JUDGE WEINFELD AND THE ADJUDICATORY PROCESS: A LAW FINDER IN AN AGE OF JUDICIAL LAWMAKERS

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In his 25 years on the bench, Edward Weinfeld has attained a nationwide reputation as an outstanding member of the federal judiciary. Judge Weinfeld's reputation is based, in part, upon his longstanding efforts to foster social justice and upon the new law that those efforts have produced. As the other tributes will show, the Judge's opinions have made much new law; very few other district judges have been as innovative.

Judge Weinfeld has made his most important contributions in the law of criminal procedure. Since the 1950's he has consistently permitted criminal defendants to engage in broad pretrial discovery so that "[a] trial with possible serious consequences to the defendant and of importance to the public should not be treated 'as a game of combat by surprise.' "[1] In the 1960's he authored two significant opinions prohibiting judicial participation in the plea-bargaining process.[2] There have also been many other cases in which the Judge has protected the procedural rights of criminal defendants. He has held, for example, that testimony procured by misleading statements on the part of the police cannot be admitted at trial[3] and that a grant of immunity from federal prosecution bars any related state prosecution.[4]

Before the Supreme Court entered the field, Judge Weinfeld was one of the leading judicial protectors of constitutional rights in noncriminal cases. He has consistently upheld the right to due pro-

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[1] United States v. Peace, 16 F.R.D. 423, 424 (S.D.N.Y. 1954), *quoting* Fryer v. United States, 207 F.2d 134, 136 (D.C. Cir. 1953).

[2] United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963).

[3] United States *ex rel.* Caserino v. Denno, 259 F. Supp. 784 (S.D.N.Y. 1966).

[4] *In re* Ullmann, 128 F. Supp. 617 (S.D.N.Y.), *aff'd sub nom.* United States v. Ullmann, 221 F.2d 760 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956).

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cess of alien residents,[5] of government employees[6] and of selective service registrants.[7] Weinfeld decisions have also protected dissident political groups from unauthorized congressional investigations[8] and from infiltration by undercover police agents seeking to entrap them into criminal activities.[9] At least at the preliminary stages of litigation, he has ruled in favor of racial and ethnic minorities seeking equal protection in housing[10] and in employment.[11] In these opinions, which reflect his commitment to the ideal of justice for all, Judge Weinfeld has assuredly been one of the more creative members of the federal judiciary.

The Judge is not the only innovative member of this group, however, and his judicial creativity is not the sole basis of his reputation. That reputation also rests upon the distinctive quality of the more-than-1500 of his opinions that have been published in the reports—opinions that uniformly bespeak the Judge's thorough research, scholarship and craftsmanship. But his opinions contain more: they are characterized by a consistency of style that reveals him as a judge who believes in the existence of unchanging legal rules and principles that he must find and follow, and as one who, in fact, pronounces judgments that are products of reason rather than acts of will.[12]

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[5] *See, e.g.*, United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966). In a number of cases involving deportation proceedings in which resident aliens or naturalized citizens have advanced due process claims, Judge Weinfeld has decided the cases in their favor on statutory grounds, rendering it unnecessary to reach the broader constitutional issues. *See* United States *ex rel.* Kusman v. District Director, 117 F. Supp. 541 (S.D.N.Y. 1953); *In re* Oddo, 117 F. Supp. 323 (S.D.N.Y. 1953), *rev'd sub nom.* Application of Barnes, 219 F.2d 137 (2d Cir. 1955), *rev'd sub nom.* United States v. Minker, 350 U.S. 179 (1956); United States *ex rel.* Daniman v. Esperdy, 113 F. Supp. 283 (S.D.N.Y. 1953); United States *ex rel.* Chew v. Shaughnessy, 113 F. Supp. 49 (S.D.N.Y. 1953). *See also In re* Chew, 278 F. Supp. 44 (S.D.N.Y. 1967).

[6] *See, e.g.*, Snead v. Department of Social Servs., 355 F. Supp. 764 (S.D.N.Y. 1973) (three-judge court), *vacated*, 416 U.S. 977 (remanded for further consideration in light of Arnett v. Kennedy, 416 U.S. 134 (1974)), *adhered to on remand*, 389 F. Supp. 935 (S.D.N.Y. 1974) (three-judge court) (per curiam); Haine v. Googe, 248 F. Supp. 349 (S.D.N.Y. 1965) (since common law gave public employee right to withdraw resignation, consideration of due process claim unnecessary).

[7] *See, e.g.*, United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966). Judge Weinfeld's rationale in *Burlich* was adopted by the Supreme Court in Mulloy v. United States, 398 U.S. 410, 415-16 (1970).

[8] *See* United States v. Lamont, 18 F.R.D. 27 (S.D.N.Y. 1955), *aff'd*, 236 F.2d 312 (2d Cir. 1956).

[9] Handschu v. Special Servs. Div., 349 F. Supp. 766 (S.D.N.Y. 1972).

[10] Feliciano v. Romney, 363 F. Supp. 656 (S.D.N.Y. 1973).

[11] Vulcan Soc'y v. Civil Serv. Comm'n, 360 F. Supp. 1265 (S.D.N.Y.), *aff'd in part*, 490 F.2d 387 (2d Cir. 1973).

[12] Although Judge Weinfeld appears to fit Karl Llewellyn's description of a judicial formalist in that his opinions are written "in deductive form with an air of

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My objective in the first section of this Article will be to analyze Judge Weinfeld's style of writing opinions to see how he avoids infusing his personal policy predilections into his decisions in an arbitrary fashion. Then, in the second section, I shall seek to explain how it is possible for a judge in the second half of the 20th century to avoid arbitrariness in his judgments yet at the same time maintain a concern for social justice and a position as one of the more innovative members of the federal bench.

I

Edward Weinfeld calls himself a "fact judge." To the casual reader, any single Weinfeld opinion often seems merely to decide disputed issues of fact and to apply the law as discovered by following professionally established standards of research and analysis. The reader of his opinions will almost never find the Judge engaged in the self-conscious making of new law. The opinions seem to reveal instead a strong faith that existing law will suffice to decide every case coming before him—a belief that, if he uses his energy and intelligence, he will be able to find the law, and that failure to find it would reflect on his capacity as a judge, not on the majesty of the law.

Although Judge Weinfeld has never written or spoken publicly about the nature of the judicial function, he would, I am convinced, emphatically reject the notion that judges should explicitly consider competing social policies in deciding individual cases and advance those policies they think most desirable with new rules that would replace existing law. The Judge, who is not naive, knows that existing rules of law often reflect past policy judgments made in legislative or judicial forums, and, as a well-informed judge, he is aware of the policies underlying the rules by which he decides cases. Nevertheless, he considers it no part of the judicial function, at least at the trial court level, to decide whether social policies adopted as law in the past should give way to newer com-

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single-line inevitability," K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38 (1960), I have purposely declined to label him as such. Duncan Kennedy persuasively suggests that formalism involves more than mere removal of arbitrariness from the judicial reasoning process: he thinks formalists also seek to minimize discretion in factfinding by providing detailed rules for individual fact situations. To eliminate arbitrariness in rule identification, he theorizes, a formalist deduces rules from fundamental principles of the common law and liberal political theory. *See* Kennedy, *Legal Formalism*, 2 J. LEGAL STUD. 351, 355, 358-59, 363-65 (1973). While Judge Weinfeld is anxious to exclude arbitrariness from the judicial process, he has never expressly addressed himself to the relationship between rules and principles, nor does he believe that he should always turn to detailed rules rather than basic principles as a source of decisional law.

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peting ones. For Weinfeld, the duty of a judge is to apply the law as it exists, without passing judgment on the policies it may promote.

