluctantly imposed the five-year minimum, citing Leviticus and

Maimonides in the portion of his decision examining the history of criminal punishment.⁴⁵

That four-hundred-page opinion, and the others like it, are, I think, crucial to understanding this judge. Some of his critics latch on to the compassion and social insight on display in many of these opinions to argue that Judge Weinstein wears rose-colored glasses or is “soft” on crime. Weinstein, so they say, misconstrues text, facts, and precedent in order to reach “some conclusion that [he] like[s].”⁴⁶ These critics fail to engage with the many cases in which the Judge has been “tough” on the guilty even when they ask for (unmerited) leniency.⁴⁷ Others, while expressing admiration for the Judge’s great intellect, contend that Weinstein’s professorial “desire for intellectual autonomy” leads him to disregard the institutional limits of his judicial office.⁴⁸ While it is certainly true that Judge Weinstein’s approach to judging entails interpretive creativity, there is a good jurisprudential argument that this approach is not only *consistent* with the responsibilities of his office, but is itself *necessary* to fulfill those responsibilities. As Dworkin wrote, judges have the interpretive duty to cast the law in its best light and to apply it with cognizance of its normative thrust.⁴⁹ Judge Weinstein comprehends “the law” broadly and never fails to situate his reasoning within this mighty edifice.

Finally, there are critical aspects of judging that the debate about the Judge’s interpretive philosophy misses entirely. Judge Weinstein always brings to bear piercing intelligence that untangles complexity, and integrity that rebukes deception. I would say of Jack Weinstein what he has recalled about great judges of the past. In an article entitled *The Roles of a Federal District Court Judge*, he writes: “A candid statement of the reasoning supporting the trial court’s decision is always required. Mendacity in twisting the facts, evidence, history or legal background to arrive at a conclusion is not acceptable.”⁵⁰ He then quotes Learned Hand’s description of another New York judge: “He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table.”⁵¹

Judge Weinstein has always acknowledged all the chessmen—all the laws that bind him and the litigants who come before him.

But Judge Weinstein does play chess very well.

Notes

* The author thanks Max Jesse Goldberg, Yale Law School class of 2022, for his excellent research and editorial assistance. The original version of this essay consisted of remarks given at a panel on Judge Weinstein’s jurisprudence held on September 13, 2011, at the New York City Bar Association. That event marked Judge Weinstein’s ninetieth birthday and also the publication of Jeffrey Morris’s new biography, *Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein* (2011). The remarks were published in 24 Fed. Sent’g Rep. 214 (2012). In the same spirit of commemoration, this essay has expanded and updated my examination of Judge Weinstein’s sentencing jurisprudence through his recent retirement from the bench. See Carl Prine, *WWII Vet, Federal Judge Named by LBJ Retires at 98*, Navy Times (Feb. 13, 2020),

<https://www.navytimes.com/news/your-navy/2020/02/13/wwii-vet-federal-judge-named-by-lbj-retires-at-98/>.

¹ See, e.g., Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 Colum. J. Gender & L. 2 (1995); Jack B. Weinstein, *A Trial Judge’s Reflections on Departures from the Federal Sentencing Guidelines*, 5 Fed. Sent’g Rep. 6 (1992); Jack B. Weinstein and Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent’g Rep. 121 (1994); Jack B. Weinstein, Jamie Lehmann Memorial Lecture at Fifth Avenue Synagogue in New York City: Does Religion Have a Role in Criminal Sentencing? (June 4, 2007), in 23 Touro L. Rev. 539 (2007).

² 543 U.S. 220 (2005).

³ *United States v. Fatico*, 441 F. Supp. 1285, 1287 (E.D.N.Y. 1977). Taking the long view, Judge Weinstein argued that these constitutional procedural protections had evolved considerably in recent decades, as evidenced both by Supreme Court cases, like *Gardner v. Florida*, 430 U.S. 349 (1977), that applied a few constitutional rights at sentencing, and by changes in the Rules of Criminal Procedure. Before 1966, Rule 32 prohibited even revelation of the pre-sentence report to defendants and their counsel, but by 1975 the Rule required such disclosure and provided that, at the court’s discretion, the defendant could introduce testimony relating to any factual inaccuracy, Fed. R. Crim. P. 32 advisory committee’s notes to 1975 amendment. It was a short step to recognize that the defendant had the right to cross-examine the government’s witnesses.

⁴ The Second Circuit ordered Judge Weinstein to allow the witness to be called. *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). This first Court of Appeals opinion in *Fatico* did move the law of the Circuit a little, however, in implying that hearsay is admissible at a sentencing hearing only “when the defendant does not dispute the truth of the statements sought to be introduced or the statements are *sufficiently corroborated* by other evidence.” *Id.* at 713 (emphasis added) (citations omitted). The Court of Appeals also noted that “the weight given to the informer’s declarations and the assessment of credibility are matters for the sentencing court.” *Id.* at 713 n.14.

⁵ *United States v. Fatico*, 458 F. Supp. 388, 412 (E.D.N.Y. 1978).

