

## LETTER TO PROFESSOR BURCH

*Jack B. Weinstein\**

Dear Professor Burch:

I enjoyed your *A New Way Forward*.<sup>1</sup> Your views about ways to deal with mass torts—as well as massive civil rights, discrimination, and institutional abuses—largely accord with my own.<sup>2</sup> Below are brief additional thoughts.

Ad hoc groups of those with shared grievances are desirable, particularly in local air and water pollution matters, civil and constitutional rights deprivations, and cases such as DES where mutual psychic as well as monetary help is necessary. Transient groups of harmed or otherwise affected laypersons sometimes can agree on sound remedies that may save a community. In litigations over discrimination and civil rights violations with many potential clients requiring a decree, non-governmental agencies such as legal defense funds, civil liberties unions and Legal Aid organizations are useful, and often essential. Even these organizations, however, sometimes act without full consultation with members of the groups they are representing. An important settlement in favor of a group may affect many persons other than those who are parties to the litigation.<sup>3</sup>

Compensation through money damages is generally favored by individual entrepreneurial lawyers. The tasks and fees of attorneys are generally simplified when they represent a passive group that, by default, turns over discovery,

---

\* Senior Judge, United States District Court, Eastern District of New York.

<sup>1</sup> 2009 CARDOZO L. REV. DE NOVO 168.

<sup>2</sup> See, e.g., JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 46–60, 86–87, 92–106, 95–106 (1995) (communitarianism and communication among and with the aggrieved); Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1359279>.

<sup>3</sup> See, e.g., Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES, Aug. 11, 2009, at A1.

settlement, and other litigation determinations to the attorney. Litigation—whether by trial or settlement—requires decisions; as centers of decision-making multiply, resolution becomes more difficult.

Resolution is also complicated because of aspects of social psychology. Some participants will attach different values to group litigation and measure those values in different ways. Some give greater weight to accessing the judicial system, while others will desire administratively easy determinations. Some will be indifferent to small awards, while others will be vindictive regardless of what is at stake.<sup>4</sup> Conclusions may be swayed by the way people make decisions.<sup>5</sup> Many choices are irrational—that is, left to their own devices, people may select outcomes that are not economically, socially, or otherwise beneficial for themselves.<sup>6</sup>

The judge's task is usually simpler when only attorneys speak for the clients. That simplification does not justify the judiciary's failure to conduct hearings in appropriate cases to determine whether a settlement is fair to the parties as well as to affected communities. Judges need not be rubber stamps.

As you suggest, the administrative route to handling these massive disputes has disadvantages. But, when well run and sufficiently funded, a public administrative agency can effectively protect against future harm, as well as provide compensation for past delicts. As Judge Jed Rakoff's skeptical questioning of an S.E.C. settlement reflects,<sup>7</sup> oversight of an administrative scheme by the courts and Congress is often necessary.

Civil litigation cannot carry the full burden of many mass disputes. Cooperation among the administrative, criminal, and civil legal systems is necessary in order to adequately compensate victims and help avoid mass harms.<sup>8</sup>

---

<sup>4</sup> See Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 OHIO ST. L.J. 1, 42 (1993); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 383 (1995) (observing that law of aggregate litigation promotes values associated with process and participation by "attend[ing] to varying and potentially incommensurate valuations across a range of litigants").

<sup>5</sup> See Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. (forthcoming Mar. 2010).

<sup>6</sup> See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973).

<sup>7</sup> See *Judge Halts Settlement With Bank*, N.Y. TIMES, Aug. 6, 2009, at B3.

<sup>8</sup> See generally Jack B. Weinstein, *Compensation for Mass Private Delicts*:

The mass litigation field remains volatile. Changes are constantly being made as a result of academic analysis, pragmatic choices of counsel and parties, and decisions by courts. For example, the attorneys general of the states, often acting in coordination, have in recent years proven to be a new and powerful governmental force. In the coordinated tobacco settlement, they laid down what amounted to national policy with respect to advertising to juveniles and the like. In the Zyprexa cases, settlements of cases by state attorneys general have included a uniform provision for ethical practices by the defendant pharmaceutical company which may set a new pattern within a major industry.

Modern evolving communication technology has made it possible for many persons to participate in information sharing and decision-making. For example, the *New York Times* described the Army's use of new online systems to permit all levels of army personnel to participate in devising and revising new manuals.<sup>9</sup> These devices should be utilized by the courts to ensure appropriate consultation with those affected by judicial decisions in mass cases.

As I pointed out to the law clerks of the Eastern District of New York recently, judges retain an enormous common law power to modify the substantive and procedural rules affecting mass cases.<sup>10</sup> I think I shocked some of them by suggesting that the contention that judges make no law is absurd. Judges' and academics' recognition of their obligations to the individuals and groups before them, as well as to the community at large, in the kinds of cases we are discussing, remains vital to the utility and dynamism of the rule of law.

Sincerely yours,

Jack B. Weinstein  
Senior U.S. District Judge

---

*Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 960–82 (2001); Adam S. Zimmerman, *Distributing Justice* (July 1, 2009) (unpublished manuscript, on file with author).

<sup>9</sup> See Noam Cohen, *Care to Write Army Doctrine? If You Have ID, Log Right On*, N.Y. TIMES, Aug. 14, 2009, at A3 (use of Wikipedia-style software to permit consultation and contribution).

<sup>10</sup> See Jack B. Weinstein, Senior U.S. District Judge, Eastern District of New York, *Speech to Law Clerks and Student Interns: Making Law for Mass Cases* (July 16, 2009) (transcript available at <http://www.nyed.uscourts.gov/pub/docs/local/TranspeechLC.pdf>).

Preferred Citation

Jack B. Weinstein, *Letter to Professor Burch*, 2009 CARDOZO L. REV. DE NOVO 192, available at [http://www.cardozolawreview.com/index.php?option=com\\_content&view=article&id=120:weinstein2009192&catid=14:featured-de-novo-articles&Itemid=22](http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=120:weinstein2009192&catid=14:featured-de-novo-articles&Itemid=22).