Much of my sense of Judge Weinfeld's faith in the existence of law and his commitment to its application is based upon my year's experience as his law clerk during 1965-66. That faith and commitment were important operational principles in chambers. The Judge was always willing to discuss in depth and detail the cases before him, and he never dismissed any argument I made which was directed to the law. Largely through his personal example, he communicated his assumption that we were both professionals engaged in a search, conducted according to professional standards, for the single correct answer to every legal problem raised by a case. Since he believed that there could be only one correct answer for any given problem—an answer whose truth anyone who understood the profession's standards would be persuaded of once he was shown it—the Judge never came to a final decision in a case until he had succeeded in persuading me that his understanding of the law was the correct one. If he could not persuade me, he encouraged me to do more research and then attempt to convince him that some other answer was correct. In short, during my clerkship, Judge Weinfeld never conceived of his judicial duty as involving the exercise of will; never did he rely on the fact that he was the judge, while I was merely his law clerk, in order to expedite his work on a case. Rather, the essence of judicial duty as the Judge saw it was the pursuit of right and justice as they had been incorporated into law.

The best evidence of the Weinfeld approach, however, is found in his opinions. The essence of his opinion-writing style is to avoid deciding unresolved questions of law. When parties to a case pose such a question, he either attempts to resolve the case on its facts or probes the law more deeply, searching for a bedrock legal principle that will make decision of the more specific, unresolved issue superfluous. Suppose, for example, that in a diversity case involving an automobile collision tried to the court without a jury, the parties requested the Judge to decide whether driving in excess of the new federally mandated 55-mile-per-hour speed limit —which was designed to conserve gasoline—constituted negligence as a matter of law. Instead of turning immediately to that unresolved question,[13] Judge Weinfeld would focus on the basic

[13] In Cooper v. Hoeglund, 221 Minn. 446, 22 N.W.2d 450 (1946), the Minnesota Supreme Court held that speeding in violation of a wartime regulation designed to

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definition of negligence, the absence of that ordinary care which a prudent person would exercise in a given set of circumstances. He would then closely analyze the facts in order to decide whether the driver had used ordinary care. If he found that the driver had not, no decision about the significance of the gasoline-conservation speed limit in terms of negligence would be necessary. If the driver had used due care, the Judge might turn to another issue of fact, such as the other party's negligence, to see if decision of the novel legal issue was truly essential to dispose of the case. Only as a last resort would he decide the new question.

A detailed discussion of some of Judge Weinfeld's opinions will demonstrate this method. Although I have chosen to consider only four, they fairly represent the variety of the many published Weinfeld opinions, since the four cases range widely both in time and in subject matter. *United States ex rel. Belfrage v. Shaughnessy*,[14] an immigration case, came before the Judge in his third year on the bench. Five years later, he decided *United States v. Bethlehem Steel Corp.*,[15] an antitrust case that brought him national attention. *United States ex rel. Elksnis v. Gilligan*,[16] now a leading case in criminal procedure, was decided by the Judge in 1966. *Vulcan Society v. Civil Service Commission*,[17] an equal opportunity employment case, was written less than three years ago.

United States ex rel. Belfrage v. Shaughnessy was a habeas corpus action brought by a resident alien after he had been arrested and detained at Ellis Island. The Department of Justice was holding him without bail, pending the hearing and resolution of proceedings for his deportation on charges of his alleged affiliation with the Communist Party.[18] The Government had previously investigated Belfrage on similar charges, but had failed to uncover evidence sufficient to justify proceedings against him.[19] Then, early in 1953, Belfrage was called to testify before the House Un-

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conserve gasoline did not constitute negligence, since the object of the regulation was not protection of the class of which the plaintiff was a member. No New York case has resolved this precise issue; indeed, New York law is unclear whether violations of traffic regulations, including speed limits, constitute negligence as a matter of law or are merely evidence of negligence which a jury can properly consider. *Compare* Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920), *with* Leotta v. Plessinger, 8 N.Y.2d 449, 460, 171 N.E.2d 454, 459, 209 N.Y.S.2d 304, 311 (1960), *and* Lee v. City Brewing Corp., 279 N.Y. 380, 388-89, 18 N.E.2d 628, 632 (1939).

[14] 113 F. Supp. 56 (S.D.N.Y. 1953), *aff'd*, 212 F.2d 128 (2d Cir. 1954).

[15] 168 F. Supp. 576 (S.D.N.Y. 1958).

[16] 256 F. Supp. 244 (S.D.N.Y. 1966).

[17] 360 F. Supp. 1265 (S.D.N.Y.), *aff'd in part*, 490 F.2d 387 (2d Cir. 1973).

[18] 113 F. Supp. at 57.

[19] *Id.* at 59.

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American Activities Committee and Senator Joseph McCarthy's Investigations Subcommittee. Before both committees he refused to answer questions on fifth amendment grounds.[20] The Government arrested him and began deportation proceedings the day after his appearance before the McCarthy panel,[21] claiming in essence that an alien's refusal to answer questions about alleged Communist affiliations was a sufficient ground for deportation.[22]

It must have been tempting for the Judge, who was a strong opponent of McCarthyism,[23] to have held as a matter of law that an alien's taking the fifth amendment before a congressional committee was not a sufficient ground for deportation. In fact, the Second Circuit so held when it affirmed the decision to release Belfrage from custody.[24] Judge Weinfeld, however, took a different approach. Refusing to decide the legal issue posed by the parties,[25] he found an answer by referring to the controlling standard set by the then-recent Supreme Court decision in *Carlson v. Landon*.[26]

In *Carlson* the Court had held that a resident alien charged with Communist activities could be held without bail pending deportation only if the facts showed that the alien, if at large, would "so conduct himself . . . as to aid in carrying out the objectives of the world communist movement,"[27] or if the Government could prove membership by the alien in the Communist Party together with present or recent "personal activity in supporting and extending the Party's philosophy concerning violence."[28] Examining the evidence in *Belfrage* to see if the Government had made out its case on either of those grounds, Judge Weinfeld found that the Government had advanced general allegations that Belfrage was an active member of the Communist Party and the world Communist movement, that he had associated with principal party leaders and that he had traveled to the Soviet Union and engaged in espionage

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[20] *Id.* at 58.

[21] *Id.* at 57-58.

[22] *See* Government's Return to Writ of Habeas Corpus at ¶¶ 8-9.

[23] This conclusion, based largely upon my own personal sense of Judge Weinfeld, is buttressed by his close association with Herbert Lehman, one of McCarthy's earliest opponents in the Senate, *see* text accompanying notes 103-12 *infra*, and by the Judge's pro-civil-liberties decisions during the McCarthy era. *See* cases cited in notes 4-5, 8 *supra*.

[24] United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 130 (2d Cir. 1954).

[25] The relator had explicitly posed this issue. *See* Relator's Amended Traverse to Return at 7.

[26] 342 U.S. 524 (1952).

[27] *Id.* at 544, *quoted in* 113 F. Supp. at 60.

[28] *Id.* at 541, *quoted in* 113 F. Supp. at 60.

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activities, but it had never availed itself of an opportunity to supplement its allegations with evidentiary facts.[29] Judge Weinfeld also noted that Belfrage had previously been questioned by the FBI and by a grand jury about his alleged Communist affiliations and that, under oath, he had denied all suggestion of Communist activity.[30] For more than seven years after these investigations, wrote the Judge, Belfrage "was permitted to remain at large and to continue his activities, whatever they were."[31] No new facts had been presented to the court which might justify detention without bail. Analyzing these factual issues, Judge Weinfeld concluded:

> If for the long period of seven years following the FBI and Grand Jury inquiries, immigration and other governmental officials did not consider Belfrage's presence and activities inimical to the nation's welfare and a threat to its security, it is difficult to understand how, overnight, because of his assertion of a constitutional privilege, he has become such a menace to the nation's safety that it is now necessary to jail him without bail pending the determination of the charges, as to which the government has the burden of proof.[32]

Judge Weinfeld treated Belfrage's refusal to answer before the congressional committees as just another factual circumstance to be considered along with every other fact in measuring Belfrage's behavior against the *Carlson* standard. Stating that "the assertion by Belfrage of his constitutional privilege . . . does not supply the proof that is lacking,"[33] he held that since the Government had not met the *Carlson* test, it could not prevent Belfrage's release on bond.