⁶ Instead of sentencing *Fatico* to three years to be served concurrently with a separate conviction on a federal gambling charge, Judge Weinstein sentenced him to a term of four years to be served consecutively to the gambling sentence, and noted that consecutive sentences, along with “the finding of organized crime,” reduced “the chances of early parole . . . to the vanishing point.” *Id.* at 412–13.

⁷ *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979).

⁸ *Id.*

⁹ It took a couple of decades, but under the guidelines regime the Second Circuit also adopted Judge Weinstein’s view that sometimes a burden of proof higher than the preponderance standard is needed for the finding of aggravating facts. See *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997) (“[A] more rigorous standard should be used in determining disputed aspects of relevant conduct, where such conduct, if proven, will significantly enhance a sentence.”) (citing *United States v. Gigante*, 94 F.3d 53, 56–57 (2d Cir. 1996)). For more on *Gigante*, see *infra* note 47. Judge Weinstein has explained that the significance of *Fatico* hearings is their deterrent effect: knowing that disputed facts will lead to a hearing, counsel exercise greater diligence in contributing to and reviewing pre-sentence reports. In particular, defense counsel exercise greater diligence in ensuring that their clients understand and agree with the representations in such reports. See Jack B.

Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357, 358–59 (1992).
 10 See Jack B. Weinstein, *A Trial Judge's First Impression of the Sentencing Guidelines*, 52 Alb. L. Rev. 1 (1987–88).
 11 *Id.* at 11.
 12 See Weinstein, *supra* note 9.
 13 United States v. Ekwunoh, 888 F. Supp. 364, 364 (E.D.N.Y. 1994); see also United States v. Molina, 963 F. Supp 213, 215 (1997) (“Theseus reportedly killed the evil Procrustes. Procrustean Guidelines are not so easily dealt with.”).
 14 See Weinstein, *supra* note 9, at 363–64.
 15 *Id.* at 364.
 16 *Id.* at 366.
 17 *Id.*
 18 *Id.*
 19 See United States v. Hammond, 37 F. Supp 2d 204 (E.D.N.Y. 1999) (HIV-positive status); United States v. Velasquez, 762 F. Supp. 39 (E.D.N.Y. 1991) (metastatic cancer).
 20 See United States v. Concepcion, 795 F. Supp. 1262 (E.D.N.Y. 1992).
 21 See United States v. Liu, 267 F. Supp. 2d 371, 377 (E.D.N.Y. 2003).
 22 See United States v. Cordoba-Hincapie, 825 F. Supp. 485 (E.D.N.Y. 1993); see also United States v. Ekwunoh, 813 F. Supp. 168, 179 (E.D.N.Y. 1993) (sentencing the defendant on the basis of her “credible and candid” testimony that she believed she was assisting in smuggling only 400 grams of heroin, rather than the 1,013 grams that DEA agents actually found in the attaché case that she was carrying), *rev'd*, 12 F.3d 368 (2d Cir. 1993).
 23 See United States v. Simons, 375 F. Supp. 3d 379 (E.D.N.Y. 2019); see also First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194.
 24 See, e.g., United States v. K., 160 F. Supp. 2d 423 (E.D.N.Y. 2001). Judge Weinstein had held in an earlier case that the guidelines did not prohibit such delays. See United States v. Flowers, 983 F. Supp. 159 (E.D.N.Y. 1997).
 25 United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412 (E.D.N.Y. 2002).
 26 See United States v. Abbadessa, 848 F. Supp. 369 (E.D.N.Y. 1994), *vacated sub nom.* United States v. DeRiggi, 45 F.3d 713 (2d Cir. 1995). Judge Weinstein concluded that the guidelines were just one factor the judge should look at under the Sentencing Reform Act’s section 3553(a). This is not a nutty theory; it was shared by, among others, my late, great colleague Dan Freed. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681 (1992). The Second Circuit, like all the other courts of appeals, rejected this reading, applying instead a *Chevron*-like deference to the Commission’s reading of its enabling statute. See *DeRiggi*, 45 F.3d 713. In an earlier case, Judge Weinstein held that the sentencing enhancement for perjury was not mandatory (and in the course of his opinion discussed not only the issue of double-counting in that particular case, but also the general nature of “human frailty”). United States v. Shonubi, 802 F. Supp. 859, 862 (E.D.N.Y. 1992). He was reversed. United States v. Shonubi, 998 F.2d 84 (2d Cir. 1993).
 27 See United States v. Molina, 106 F.3d 1118 (2d Cir. 1995).
 28 United States v. Molina, 963 F. Supp. 213, 216 (E.D.N.Y. 1997). The sentence quoted at text is the title of Jeffrey Morris’s chapter on Judge Weinstein’s sentencing decisions. On remand in *Molina*, Judge Weinstein also wrote as follows: “Molina made two mistakes. The first was entering into a conspiracy to rob an armored truck and acting to carry out that plan. His second mistake was in seeking trial rather than in quickly working out a plea deal with the government. The result is that Molina, although . . . more apt to be