Five years after *Belfrage*, Judge Weinfeld decided *United States v. Bethlehem Steel Corp.*[34] The Government had brought suit under Section 7 of the Clayton Act[35] to enjoin the merger of Bethlehem Steel and Youngstown Sheet and Tube Company, which were the nation's second and sixth largest steel companies, respectively.[36] The defendant companies argued that they should be permitted to merge in order to enhance their ability to compete

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[29] 113 F. Supp. at 58-59.
[30] *Id.* at 59.
[31] *Id.*
[32] *Id.* at 60.
[33] *Id.* at 61.
[34] 168 F. Supp. 576 (S.D.N.Y. 1958).
[35] 15 U.S.C. § 18 (1970).
[36] 168 F. Supp. at 585.

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effectively with United States Steel, the largest company and acknowledged trend-setter in industry pricing policies.[37] Moreover, Bethlehem and Youngstown maintained that a merger would permit them to increase their production capacity in the general vicinity of Chicago in response to a long-felt shortage of certain steel products in that area—an expansion neither company desired to undertake individually.[38]

Judge Weinfeld did not immediately turn to the resolution of the important and, at that time, unresolved legal issue of whether necessity to compete could justify an otherwise impermissible merger.[39] Instead, he began with an explanation of the central goal of Section 7 of the Clayton Act as it had been amended in 1950[40]—the prevention of any significant reduction of competition in any market in which two merging companies were competing.[41] He then resolved two factual issues. The first was whether any markets existed in which the merging companies were competing;[42] the second, whether a merger would substantially lessen competition in any of those markets.[43]

Resolution of these highly complex issues raised subsidiary issues which could have been treated as questions of law, but which were not so treated by Judge Weinfeld. For example, the Government contended that each of the defendants' product lines that had peculiar physical characteristics and uses constituted a separate market,[44] while the defendants claimed that markets had to be determined with reference to the ability of steel producers to shift from product to product.[45] The Judge did not consider the defendants' claim, because it had no factual basis. He pointed out that the evidence had established that "the defendants' production flexibility or mill product line theory is indeed pure theory. In prac-

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[37] *Id.* at 587; *see* Brief for Defendants at 3-5, 9-30; Defendants' Reply Brief at 15-19.

[38] 168 F. Supp. at 616.

[39] This issue was later settled in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (asserted need to compete with the largest bank in its city and with New York banks would not justify the merger of Philadelphia's second and third largest banks). *See also* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (absent horizontal or vertical effects, merger acquisition which will stimulate competition in an oligopolistic industry does not violate Section 7 of the Clayton Act).

[40] 15 U.S.C. § 18 (1970), *formerly* ch. 323, § 7, 38 Stat. 731 (1914).

[41] 168 F. Supp. at 581-83.

[42] *Id.* at 587-603.

[43] *Id.* at 603-15.

[44] *Id.* at 589; *see* Government's Brief After Trial at 2-8.

[45] 168 F. Supp. at 589; *see* Defendants' Brief After Trial at 59-63; Defendants' Reply Brief at 8-10.

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tice, steel producers have not been quick to shift from product to product in response to demand."[46] He also remarked that "continuing relationships between buyers and sellers in the steel industry make such shifts unlikely."[47] Noting in addition the inconsistency with which the defendants advocated their position, he adopted the Government's approach toward delineation of product markets.[48] Of course, in favoring the Government's market theory, Judge Weinfeld implicitly accepted its legal sufficiency, but he never actually ruled that the defendants' position was legally insufficient. By finding a lack of factual support for the argument rather than ruling that the theory was bad law, the Judge completely undercut the defendants' argument and precluded them from advancing it on appeal.

Another issue which Judge Weinfeld resolved on factual rather than legal grounds was whether the defendants' or the Government's theory of the relevant markets should govern. The Government contended that the nation as a whole or, alternatively, certain sections of the country into which both Bethlehem and Youngstown shipped steel and steel products, should be denominated the relevant market for the steel industry and for the component lines of commerce.[49] Defendants asserted that it would be more appropriate to view the nation as divided into three sections or markets—East, West and Mid-Continent.[50] They argued that Bethlehem was an effective competitor only in the two coastal sections, while Youngstown was effective only in the Mid-Continent area.[51] Judge Weinfeld declined to decide whether such a division of the country was appropriate as a matter of law. He turned instead to a review of industry practice and statistics.

The Judge found that Bethlehem's shipments of over two million tons of finished steel products into the Mid-Continent area represented almost 5% of total shipments in the area and exceeded the capacity of several major local producers.[52] The volume of Bethlehem's sales indicated that it was without question nearly as effective in the Mid-Continent area as Youngstown, which accounted for 7% of that area's total shipments.[53] Naturally, the fac-

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[46] 168 F. Supp. at 592.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 596.

[50] *Id.*

[51] *See* Defendants' Reply Brief After Trial at 33-45; Defendants' Reply Brief at 27-28.

[52] 168 F. Supp. at 597.

[53] *Id.*

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tual determination that Bethlehem was a competitor to reckon with in the Mid-Continent region also involved a legal assumption that a supplier of nearly 5% of the total goods in any given market was a substantial competitor—but few would disagree with such an assumption.[54] Nevertheless, Judge Weinfeld was not content to rest his decision solely on his findings about the Mid-Continent region. His alternative basis for finding that Bethlehem and Youngstown competed in the same markets derived from a concession by the defendants' witnesses that Michigan, the largest steel consuming state in the nation, was sufficiently important to be considered a separate market and that Bethlehem, which supplied almost 12% of Michigan's total steel needs, was an effective competitor in that state.[55]

To summarize Judge Weinfeld's reasoning up to this point: first, he made findings of fact about the product and geographical markets in which the parties competed. Then, he reached a legal conclusion that followed almost inevitably from the facts: because there was substantial competition between Bethlehem and Youngstown, their merger would substantially decrease competition in the steel industry. Since section 7 specifically prohibits mergers which would "substantially . . . lessen competition," the merger between the two companies was prohibited by that statute.

Once he had reached these conclusions, the Judge tackled the defendants' principal claim that the merger should be permitted because of its likely beneficial effects. He did not initially rule on that claim as a matter of law; instead, he examined the practical likelihood that only the merger could achieve the defendants' aims and that the need for additional capacity in the Chicago area could not be met without the merger. He found that Bethlehem had successfully met past challenges and was well equipped to "keep pace with the demands of our national economy."[56] Only after arriving at that conclusion of fact did he reject the defendants' claim as a matter of law, holding that "[i]f the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense."[57]

United States ex rel. Elksnis v. Gilligan[58] may be the Judge's

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[54] *See* Standard Oil Co. v. United States, 337 U.S. 293, 305 (1949). In that case Justice Frankfurter stated that since Standard Oil requirements contracts affected 6.7% of an area's business, there was support for an inference that competition had been or would be substantially lessened in that particular area.

[55] 168 F. Supp. at 602; *see* Defendant's Brief After Trial at 42-45, 73.

[56] 168 F. Supp. at 616.

[57] *Id.* at 617.

[58] 256 F. Supp. 244 (S.D.N.Y. 1966).

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most masterful opinion. Almars Elksnis, a Latvian immigrant, had been convicted on his own guilty plea in state court of killing his common law wife. Ten years later he brought a habeas corpus action in federal court on the ground that his plea before the state court judge had been taken in violation of the Constitution and was therefore void. Judge Weinfeld released Elksnis from prison, upholding his claim on three alternative grounds. One ground was that any plea offered in return for a promise by the judge as to the maximum penalty he would impose was not a voluntary plea and hence was unconstitutional. Essentially this holding was one of law, yet it was closely intertwined with the facts. Judge Weinfeld observed that before petitioner Elksnis met with the judge to discuss his sentence, he had resolutely refused to plead guilty and thereby waive trial.[59] From this fact Judge Weinfeld inferred that the judge's statement must have had compelling force,[60] explaining that, even aside from the petitioner's obvious determination to plead not guilty, there was every reason to believe that the interview with the judge did in fact unduly influence his plea:

> When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence. A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act. The plea is so interlaced with the promise that the one cannot be separated from the other; remove the promise and the basis for the plea falls.[61]

Strong as this argument may have been, Judge Weinfeld was not content to base his decision upon it alone, especially in view of the apparent novelty of the holding[62] and its seeming inconsistency

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[59] *Id.* at 253.

[60] *Id.* at 254.

[61] *Id.*

[62] Judge Weinfeld cited several cases as support for the proposition that "the imposition by the judge of a sentence contrary to his express promise is wholly irreconcilable with constitutional safeguards and due process of law." 256 F. Supp. at 249 n.12. None of these cases, however, directly states that a guilty plea accompanied by a judicial promise is per se involuntary.

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with a contemporary decision of the Court of Appeals for the Second Circuit.[63] Consequently, he put forward two other grounds for invalidating the plea.

The first of these was the fact that the state trial judge had failed to abide by his promise when he imposed a longer maximum sentence than the one he had agreed would be imposed.[64] The state agreed that under normal circumstances a sentence inconsistent with a promise upon which a plea had been based would be void.[65] It argued, however, that in this case the judge was released from this promise since it had been based upon a misunderstanding about Elksnis's prior record that had been induced by his attorney and since Elksnis had acquiesced in its withdrawal.[66]

Judge Weinfeld answered the state's initial argument by showing that it was factually incorrect. A careful and thorough review of the record—in particular, of the testimony of the state trial judge who had made the promise—established that the state judge must have known of Elksnis's prior record at the time the guilty plea was entered.[67] Concerning the claim of acquiescence, Judge Weinfeld observed that acquiescence meant a waiver of a constitutional right and thus had to be measured against the controlling standard of "intentional relinquishment."[68] A review of the circumstances surrounding the plea showed that Elksnis never had explicitly acquiesced in the sentence that had been imposed, nor had he relinquished his right to reinstate a plea of not guilty. Indeed, at the first opportunity he had attacked his sentence on the ground that the judge had broken his promise.[69] Thus, both because Elksnis had never actually waived his right to reinstate his plea of not guilty and because the guilty plea had been induced by the judge's

[63] In United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308, 313-14 (2d Cir. 1963), the court of appeals had expressly stated that judicial participation in plea bargaining did not necessarily invalidate a guilty plea. *See* text following note 74 *infra*. On a second *McGrath* appeal, 348 F.2d 373 (2d Cir. 1965), Judge Kaufman reaffirmed his holding that a judge's advising a defendant on his decision to plead guilty was not improper. He also remarked, without reaching the merits, that he doubted that the judge's decision to sentence more harshly than he had intimated he would when the defendant agreed to the plea constituted a violation of the defendant's constitutional rights. *Id.* at 378. Nevertheless, he distinguished this case from two cases cited by the defendant for the proposition that imposition of a sentence differing in length from the one promised rendered a guilty plea involuntary. *Id.* at 378 n.3. The key factor was that in *McGrath* the judge had "made no specific promises about the sentence he would impose." *Id.*

[64] 256 F. Supp. at 249.

[65] *See id.* at 249-50.

[66] *Id.*; *see* Respondent's Memorandum of Law in Opposition at 14-16.

[67] 256 F. Supp. at 250-51.

[68] *Id.* at 251.

[69] *Id.* at 252.

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promise, Judge Weinfeld found that Elksnis's plea could not be viewed as voluntary. Since the accepted constitutional standard unambiguously required that a guilty plea be voluntary,[70] Elksnis's plea had to be set aside.

Judge Weinfeld's final alternative ground for finding that the plea was not voluntary was that it was not knowledgeable. The record showed that when asked by the state judge about the crime with which he had been charged—the fatal stabbing of his wife —Elksnis had claimed that he had acted in self-defense or in a temporary fit of insanity.[71] Since Elksnis had never deliberately chosen to abandon these defenses, the Judge found that the guilty plea was "not understandingly and knowingly made."[72] On this ground, too, unambiguous constitutional law required that the guilty plea be set aside.[73]

To appreciate fully the craftsmanship of *Elksnis* and the law that it made, one must be familiar with the state of the law at the time the opinion was announced. Only three years earlier, in *United States ex rel. McGrath v. LaVallee*,[74] the Second Circuit had held that a plea was not invalid simply because it was induced by a judicial suggestion of leniency. *Elksnis* appeared to take issue with that holding.[75] Although the Judge could have readily distinguished *Elksnis* from *McGrath*—in the former case the promise of a 10-year maximum sentence was explicit, whereas in the latter the judge had merely advised that a more lenient sentence might follow from a guilty plea to a lesser offense—he did not take that approach. Instead, he left language in the *Elksnis* opinion that suggests that any judicial discussion of sentencing, whether or not it results in an explicit promise by the judge, invalidates a guilty plea that is a product of the discussion.[76]

Despite this broad language, it should be noted that after the state attorney general's office had studied Judge Weinfeld's *Elksnis*

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[70] *See* Henry v. Mississippi, 379 U.S. 443, 451 (1965); Fay v. Noia, 372 U.S. 391, 439 (1963); Whitus v. Balkcom, 333 F.2d 496, 505-10 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

[71] 256 F. Supp. at 256-57.

[72] *Id.* at 257.

[73] *Id.*

[74] 319 F.2d 308 (2d Cir. 1963). *See also* note 63 *supra*.

[75] Judge Weinfeld's only overt expression of lack of sympathy with *McGrath* was his citation from the dissent in that case to support his point that there is a significant difference between a defendant's bargaining with a prosecutor and a defendant's bargaining with a judge, " 'who [is] ultimately to determine the length of the sentence to be imposed.' " 256 F. Supp. at 255, *quoting* 319 F.2d at 319 (Marshall, J., dissenting).

[76] *See id.* at 254.

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opinion, the opinion was found to be so persuasive that the office withdrew its notice of appeal to the Second Circuit Court of Appeals.[77] The chief difficulty the opinion must have presented for the state was that the only actual point of law Judge Weinfeld relied upon was the proposition that a guilty plea must be voluntarily and knowingly made in order to be constitutionally valid. That legal conclusion had been affirmed many times by the Supreme Court.[78] Every subsidiary issue that the Judge decided resulted from the measurement of the facts against this controlling standard. It would have been impossible, for example, for the court of appeals to have reversed the alternative legal holding that a plea made with a reservation of defenses is constitutionally invalid, without at the same time reversing Judge Weinfeld's finding of fact that at the time Elksnis reserved his defenses he did not understand what he was doing. Since that finding had unquestioned support in the record, the Second Circuit would have had no power to reverse it. Thus *United States ex rel. Elksnis v. Gilligan* is a typical Weinfeld opinion in that, rather than making new law, it seems merely to resolve questions of fact that guide decision of the ultimate legal issues, as to which the recognized controlling standard is not in doubt.

A recent opinion in the same mold is *Vulcan Society v. Civil Service Commission*.[79] *Vulcan* was a class action brought by black and Hispanic individuals to challenge the constitutionality of the examination administered to applicants for the position of New York City fireman. The Judge found that the plaintiffs had made out a prima facie statistical showing that the test discriminated against blacks and Hispanics.[80] The principal remaining issue was whether the test was sufficiently job-related—whether the skills it examined were needed to perform the job of fireman. Judge Weinfeld noted that there were three professionally accepted techniques for establishing the job-relatedness and thus the validity of examinations—predictive validation, concurrent validation and content validation.[81] The defendant conceded that it had used neither of the first two methods, but had relied solely upon content validation, which consists of nothing more than a check whether "the content of the examination matches the content of the job."[82] The

[77] *See* Stipulation Withdrawing Appeal, July 28, 1966.