rehabilitated . . . will languish under a sentence much longer than all but one of his confederates. His two year-old son will spend more than a decade of his childhood without his father. This is what the guidelines as interpreted by the courts require.” *Id.* at 215.
 29 S. 151, 108th Cong. § 401(d) (2003) (enacted and codified at 18 U.S.C. §3742(e)(3) (2018)). Because it depended on the guidelines’ mandatory nature, this provision was invalidated two years later by *United States v. Booker*, 543 U.S. 220, 259 (2005).
 30 *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004).
 31 *Id.* at 262.
 32 *Id.*
 33 When the Supreme Court issued its landmark decision in *Blakely v. Washington*, 542 U.S. 296 (2004), Judge Weinstein immediately saw that the *Blakely* reasoning applied equally to the federal guidelines, and sought to adapt sentencing procedures to avoid the *Blakely* problem. In one case, the Judge even ordered the empanelling of a jury to hear disputed sentencing facts. United States v. Landgarten, 325 F. Supp. 2d 235 (E.D.N.Y. 2004); see also United States v. Khan, 325 F. Supp. 2d 218, 219 (E.D.N.Y. 2004) (“*Blakely*’s reintroduction of the jury into the present sentencing process suggests the desirability of making the Guidelines discretionary guideposts—as their name implies—rather than mandatory precepts, inflexible commands.”). In another case, he stayed a federal revocation proceeding so that the defendant could be tried on his new crime in state court and be eligible for drug treatment. United States v. Brennan, 468 F. Supp. 2d 400 (E.D.N.Y. 2007).
 34 See United States v. Handy, 570 F. Supp. 2d 437 (E.D.N.Y. 2008).
 35 See United States v. Lawrence, 254 F. Supp. 3d 441 (E.D.N.Y. 2017).
 36 United States v. Bannister, 2011 WL 1113591, *amended*, 786 F. Supp. 2d 617 (E.D.N.Y. 2011). In the end Judge Weinstein acknowledged that he viewed the minimums as appropriate for some of the defendants. See 786 F. Supp. 2d at 670.
 37 United States v. Caesar, 388 F. Supp. 3d 194 (E.D.N.Y. 2019).
 38 See, e.g., Kira Grant, *American Who Admitted to Helping ISIS Wants Leniency as Prosecutors Accuse Her of Being a Double-Agent*, Fox News (June 26, 2019), <https://www.foxnews.com/us/islamic-state-recruiter>; Karen Xia & Leonard Greene, *ISIS Sympathizer Who Broke Promise to Help Government Sentenced to 4 Years in Prison*, N.Y. Daily News (June 26, 2019), <https://www.nydailynews.com/new-york/ny-terror-sentencing-isis-20190626-lv5rut2turd67acc3aqt6jcpdy-story.html>.
 39 *Caesar*, 388 F. Supp. 3d at 220, 223. As required by statute, Judge Weinstein’s sentence also included eight years of supervised release. The government did not appeal.
 40 See generally United States v. D.W., 198 F. Supp. 3d 18, 56 (E.D.N.Y. 2016) (contemplating the increased risk of harm to defendant in prison as a consideration in sentencing); United States v. D.M., 942 F. Supp. 2d 327 (E.D.N.Y. 2013) (critically analyzing the legislative and judicial development of standards for child pornography sentencing).
 41 United States v. R.V., 157 F. Supp. 3d 207 (E.D.N.Y. 2016).
 42 See *id.* at 267. The term of supervised release was above the five-year mandatory minimum. See *id.* at 217.
 43 *Id.* at 267.
 44 United States v. C.R., 792 F. Supp. 2d. 343 (E.D.N.Y. 2011), *vacated sub nom.* United States v. Reingold, 731 F.3d 204 (2d Cir. 2013).
 45 United States v. C.R., 972 F.Supp.2d 457, 458 (E.D.N.Y. 2013).

⁴⁶ Orin Kerr, *Second Circuit Clerks, Get Ready: Judge Weinstein's New Opus Concluding Mandatory Minimum for Child Porn Distribution Is Unconstitutional (At Least for Younger Defendants)*, Volokh Conspiracy (May 20, 2011, 4:33 PM), <http://volokh.com/2011/05/20/second-circuit-clerks-get-ready-judge-weinstein-hands-down-new-opus-concluding-mandatory-minimum-for-child-porn-distribution-is-unconstitutional-at-least-for-younger-defendants/> (replying to a question in the comments section).

⁴⁷ See, for example, *United States v. Gigante*, 996 F. Supp. 194 (E.D.N.Y. 1998), in which Judge Weinstein saw through Vinny "The Chin" Gigante's pretended mental illness or incompetency and sentenced accordingly.

⁴⁸ Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 Colum. L. Rev. 1971, 1971, 1985–92 (1997).

⁴⁹ See Ronald Dworkin, *Law's Empire* 228–32 (1986). Dworkin invents and develops the metaphor of the chain novel to argue that judges "must decide which interpretation shows the legal record to be the best it can be from the standpoint of substantive political morality." *Id.* at 248.

⁵⁰ Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 Brook. L. Rev. 439, 453 (2011).

⁵¹ *Id.* at 454 (quoting Learned Hand, *Mr. Justice Cardozo*, 48 Yale L.J. 379, 380 (1939)).