[78] *E.g.*, Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

[79] 360 F. Supp. 1265 (S.D.N.Y. 1973).

[80] *See id.* at 1268-72.

[81] *Id.* at 1273-74.

[82] *Id.* at 1274.

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major legal issue in the case was whether content validation alone was a sufficient indicator of job-relatedness: in its leading case on the subject, the Second Circuit had left that issue open;[83] other circuits were divided.[84] The Judge found it unnecessary to resolve this knotty question of law. Instead, after a careful examination of the facts, he concluded that the content validation in which defendant had engaged was inadequate.[85]

Of course, Judge Weinfeld's opinions are not always written in the style of the four we have considered above. At times, he explicitly decides unresolved issues of law,[86] especially in cases involving the construction of unclear legislation.[87] Nonetheless, a study of the mass of Judge Weinfeld's opinions reveals a distinctive style in his approach to a case. First, nearly every Weinfeld opinion contains a thorough and sensitive factual analysis, including a precise resolution of disputed factual issues. This analysis is strikingly evident in the four opinions chosen for discussion. Second, the law upon which the Judge rests his decisions is, for the most part, unambiguous and unchallenged. When he does forge a new legal doctrine—as with his holding in *Elksnis* that a guilty plea induced

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[83] Chance v. Board of Examiners, 458 F.2d 1167, 1177 n.16 (2d Cir. 1972).

[84] *Compare* Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090-91 (E.D. Pa. 1972), *aff'd in relevant part by an equally divided court*, 473 F.2d 1029, 1030 (3d Cir. 1973) (en banc) (per curiam) (city must attempt to devise a test predictive of on-the-job performance), *with* Castro v. Beecher, 459 F.2d 725, 729 & n.3. 737-38 (1st Cir. 1972), *aff'g in relevant part* 334 F. Supp. 930, 942, 945 (D. Mass. 1971) (city must create test valid under either content or "empirical" validation criteria), *and* Carter v. Gallagher, 452 F.2d 315, 320, 326 (8th Cir. 1971), *adopted in relevant part*, 452 F.2d 327, 331 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972) (specific adherence prescribed to guidelines of 29 C.F.R. § 1607 (1975)). The EEOC guidelines for valid testing procedures set forth in 29 C.F.R. § 1607.5(a) (1975), urged by plaintiffs upon all three courts in the above-cited cases as the appropriate standard, strongly favor "criterion-related" (predictive or concurrent) validation, allowing content relation "where criterion-related validity is not feasible."

[85] 360 F. Supp. at 1275.

[86] *See* United States *ex rel.* D'Antonio v. Follette, No. 66 Civ. 51 (S.D.N.Y. Sept. 22, 1966), *rev'd*, 394 F.2d 402 (2d Cir. 1969); Terry v. Denno, 254 F. Supp. 909 (S.D.N.Y. 1966); Austrian v. Williams, 103 F. Supp. 64, 110-17 (S.D.N.Y.), *rev'd*, 198 F.2d 697 (2d Cir. 1952).

[87] *See, e.g., In re* Ullmann, 128 F. Supp. 617 (S.D.N.Y.), *aff'd sub nom.* United States v. Ullmann, 221 F.2d 760 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956) (extending scope of witness-immunity statute in subversion and treason cases to state as well as federal courts); *In re* Oddo, 117 F. Supp. 323 (S.D.N.Y. 1953), *rev'd sub nom.* Application of Barnes, 219 F.2d 137 (2d Cir. 1955), *rev'd sub nom.* United States v. Minker, 350 U.S. 179 (1956) (limiting the power of the INS to summarily subpoena naturalized citizens for the purpose of revocation of citizenship); De La Rama S.S. Co. v. United States, 98 F. Supp. 514 (S.D.N.Y. 1951), *rev'd*, 198 F.2d 182 (2d Cir. 1952), *rev'd*, 344 U.S. 386 (1953) (finding district court jurisdiction under a wartime ship-insurance statute repealed during the pendency of the action, even though the repealer contained no savings clause).

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by a judicial promise of leniency is unconstitutional, or his holding in *Bethlehem* that a merger that violates section 7 of the Clayton Act is not cured because it may have beneficial side effects—he rarely permits the actual outcome of the case to turn solely on the new point of law. The Judge prefers to introduce a legal innovation either as dictum or as an alternative holding, often leaving the reader of his opinion somewhat uncertain what role a newly stated rule plays.

Normally, as in *Belfrage*, *Bethlehem* and *Vulcan*, the source of the unambiguous law on which a decision is based will be the latest authoritative statute or judicial holding on the matter at issue. In the unusual case such as *Elksnis*, where an authoritative precedent seems to impede a right result, Judge Weinfeld will base his opinion squarely on generally recognized principles in order to bypass rather than dispute the apparently contrary holding. Although the Judge—chiefly to economize time and resources—will normally extract controlling law from relatively few statutes or cases, he frequently seems to be testing narrow rules against a broad background of legal principle when either his own or counsel's research leads him to question the validity of a specific rule. The key point is that the Judge always searches for controlling law of unambiguous content which cannot be challenged by comparison with a more general source.

Vulcan is a clear example of this technique. Judge Weinfeld could have ruled in favor of the plaintiffs either by holding as a matter of law that content validation is an inappropriate means of insuring the relevance of an examination or by ruling as a matter of fact that the defendants' actual performance could not be properly denominated as content validation. The Judge chose the latter course, preferring to find facts rather than to make law. In a sense, he did make law by adding new factual meaning to the legal concept of content validation, but the outcome of the case did not rest upon this new law per se, *i.e.*, abstracted from its factual background. Any new law made in *Vulcan* remains grounded in the Judge's findings of fact in that case; it will not be extracted from them until a substantially similar case arising in the future creates a need to analyze *Vulcan* as a precedent.

II

As the preceding discussion suggests, many of Judge Weinfeld's opinions have innovatively furthered the ends of social justice through application of what the Judge sees as a fixed body of existing legal principles. One important question that I now wish to

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explore is how the Judge has been able to ignore considerations of social policy and apply his unchanging legal principles in a way that nonetheless promotes essential legal and social change. But first I must turn at least briefly to several of the many other questions about the judicial reasoning process that analysis of Judge Weinfeld's opinions raises.

A preliminary question is whether it is ever possible for a judge to decide any issue of law without favoring some social policies or interests over others—an inquiry which arises out of the Realist critique of early 20th-century American formalism.[88] Assuming, as the Realists did, that all legal rules promote particular policies and interests,[89] it is obvious that a judge cannot avoid favoring some interests over others. But while he will promote a policy or favor an interest through every official act, the judge need not be conscious of doing so, nor need he promote the policies and interests that he personally prefers. On the contrary, an insensitive judge can mechanically apply rules of law without ever considering policy. If, however, a sensitive judge like Weinfeld believes that it is impossible to decide purely through the use of reason whether to prefer particular policies and interests, he can almost always turn away from policy in order to keep his judgments from reflecting his own preferences and thereby becoming arbitrary acts of will. A number of techniques have been suggested in recent decades. For example, a judge can rely on institutional values or on economic analysis as the basis for his decisions.[90] Or, as Judge Weinfeld does, he can turn to already existing legal rules and principles.[91]

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[88] *See generally* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Ackerman, *Law and the Modern Mind*, 103 DAEDALUS 119 (Winter 1974); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

[89] *See* Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 461 (1930).

[90] *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

[91] *But see* J. FRANK, LAW AND THE MODERN MIND (1930). Frank maintained that judges cannot turn to a preexisiting body of law to avoid making policy decisions since "[t]here never was and there never will be a body of fixed and predetermined rules alike for all. . . . It is impossible to . . . eliminate 'the influence of illegitimate considerations applicable to the particular instance.' " *Id.* at 120, *quoting* Salmond, *Introduction*, in THE SCIENCE OF LEGAL METHOD lxxxiii (1921). Frank's claim raises important epistemological issues about the nature of human categorization that cannot be considered within the scope of the present Article. Nevertheless, in response to his statement one might point to the actual behavior of many turn-of-the-century judges who sincerely believed that they could fit the facts of the cases before them into preexistent categories, that their process of judicial reasoning seemed

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By using legal precedent as the main underpinning for his decisions, a judge will of course promote the policies favored by existing law. Nevertheless, the use of precedent will foster particular policies only indirectly, without any need for an explicit judicial consideration of the relative merits of competing policies.

The question still arises whether a judge should refuse to choose among policies merely to avoid being arbitrary. The main point of the Realist critique—that policy choices which inevitably must be made should be made deliberately and openly and should not be hidden in institutional considerations or formalistic legal rules[92]—has considerable merit. The response that throughout our history the imposition of limits on judicial arbitrariness has been viewed as a constituent element of political liberty does not resolve the question decisively.[93] Nonetheless, the link between tyranny and judicial arbitrariness ought properly to make us wary of judges who openly inject policy considerations into their decisions and to lead us to respect judges like Weinfeld who enlist the artificial reason of the law or some other impersonal source as the basis for their judgments.

Another argument that has been advanced against judges' ignoring policy considerations and arriving at judgments on the basis of existing rules and principles is that such a methodology preserves the status quo.[94] Those who find the maintenance of the status quo an unappealing social program might point out that existing principles and rules of law, as they have been manipulated by conservative jurists of the last half-century, often seem to impede the development of a just and progressive society. Most of the leading judges of this century, among them Cardozo, Frankfurter and Douglas, have struggled with this conflict between craftsmanlike adherence to existing law, on the one hand, and progress and justice, on the other, although each judge resolved

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to work for all or nearly all the cases that came before them, and that important jurisprudential ends were served through grounding of new decisions upon firm judicial precedent. *See* Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 547-66 (1974).

[92] *See* FRANK, *supra* note 91, at 120-21; Llewellyn, *supra* note 89, at 441-54.

[93] *See, e.g.*, THE FEDERALIST NO. 78 (A. Hamilton); J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 358-60 (1971); J. STORY, *A Discourse Pronounced at the Inauguration of the Author as Dane Professor of Law in Harvard University, August 25, 1829*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 511-12 (1852); Nelson, *supra* note 91, at 547-66; Ackerman, *supra* note 88, at 120-21, 123-24.

[94] *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66-67, 150-52 (1921) [hereinafter CARDOZO, THE JUDICIAL PROCESS].

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the conflict in a different way.[95] Judge Weinfeld is one of the few judges of our time who has scarcely felt it: he has been able to abide by existing rules and principles and at the same time to remain committed to the attainment of social justice. The means by which he has been able to do so is the central question to which I now wish to turn.

A combination of factors enables the Judge to apply fixed principles and at the same time preserve flexibility in the law. Perhaps the most important is his conception of his judicial role. Judge Weinfeld does not see himself as a social engineer whose task is to resolve conflicts among competing social classes or interest groups; instead, he views his responsibility as the resolution of disputes between litigants in particular cases. Generally, he avoids thinking about the impact his decision will have on groups or individuals other than the immediate litigants. As a result, he writes his opinions for the purpose of justifying his decisions to the litigants before him in terms of existing law, not in order to maximize the social impact of his views or consciously foster social change.

Of course, Judge Weinfeld's practice of handling cases as disputes between particular litigants rather than as clashes of interest between large social groups is facilitated by his sitting as a trial rather than as an appellate judge. In fact, much of the litigation in the district court does consist of matters having little immediate significance to anyone other than the parties. The craft of a trial judge is so different from that required for an appellate court that if Weinfeld had been an appellate judge the judicial style which I have described might not, perhaps, have served him adequately. For example, the Justices of the United States Supreme Court must find it difficult to view the cases before them solely as disputes between the particular litigants, since the Court, by virtue of its certiorari procedure, seeks to hear only those cases having

[95] Justice Cardozo discussed and analyzed the conflict, maintaining that judges must give due weight to both precedent and progress, among other factors. *E.g.*, B. CARDOZO, THE GROWTH OF THE LAW 42-80 (1924); CARDOZO, THE JUDICIAL PROCESS, *supra* note 94, at 24-25. Justice Frankfurter also spoke of the need to balance claims for stability and change, *e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 266-67 (1957) (concurring opinion), although in the bulk of his judicial work he seemed primarily concerned with adherence to craftsmanship. Justice Douglas, on the other hand, stated that judges should not give excessive weight to precedent, *see* W. DOUGLAS, WE THE JUDGES 428-32 (1956), and, particularly in his later years on the bench, showed substantially more interest in attaining social justice than in writing opinions that are faithful to the lawyer's craft. *See, e.g.*, Wolfman, Silver & Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 255, 272-76, 285-86, 326-30 (1973); Rogat, Book Review, N.Y. REV. BOOKS, Oct. 22, 1964, at 5 (reviewing Justice Douglas's *The Anatomy of Liberty* and *Freedom of the Mind*).

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broad social or political significance.[96] Nevertheless, some cases have come before Judge Weinfeld in which his role has not been radically different from that of an appellate judge, at least in that he could not avoid recognizing that important social issues must implicitly be resolved as part of the resolution of the parties' controversy. It is in these cases that Judge Weinfeld should feel most strongly the tension between his perception of his duty to apply the law as it exists and any felt need to change that law in order to promote social justice. Two devices, however, enable him to overcome whatever tensions he might feel.

The first is his intuitive caution. The Judge has never deliberately cultivated his cautious attitude and is apparently not even consciously aware of it; nonetheless, he often worries that as a single federal district judge he lacks the breadth of information and experience and the moral authority to change social and political practices and policies instituted by elected public officials. For example, during his consideration of *Elksnis*, which he decided when I was his law clerk, the Judge often told me that he felt he ought not invalidate the rather common New York practice of judicial participation in plea bargaining simply because his view of its propriety differed from the views of many of his counterparts on the state bench. He finally declared judicial participation unconstitutional only because he became convinced that the law required him to do so. Even then his caution was reflected in the fact that the decision on unconstitutionality was put forward as dictum or an alternative holding, with its exact precedential weight left to future determination. As a result, *Elksnis* did not by fiat require New York State to immediately abandon its practice of permitting judges to join in plea-bargaining sessions, but merely suggested—by the persuasiveness of its reasoning—the direction in which federal constitutional law was moving and in which New York judges ought to move.[97] As an analysis of other Weinfeld opinions shows, the

[96] *See* SUP. CT. R. 19.

[97] The *Elksnis* limitation on judicial persuasion has often been cited as an important statement of federal plea-bargaining standards. *See, e.g.*, Brown v. Peyton, 435 F.2d 1352, 1358 (4th Cir. 1970) (dissenting opinion); Scott v. United States, 419 F.2d 264, 273-74 (D.C. Cir. 1969); United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 725 (2d Cir. 1968); Brown v. Beto, 377 F.2d 950, 957 (5th Cir. 1967); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508, 517 (E.D.N.Y. 1967).

Similarly, the American Bar Association has concluded that "[t]he trial judge should not participate in plea discussions." ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (1968). The commentary to § 3.3(a) recognizes that judges often participate in plea bargaining sessions. *Id.* at 72-74. Nevertheless, the ABA decided that the practice should not be condoned, agreeing with Judge Weinfeld and citing his statement in *Elksnis* about the disparity in bargaining power between the judge and the accused. *Id.* at 73.

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limited but concrete advance effected by *Elksnis* is typical of the Judge's judicial craftsmanship: because Judge Weinfeld ties his holdings closely to the facts of the cases and often puts them forward only tentatively and ambiguously, his opinions rarely require anyone other than the immediate litigants to alter their conduct to conform at once to his restatement of the law.

The second reason why Judge Weinfeld can overcome the tension between basing his decisions on existing law and simultaneously modifying that law is his attitude, shared by few judges of our time, toward the extension of old law to new subjects. This attitude is not unusual if one looks back in time: it goes back in American legal history to the great judges of the early 19th century—John Bannister Gibson, James Kent, Lemuel Shaw and Joseph Story. Using existing law as the starting point of their reasoning, each brought about substantial change in the law by flexibly applying old rules and principles. Like Judge Weinfeld, they were mediators between stability and change.

Let us look more closely at Joseph Story. Both in his opinions and in his scholarly writings, Justice Story was perhaps the leading advocate in his time of careful legal analysis and strict adherence to the rules of law.[98] Yet many of his opinions changed the law,[99] and

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Courts, however, have drawn a distinction between a judge's actually joining in plea bargaining negotiations and a judge's later discussion of the plea with a defendant, a discussion which Rule 11 of the Federal Rules of Criminal Procedure mandates in federal cases in order to determine the voluntariness of and factual basis for a guilty plea. United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); Scott v. United States, *supra* at 274-75 (Bazelon, C.J.); United States *ex rel.* Rosa v. Follette, *supra* at 724-25. In *Rosa*, Chief Judge Kaufman stated:

> [W]e would be hesitant to hold that the mere participation of the trial judge in any aspect of plea negotiation—no matter how tangential and unlikely to be coercive—necessarily renders a plea of guilty involuntary. . . . The issue ultimately to be resolved is not so much who participated in the plea discussions but whether the defendant's decision to plead guilty was coerced or otherwise invalid. . . . While we certainly adhere to the proposition that a trial judge must always act with full awareness of the awesome power of his office, . . . the participation of the trial judge in plea discussions does not *in itself* render the plea involuntary. . . .

Id. at 725 (emphasis in original).

Moverover, a condemnation of all judicial involvement in any aspect of plea bargaining would ignore the practical consideration that the prosecutor's promise to the defendant is only as good as the judge's affirmation of that promise. " 'The actual value of any commitments made to [the defendant] by the court' can only contemplate plea bargaining in which the judge has participated." Brown v. Peyton, *supra* at 1355, *quoting* Brady v. United States, 397 U.S. 742, 755 (1970) (standards for measuring voluntariness of guilty pleas).

[98] *See* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 310-15, 318, 323 (1970).

[99] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Inglis v. Sailor's Snug Harbor,

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he opposed codification for fear that it would render the law inflexible.[100] How could Story, along with many of his contemporaries, have so readily resolved the apparent conflict between law and progress which we find utterly incapable of resolution? In part, the answer may lie in the fact that few, if any, Americans in the first half of the 19th century thought deeply about many of the central questions of jurisprudence: men like Story, while possessed of great minds, were too busy in the day-to-day administration of justice and the building of a new nation to have time to think deeply about such abstractions. But there was also, I think, a special historical reason that enabled Story and his contemporaries to avoid confrontation with our seemingly insoluble conflict between adherence to existing law and the need for legal change. Justice Story's conception of the nature of the legal system which he and his contemporaries had inherited was very different from our conception of the system which we have inherited. Although recent historical research suggests that they were probably wrong,[101] Story and many other lawyers of his generation believed that colonial America had not been governed by law and that the mission of their age was to make law dominant. They did not see themselves as conservatives seeking to preserve a legal tradition received from the past, but as progressives who were seeking to replace the crude, untechnical and essentially lawless system of administration which they had inherited with a professionally administered body of law.[102] Given their understanding of history, legal change and adherence to law were therefore synonymous.

It is only our understanding of our own history that creates a conflict. As we look back at the struggle over federal economic policy that began during the administration of Theodore Roosevelt and continued through the New Deal, it seems plain that legal reform

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28 U.S. (3 Pet.) 99 (1830); Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1 (1829); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); De Lovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

[100] *See* DUNNE, *supra* note 98, at 315-18. For Justice Story's exposition of his views on codification, see Story, *Unsigned Article*, 7 ENCYCLOPEDIA AMERICANA 576-92 (F. Lieber ed. 1831), in MCCLELLAN, *supra* note 93, at 357-72.

[101] For my analysis of the technical nature of much pre-Revolutionary property and contract law, see W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 48-63 (1975). *See also* 1 LEGAL PAPERS OF JOHN ADAMS 162-279 (L. Wroth & H. Zobel eds. 1965) (illustrating the often highly technical nature of a successful mid-18th-century legal practice).

[102] *See* J. STORY, *An Address Delivered Before the Members of the Suffolk Bar, at their Anniversary, September 4, 1821, at Boston*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 228-32 (1852).

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designed to bring about a more just and equitable distribution of wealth was continually blocked by existing rules of law that were heavily oriented toward the protection of private property and hence the economic status quo. Indeed, even today no radical change in the economic structure of American society seems likely as long as existing precedents dominate judicial interpretations of the Constitution and judicial application of the common law. If one were to accept the position of the many New Deal ideologues who favored substantial economic change, then existing law would indeed stand in the path of change, and it would be appropriate to question its value.

But Americans can have an alternative perspective on their recent history—a perspective in which social progress and legal change, on the one hand, and existing law, on the other, are not irreconcilably in conflict. The career of Edward Weinfeld illustrates this perspective well. In part, this is because Judge Weinfeld, like Justice Story, is not a speculative thinker, but a man of affairs concerned with the day-to-day administration of justice and the smooth functioning of the legal system. He has not been influenced by the quasi-Marxist view held by many intellectuals that all political issues are ultimately reducible to economic terms. His perspective on history springs from a different source—his early life in New York City and his experiences in state politics in association with men such as Governor Herbert Lehman and Senator Robert F. Wagner.

The first and only time that Weinfeld held elective office was as a delegate to the New York Constitutional Convention of 1938, when he was 37 years of age. One of the proposals he introduced at that convention was aimed at excluding any fruits of an unlawful search from reception into evidence in criminal trials.[103] The debate on his proposal was quite illuminating. Those who opposed it feared that it would enable guilty criminals to escape punishment because of misjudgments by the police in the collection of evidence,[104] while those who favored it warned generally that if civil liberties were not protected, the United States, like Germany, could slide in the direction of fascism.[105] Some supporters of the proposal were quite specific. Chauncey M. Hooper, a black delegate from Harlem, explained that the real beneficiaries of an ex-

[103] *See* 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, at 51 (1938).

[104] *See id.* at 414-17, 424-32, 449-55, 466-69, 478-83, 497-503, 507-08, 522-29, 533-44, 554-58, 562-68.

[105] *See id.* at 336-40, 412-14, 417-24, 455-66, 469-78, 503-07, 508-22, 529-33, 546-54, 559-62.

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clusionary rule would not be criminals, but "a class and a group that by virtue of an accident of birth" were frequently "victims" of unlawful "searches" and "assaults."[106] Later in the debate, Robert F. Wagner, who was also a delegate, noted that members of labor unions had also been "subjected to official tyranny,"[107] and for that reason he favored inclusion of the exclusionary rule in the constitution. Weinfeld himself brought to the convention's attention an instance in which a Roman Catholic priest who had never been known to be involved in crime had been a victim of an unlawful police wiretap.[108] Illustrated by the debate on the exclusionary rule, Weinfeld's commitment to the protection of the human rights of ethnic, political and religious minorities both in New York and throughout the world was further demonstrated when, shortly after the convention, he accepted Governor Lehman's appointment as state Housing Commissioner. Weinfeld thus began a close association with a man who was one of the first statesmen to warn Americans of the threat that Nazism posed for the world and of the dangers that similar philosophies of intolerance might pose for America, and who was later to become the earliest foe of McCarthyism in the Senate.[109]

In short, Weinfeld and those with whom he associated in his formative political years recognized that America contained two societies. One, composed chiefly of white, Protestant, middle-class native Americans, was ruled by law. Citizens of that society received protection from the government both for their property and for their personal rights. Their relations with each other were regulated according to law. The other society, composed chiefly of blacks, immigrants and their children, and left-wing political dissidents, often lived amidst violence. Government offered this society little protection;[110] in fact, its members were harassed by the authorities, notably the Immigration and Naturalization Service and local police units.[111] Life within its own communities was ordered

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[106] *Id.* at 444.

[107] *Id.* at 561.

[108] *See id.* at 422-23.

[109] *See* A. NEVINS, HERBERT H. LEHMAN AND HIS ERA 198-201, 332-51 (1963); E. Weinfeld, Dedication of the Herbert H. Lehman College of the City University of New York 5-8 (1969).

[110] *See* THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 396-98 (H. Graham & T. Gurr eds. 1969) [hereinafter HISTORY OF VIOLENCE]; Levy, *A 150-Year Study of Political Violence in the United States*, in HISTORY OF VIOLENCE, *supra* at 84-100; Meier & Rudwick, *Black Violence in the 20th Century: A Study in Rhetoric and Retaliation*, in HISTORY OF VIOLENCE, *supra* at 399-404.

[111] *See generally* NATIONAL COMMISSION ON LAW OBSERVANCE AND EN-

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through extra-legal norms, often religious ones.[112] Although wealth was much more common in the first society and poverty in the second, the key distinction between the two was not economic: there were poor people in the first and wealthy ones in the second. In the minds of men like Lehman and Weinfeld, the principal difference was that members of the second society did not receive the same protection from the law as did members of the first.

The judicial career of Edward Weinfeld can, I believe, best be understood as a continuing effort on his part to extend the equal protection of the laws to individuals and groups which in his youth did not enjoy it. Three of the four opinions analyzed above are readily understandable in such terms. In *Belfrage*, Judge Weinfeld extended to an immigrant and political outcast the same right to bail which others—often charged with more serious offenses upon more substantial evidence—enjoyed. In *Elksnis*, he granted an illiterate immigrant the same right to enter a knowing and voluntary guilty plea which a well-educated citizen represented by able counsel would possess. Finally, in *Vulcan* he extended to blacks and Hispanics the same right of access to government jobs that most inhabitants of New York already possessed.

Thus, for the Judge, as for Justice Story, there is no conflict or inconsistency between flexibility in the law and adherence to the law. For Judge Weinfeld, the formulation of new law in *Belfrage*, *Elksnis* and *Vulcan* represents not the abandonment of law—as it would have for a Van Devanter or a Roosevelt—but rather the extension of law to a new area. Even in the *Bethlehem* case, Judge Weinfeld could view his decision not as making new law, but as merely applying old law to a new area in accordance with a mandate of Congress.

The Judge's position is a historically tenable one. America in the 1930's came perilously close to being divided into two societies. While it is possible to view that division essentially as one between those who had wealth and those who did not, it is at least equally possible to view it as one between those who enjoyed and those who lacked the protection of the law. Throughout the 1930's, for

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FORCEMENT (WICKERSHAM COMMISSION), REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13-261 (1931); Black & Reiss, *Patterns of Behavior in Police & Citizen Transactions*, in 2 D. BLACK & A. REISS, STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS pt. 1, at 1 (1967) (a report of a research study submitted to the President's Commission on Law Enforcement and Administration of Justice).

[112] *See* J. KRAMER, THE AMERICAN MINORITY COMMUNITY 58-64 (1970); A. ROSE & C. ROSE, AMERICA DIVIDED: MINORITY GROUP RELATIONS IN THE UNITED STATES 220-55 (1948).

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example, there was a black middle class in the United States, yet the relatively wealthy members of that class lacked many of the legal rights which even the poorest white possessed.[113] Immigrants in general, and politically dissident immigrants in particular, were treated as second-class citizens and at times, *e.g.*, during the Red Raids of 1919, were openly persecuted.[114] In addition, there was a substantial difference in the enforcement of the criminal law—in the treatment accorded to the white Protestant middle class and the remainder of American society. Middle-class neighborhoods received far better police protection than did others,[115] and white middle-class citizens who ran afoul of the law usually received its procedural protection, while other citizens did not.[116]

Judge Weinfeld's position is also a legitimate one from a jurisprudential point of view. It rests upon a central premise in American legal, constitutional and political thought—that all men should be equal in the eyes of the law. If it is true that in the recent past America has been divided into two societies—one within the protection of the law and the other without—then the premise of equality authorizes a jurisprudential response of the sort which Judge Weinfeld has given. That response can be deemed a neutral one at least in the sense of its being impersonal: it is anchored not in the Judge's private policy preferences, but in a professionally sound analysis of the fundamental premises of the legal system and of the recent evolution of American society. Of course, it is not neutral in the sense that it promotes no values: it does incorporate a set of political and social values into the law, but only those values that have already been woven into the fabric of the legal tradition.

We might ask whether Judge Weinfeld's jurisprudential style can serve as a model for other judges. The answer lies in the realm of politics and judicial psychology. For judges who see the divisions in American society as fundamentally economic, the Weinfeld view is simply untenable. If a judge regards the existing distribution of wealth as unjust, then existing law, since it protects private property and hence wealth, must be overturned; in its place there must be substituted a faith, similar to Justice Douglas's, that law is

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[113] *See* G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 689, 703-05 (1944).

[114] *See* W. PRESTON, ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933, at 208-37 (1963).

[115] *Cf.* Comer, *The Dynamics of Black and White Violence*, in HISTORY OF VIOLENCE, *supra* note 110, at 444-64.

[116] *See id.* at 27-51; ROSE & ROSE, *supra* note 112, at 123-27.

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merely the output of the political process and that judges in deciding cases and making new law are merely participants in that process who must manipulate it in favor of the poor and the downtrodden.[117] If, on the other hand, a judge views the present distribution of wealth as fundamentally just on the theory that people who are poor are in some sense deficient, then he will resolve the conflict between stability and flexibility in the law in favor of the former. Only a judge who, like Judge Weinfeld, believes that the benefits of law have not been extended in the past to all members of American society, and that they ought to be so extended, can believe that by changing law he is strengthening rather than impairing it.

There is, however, little reason to expect that the Weinfeld view of the nation's social problems will become the prevalent one. If, as seems possible, those problems and the litigation they cause arise increasingly from economic sources, the Weinfeld technique —mediating between stability and change by obliterating invidious class distinctions and applying existing law to classes that formerly did not enjoy its benefits—will become increasingly irrelevant. Even if the continued existence of class distinctions remains the chief source of litigation, it will be beyond the capacity of history or social theory to determine by empirical research whether those distinctions are a product of legal or economic forces and whether those forces have operated benignly or invidiously. In short, I expect that many Americans will continue to view social distinctions primarily as a product of economic forces. Some will view those forces as invidious ones that arbitarily render equally meritorious individuals either rich or poor, while others will see the same forces as benign ones that merely differentiate among individuals on the basis of merit.

As long as Americans hold different views about the essential structure of their society and the nature of its social divisions, judges will carry different preconceptions to the bench and will use different reasoning styles in deciding cases and writing opinions. Some, like Judge Weinfeld, will attempt to extend old law to resolve new problems. Others, like Justice Douglas, will seek radical alternatives to old law and its replacement with something entirely new. Still others will attempt to adhere to old law without extending it, although it appears that their task will grow increasingly

[117] For an example of Justice Douglas's insistence that constitutional decisions should reflect present social reality, see W. DOUGLAS, AN ALMANAC OF LIBERTY 48 (1954).

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difficult as judges create more and more new law and the identification of old law becomes increasingly difficult. Thus, while analysis of the career and the opinions of Edward Weinfeld on the occasion of his 25th anniversary on the bench yields a coherent jurisprudential style that mediates between stability and flexibility, it is by no means certain that his synthesis will become any more prevalent in the last quarter of the 20th century than it has been in the first three-quarters.

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